January and February 2019

TABLE OF CONTENTS

ADMINISTRATIVE LAW JUDGE DECISIONS

ADMINISTRATIVE LAW JUDGE ORDERS

Review was granted in the following cases during the months of January and February 2019:

Robert Thomas v. Calportland Company, Docket No. WEST 2018-402 DM (Judge Miller, December 10, 2018)

Secretary of Labor v. KenAmerican Resources, Inc., Docket No. KENT 2013-211 (Judge Gill, December 14, 2018)

Secretary of Labor v. Richmond Sand & Stone, LLC, Docket No. YORK 2018-0031 M (Judge Bulluck, January 17, 2019)

Review was denied in the following case during the months of January and February 2019:

Secretary of Labor v. Cactus Canyon Quarries, Inc., Docket No. CENT 2018-243 (Judge Simonton, December 12, 2018)

Secretary of Labor v. Poland Sand & Gravel, LLC, Docket No. YORK 2017-0096 (Judge Bulluck, December 28, 2018)

ADMINISTRATIVE LAW JUDGE DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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January 14, 2019

M-CLASS MINING, LLC, Contestant, v. SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent.	CONTEST PROCEEDING Docket No. LAKE 2018-0188-R Order No. 9104295; 2/24/2018 Mine: MC #1 Mine ID: 11-03189

DECISION

Appearances: Christopher D. Pence, Hardy Pence PLLC, Charleston, WV, for Contestant;

Travis W. Gosselin, U.S. Department of Labor, Office of the Solicitor, Chicago, IL, for Respondent.

Before: Judge Simonton

This case is before me upon M-Class Mining, LLC's ("M-Class" or "Contestant") Notice of Contest pursuant to section 104(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d).[1] This proceeding involves § 103(k) Order No. 9104295 ("(k) Order"), issued to M-Class on February 24, 2018, and terminated on April 4, 2018. There is no corresponding section 104(a) citation or penalty assessment. Nonetheless, M-Class declined to withdraw its contest and maintained that the (k) Order should be vacated as invalidly issued and overbroad in scope.

Given the unique procedural posture of the contest, the parties were instructed to brief whether this court retained jurisdiction over a terminated (k) Order. Upon review, the court found that the Commission did in fact retain jurisdiction to review the terminated (k) Order. Order Denying Secretary's Motion to Dismiss, dated July 18, 2018. The court also denied the Secretary's subsequent Motion to Certify the Matter for Interlocutory Review, and set the docket

[1] In this decision, the parties' Joint Stipulations, the transcript, the Secretary's exhibits, and Contestant's exhibits are abbreviated as "Jt. Stip. #," "Tr.," "Ex. S–#," and "Ex. C–#," respectively.

for hearing.[2] *See* Order Denying Secretary's Motion for Certification for Interlocutory Review & Order Denying Secretary's Motion to Stay, dated September 11, 2018.[3]

The hearing was held on October 3-4, 2018, in St. Louis, Missouri. Based upon the parties' stipulations and my review of the witness testimony, the entire record, and the parties' post-hearing briefs, I make the following findings.

I. FINDINGS OF FACT

A. Joint Stipulations

The parties entered into the following joint stipulations:

1. M-Class Mining, LLC, is an "operator" as defined in Section 3(d) of the Federal Mine Safety Act of 1977, as amended (Mine Act), 30 U.S.C. § 803(d), at the coal mine at which the order at issue in this proceeding was issued.

2. MC#1 mine is operated by the Contestant in this case, M-Class Mining, LLC.

3. Contestant's MC#1 mine is located in Macedonia, Illinois.

4. MC#1 mine is subject to the jurisdiction of the Mine Act.

5. The individual whose name appears in Block 22 of the order at issue in this proceeding was acting in his official capacity and as an authorized representative of the Secretary of Labor when the order was issued.

6. A duly authorized representative of the Secretary served the subject order and terminations of the order upon the agent of the Contestant at the dates and place stated therein as required by the Mine Act, and the order and terminations may be admitted into evidence to establish their issuance.

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[2] The Secretary still maintains that the court lacks jurisdiction to review a terminated § 103(k) Order and that this matter is moot because there remains no justiciable controversy for the court to resolve. Secretary's Post-Hearing Brief ("Sec'y Br.") at 14, n. 7. Both parties have incorporated the arguments set forth in their previous briefs herein. *See id.*; Respondent's Post-Hearing Response Brief ("Cont. Resp.") at 3, n. 1. The court herein incorporates its reasoning set forth in its Order Denying the Secretary's Motion to Dismiss, and will not readdress those matters in this decision.

[3] The Commission did not deny the Secretary's petition for Interlocutory Review, but was without the authority to take any substantive action on the matter due to a lack of quorum. Commission Letter, dated September 26, 2018.

7. The order contained in Exhibit A attached to Contestant's Notice of Contest is an authentic copy of the order at issue in this proceeding with all appropriate modifications and terminations, if any.

B. Factual and Procedural Background

M-Class operates the MC#1 Mine, an underground coal mine located in Macedonia, Illinois. The Mine consists of the MC and Viking portals. Tr. 207-08. At 8:00 AM on February 24, 2018, 14 miners arrived at the Headgate #6 section of the MC portal to clean up a roof fall. Tr. 221, 224. The group was building a steel archway to re-support an approximately 20-foot void in the roof to allow miners to begin cutting, loading, and removing the fallen rock. Tr. 221, 223. Eight to ten of the miners working in the section wore handheld gas detectors, or "spotters," to track oxygen, methane, and carbon monoxide levels. Tr. 226.

The team completed the steel sets by mid- to late morning. Tr. 225. They then started up a diesel air compressor to fill the void with expanding Jen-Mar foam. Tr. 223. Miner Mitchell Mullins manned and worked in close proximity to the diesel air compressor. Tr. 51-52, 63-64, 75. About 90 minutes into his shift, Mullins began to complain of dizziness and a light headache. Ex. S–2; Tr. 76-77. Mullins' symptoms grew to include stomach pain, shortness of breath, and a racing heartrate. Ex. S–2; Tr. 77. His condition prompted a fellow miner to inform attending Superintendent Demetrios Macropoulos that Mullins needed a ride out of the mine.[4] Tr. 227. Mullins was administered oxygen, and evacuated from the mine. Ex. S–2; Tr. 227-28. Macropoulos personally drove Mullins to the section mouth to get a ride out of the mine. Tr. 228. He testified that Mullins did not indicate that he believed his symptoms to be due to carbon monoxide poisoning. Tr. 228. He also noted that no spotters went off in the Headgate #6 section during the shift. Tr. 228, 236. None of the mounted carbon monoxide monitors mounted underground revealed elevated levels of carbon monoxide during Mullins' shift. Ex. C–C.

Mullins was subsequently transported by ambulance to Herrin Hospital in Benton, Illinois. Exs. S–2, S–6. Doctor Dean Bosley treated Mullins in the emergency room and quickly diagnosed Mullins with carbon monoxide poisoning. *Id*. Mullins would spend approximately the next 72 hours in the hospital on 100% oxygen. Ex. S–6. His initial carboxyhemoglobin concentration measured 4.8%. Tr. 189. Over that 72-hour span, Mullins' carboxyhemoglobin concentration decreased to 3.4% the morning after his admission, only to increase to 3.8% that afternoon and up to 4.2% by the morning of February 26. Ex. S–6; Tr. 195-97. He was released on February 27 with a carboxyhemoglobin concentration measurement of 1.9%. Ex. S–6; Tr. 71, 195-97.

Concerned about Mullins' diagnosis, Dr. Bosley notified the Benton Police Department of Mullins' condition and recommended that the mine be shut down to prevent additional exposure to carbon monoxide in the mine. *Id*. The Police dispatcher relayed Dr. Bosley's message to the MSHA hotline. Ex. 6. The hotline constructed an Escalation Report documenting

[4] Demetrios Macropoulos is the Superintendent for the MC portal at the MC #1 Mine. Tr. 207-08. He has worked in the mining industry for 12 years and at M-Class for eight years. Tr. 208-09.

the call and sent the report to the proper channels at MSHA.[5] *See* Ex. S–7; Tr. 27-28. The Report states in pertinent part:

> Someone at the mine called 911 at approximately 2:00 PM today because a miner was sick. The miner was transported around 3:00 PM to the Emergency Room at Herrin Hospital in Herrin, IL, which is about 30 minutes away from the mine. The Emergency Room doctor contacted dispatch at approximately 6:50 PM today. He stated that the miner has very high levels of Carbon Monoxide poisoning, and wants the mine to shut down immediately. The Doctor's name is Dr. Bosley…He stated if the mine is not shut down immediately that he is afraid that there will be more miners admitted with carbon monoxide poisoning. The caller does not have the authority to shut down the mine.

Ex. S–7. MSHA's management personnel took special notice of the report because of the apparent severity of Mullins' diagnosis and because the Police Department called the hotline directly. Tr. 157. MSHA District 8 Field Office Supervisor Bob Bretzman read the Escalation Report and quickly contacted Parker Phipps, Assistant General Manager for Foresight Energy's mines.[6] Bretzman asked if M-Class had detected elevated carbon monoxide levels at the mine that day. Tr. 248-49. Phipps responded that they did not. Tr. 248-49. Bretzman informed Phipps of Mullins' condition and expressed his opinion that the mine should be evacuated. Tr. 249. When Phipps asked whether MSHA officially ordered evacuation, Bretzman hesitated and replied that he would call back shortly. Tr. 249.

Bretzman called back 15 minutes later to inform Phipps that he would not order an evacuation, but that he would be sending an accident investigator to the mine. Tr. 249. Phipps testified that he told Bretzman during that call that he was with Mullins at the Headgate #6 section during the shift and that his personal spotter did not go off. Tr. 250. After the second call, Phipps instructed Macropoulos to test all of the entries at which Mullins worked during the shift. Tr. 250-51. None of the entries presented elevated levels of carbon monoxide. Tr. 251.

Inspector Brandon Naas arrived at the mine shortly thereafter to begin MSHA's E04 investigation.[7] He immediately issued a verbal § 103(k) Order at Headgate #6. Tr. 32-33. Naas

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[5] An Escalation Report is a document prepared by the third party contractor operating MSHA's 1-800 hotline. Tr. 28, 154-55. Operators ask the callers questions regarding their complaint and take notes and record the responses. Tr. 155, 157. The operator then prepares a report summarizing the call and submits it to MSHA. Tr. 150. Escalation Reports are sent to management personnel at the corresponding District and at the Agency's Headquarters in Virginia. Tr. 150-51.

[6] Foresight Energy is the parent company to M-Class Mining, LLC. Tr. 241.

[7] Brandon Naas has worked as an underground coal mine inspector for MSHA for 7 years. Tr. 24. He has served as an accident investigator since 2015. Tr. 24. Prior to that, he

(continued...)

relied upon the description of Mullins' condition in the Escalation Report in doing so. Tr. 129, 134. He had not yet spoken with Dr. Bosley or Mr. Mullins, had not yet viewed any medical records or data at the mine, and had not yet gone underground. Tr. 93-94. He testified that in the event of an accident MSHA inspectors are trained to issue a (k) Order upon arrival to secure the scene and protect miners before conducting an investigation. Tr. 131, 137. Naas spent the first hour above ground reviewing the records for the generator, one of the spotters used by another miner on the shift, and the mine's carbon monoxide monitoring system. Tr. 41. He also requested to review Mullins' spotter, but M-Class was unable to locate it. Tr. 58-59. Unable to pinpoint exactly where the exposure occurred, Naas proceeded underground to conduct an imminent danger run across the faces and take carbon monoxide measurements in the Headgate #6 section. Tr. 49. He did not find any dangerous conditions and modified the (k) Order to allow M-Class to resume normal mining operations in the early hours of February 25. Tr. 50, 53.

On the morning of February 26, Inspector Naas returned to the mine to speak with six other miners on the crew that worked on Mullins' shift. Tr. 54. Pursuant to instructions from his supervisors, Naas also modified the (k) Order to remove the diesel air compressor from service pending the completion of the investigation. Tr. 54. Naas testified that since the compressor was running while Mullins was ill and was the only piece of equipment to which Mullins was not exposed on a normal basis, MSHA suspected it was defective and producing dangerous levels of carbon monoxide. Tr. 56.

Naas returned yet again on February 27 to meet with mine management. M-Class was still conducting its own investigation into the matter, but asked that the air compressor be released back into service. Tr. 67-69. Naas declined to do so when management could not identify any other possible source of carbon monoxide that may have led to Mullins' illness. Tr. 67-68. Naas interviewed Mullins on February 28. Tr. 72. Mullins told him that he was working inby the compressor tightening up roof bolts when he began to experience symptoms. Tr. 76. Mullins acknowledged that his spotter did not go off while he was working in the Headgate #6 section. Tr. 75. Mullins then described the progression of his symptoms and subsequent treatment. Tr. 75-77.

Although Naas completed his investigation on February 28, MSHA did not allow the compressor to be put back into service. Tr. 88. On March 1, 2018, M-Class submitted a proposal to terminate the (k) Order. Ex. C–I. MSHA denied that proposal and provided a list of requirements to be fulfilled for termination. Ex. C–J. M-Class later responded that it did not agree to implement MSHA's requirements. Ex. C–K. It filed a notice of contest on March 15. Finding no conclusive evidence that linked the compressor to Mullins' sickness, MSHA terminated the (k) Order on April 4, 2018. The Secretary did not issue an accompanying citation or penalty assessment.

[7] (…continued)
worked as a miner at White County Coal over the summers of 2003 to 2005, and was hired full time from 2005 to 2011. Tr. 25. He has completed all basic training at the Mine Academy, including retraining and two weeks of accident investigation every other year. Tr. 26.

II. PRINCIPLES OF LAW

Section 103(k) of the Mine Act provides in pertinent part:

> In the event of any accident occurring in a coal or other mine, an authorized representative of the Secretary, when present, may issue such orders as he deems appropriate to insure the safety of any person in the coal or other mine…

30 U.S.C. § 813(k).

The occurrence of an "accident" as defined by section 3(k) of the Act is a necessary precondition of the issuance of a section 103(k) Order. *Aluminum Co. of America (Alcoa)*, 15 FMSHRC 1821, 1824 (Sept. 1993); *see also Pinnacle Mining Co.*, 33 FMSHRC 2207, 2221-2225 (Sept. 2011) (ALJ); *Pattison Sand Co., LLC*, 33 FMSHRC 3096, 3142, 2011 WL 6880702 (Dec. 2011) (ALJ). Section 3(k) of the Act defines an "accident" as a "mine explosion, mine ignition, mine fire, or mine inundation, or injury to, or death of, any person." 30 U.S.C. § 802(k). In this context, section 3(k) should be broadly construed; an event not listed in the definition may nonetheless constitute an "accident" depending on whether its effects are "similar in nature or present[] a similar potential for injury or death as a mine explosion, ignition, fire, or inundation." *Alcoa*, 15 FMSHRC at 1825-26; *see also Pattison Sand Co. v. FMSHRC*, 688 F.3d 507, 513-14 (8th Cir. 2012). Though an accident need not be a sudden occurrence under section 3(k), the Commission has recognized that all of the listed events require quick action. *Alcoa*, at 1826. The Secretary need not be aware of what exactly the accident entailed or have completed an investigation into the accident prior to issuing a (k) Order. *Jim Walter Res.*, 37 FMSHRC at 1871. The determination should be made on a case-by-case basis. *Alcoa*, at 1826.

The Commission has not explicitly determined the appropriate standard of review of a (k) Order. *See Eastern Assoc. Coal Corp.*, 2 FMSHRC 2467, 2472 n. 7 (1980) (declining to determine whether a 103(k) Order was reviewable under an "'arbitrary or capricious,' 'reasonableness,' or *de novo* basis"). However, the Commission has recognized that section 103(k) grants the Secretary plenary authority to issue orders the Secretary deems appropriate to ensure the safety of any one in the mine when an accident occurs. *Jim Walter Res.*, 37 FMSHRC 1868, 1870-71 (Sept. 2015). Once an accident has been proved, Commission Judges have thus consistently analyzed (k) Orders under an arbitrary and capricious or an abuse of discretion standard. *See Pattison Sand Co., LLC*, 33 FMSHRC 3096, 3142, 2011 WL 6880702 (Dec. 2011) (ALJ) ("[The arbitrary and capricious] standard appropriately respects the Secretary's judgment while allowing review for abuse of discretion, errors of law, and review of the record under the substantial evidence test."), *aff'd*, 688 F.3d 507 (8th Cir. 2012); *see also Pinnacle Mining*, 33 FMSHRC 2207, 2231-33 (Sept. 2011) (ALJ). "The abuse of discretion standard requires the agency to examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Clintwood Elkhorn Mining Co.*, 32 FMSHRC 1880, 1893-94 (Dec. 2010) (quoting *Motor Vehicle Mfr's Ass'n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983)); *Pinnacle Mining*, 33 FMSHRC at 2226.

III. DISPOSITION

M-Class argues that the Secretary has not proven by a preponderance of the evidence that an "accident" occurred at the MC #1 Mine. It contends that the Secretary did not produce any evidence that carbon monoxide was present in the mine that injured or sickened a miner. Contestant's Post-hearing Brief ("Cont. Br.") at 11. Hence the Secretary failed to prove the occurrence of a "sudden event" constituting an accident and the (k) Order should be vacated as invalidly issued. *Id*. M-Class also contends that the scope of the (k) Order was overly broad because MSHA refused to vacate the order and return the compressor back into service until well after Inspector Naas' investigation was completed. *Id*. at 16.

The Secretary argues that Order No. 9104295 was properly issued because Mullins' hospitalization for carbon monoxide poisoning constituted an "accident" as defined by section 3(k) of the Mine Act. Sec'y Br. at 15. The Secretary notes that the responses of Dr. Bosley, MSHA, and M-Class to Mullins' hospitalization demonstrate that Mullins' was injured and that his diagnosis required the "quick action" that the events listed in section 3(k) require. *Id*. at 16; *see also Alcoa*, at 1826. Finally, the Secretary maintains that the scope of the Order and its subsequent modifications were reasonably tailored to the information known to MSHA at the time. *Id*. at 17.

A. Whether the 103(k) Order was Validly Issued

I find that the (k) Order was validly issued. The Secretary has proven by a preponderance of the evidence that an "accident" occurred. Mullins presented symptoms that concerned his fellow miners. He was evacuated from the mine and transported to the local hospital, where he was diagnosed with carbon monoxide poisoning by an emergency room doctor. Mullins spent the next 72 hours on oxygen and under observation at the hospital. Dr. Bosley quickly contacted the local police department to express his concern about Mullins' condition and alerted the local police department that other miners may be exposed to elevated carbon monoxide. Once notified, MSHA immediately contacted the operator and sent an inspector to investigate. Similarly, once M-Class was informed of Mullins' condition, it immediately opened its own investigation and tested every entry through which Mullins traveled for elevated carbon monoxide levels. Tr. 231-32.

Mullins' diagnosis and the rapid response of all involved parties demonstrate that his injury was a sudden event similar in nature to those requiring quick action under § 3(k). *See Alcoa*, 15 FMSRHC at 1826. Carbon monoxide poisoning can be life-threatening and can be indicative of a gas inundation that requires emergency action as contemplated by section 103(k). *Cf. Pinnacle Mining Co.*, 33 FMSHRC 2207, 2222 (Sept. 2011) (ALJ) (holding that elevated carbon monoxide buildup is an event similar to, but not as extensive as, an inundation of gas). Based on the information available to MSHA at the time, Inspector Naas' decision to issue a (k) Order upon his arrival at the MC #1 Mine was based on his belief that Mullins had been injured and that other miners were at risk of unsafe exposure to carbon monoxide. He issued the (k) Order to prevent any additional injuries while he investigated the Headgate #6 section. This was a valid exercise of MSHA's authority under the Act.

M-Class points to the Commission's decision in *Alcoa* to argue that the Secretary failed to prove that a "sudden event" occurred justifying the issuance of the (k) Order. Cont. Rep. at 9. Contestant argues that the Secretary failed to show evidence of elevated carbon monoxide levels anywhere in the mine or that any other miners on Mullins' shift were adversely affected by similar symptoms. *Id*.

In *Alcoa*, the Commission held that a gradual unplanned release of mercury in an area of the mine did not constitute an "accident" that justified the issuance of a (k) Order. *Alcoa*, 15 FMSHRC at 1827. The Commission found that to determine whether an accident occurred, the Secretary must look to whether the event was similar in nature to the type of sudden events that pose an immediate hazard to miners that require emergency action. *Id*. at 1826. While the Commission noted that accidents need not necessarily be a sudden occurrence and that a gradual release of a toxic chemical may qualify, the mercury buildup did not constitute an accident because the Secretary did not issue a (k) Order for nearly a month following the initial complaint and the Secretary's witnesses in this matter failed to relate the hazards associated with the conditions to the events outlined in Section 3(k)'s definition of "accident." *Id*.

Crucial factual differences distinguish the instant case from *Alcoa* and indicate that Mullins' injury qualified as an "accident" under section 3(k). First, unlike the (k) Order issued 3 months later in *Alcoa*, MSHA received the Escalation Report detailing Mullins' condition and quickly dispatched Inspector Naas to the site to issue the (k) Order and investigate what it believed could be a carbon monoxide release at the mine. MSHA and M-Class' rapid response to Mullins' diagnosis indicates that both considered the injury to be a sudden event justifying quick action as defined by *Alcoa*. 15 FMSHRC at 1826.

M-Class contends that because MSHA failed to detect elevated carbon monoxide levels and because of Mullins' low carbon monoxide concentrations, there was no "sudden event." Here, however, Mullins' hospitalization with carbon monoxide exposure is itself an "accident" as contemplated by section 3(k). Section 3(k) defines an accident as a "mine explosion, mine ignition, mine fire, or mine inundation, *or injury to*, or death of, any person." 30 U.S.C. § 802(k) (emphasis added). Thus, Mullins' symptoms and extensive hospitalization constitute such an injury.

Furthermore, the information contained in the Escalation Report rationally connects Mullins' injury to a potential buildup or elevation of carbon monoxide at the mine similar in nature and presenting a similar potential for injury or death as a gas inundation. Unlike the gradual buildup of mercury in *Alcoa* that lacked a discrete, non-speculative injury related to the buildup, the evacuation and hospitalization of a miner positively diagnosed with carbon monoxide poisoning constitutes an injury that requires quick action to ensure the safety of other miners. Mullins was visibly ill and presented symptoms that prompted his mid-shift evacuation from the mine and subsequently convinced the emergency room physician that he had carbon monoxide poisoning. The Secretary's actions were thus valid under the Commission's framework set forth in *Alcoa*.

M-Class next contends that the (k) Order was invalidly issued because Inspector Naas based his decision to issue the (k) Order on the information contained in the Escalation Report,

when in fact a more thorough investigation would have revealed that Mullins did not sustain an injury and was not exposed to carbon monoxide at the mine. Cont. Br. at 11. Contestant points out that no other miners on Mullins' shift fell ill, no spotters present in the mine detected elevated carbon monoxide levels, the subsequent examination of the compressor did not discover defects or elevated carbon monoxide emissions, and that Mullins' carboxyhemoglobin levels never reached levels that qualify as carbon monoxide poisoning. *Id*. at 12-13. It thus did not amount to an "injury" as contemplated by section 3(k).

In support of its assertion, M-Class offered the expert testimony of Dr. Michael Mullens. Dr. Mullens testified that he would not expect symptoms of carbon monoxide to present at the levels detected in Mitchell Mullins' blood stream. Tr. 190. He also opined that Mullins' carboxyhemoglobin levels were not close to toxic, and that the subsequent drop and rise in those levels during Mullins' stay at the hospital indicate that the tested concentration were more likely to be caused by smoking than by carbon monoxide poisoning. Tr. 191-93.

Although I find Dr. Mullens to be a credible expert witness, his testimony does not fully explain the context of Mullins' sickness and evacuation. Dr. Mullens did not personally observe or treat Mullins' during his stay in the hospital, and thus did not observe his condition firsthand. Tr. 187, 204. His testimony is based only upon his review of Mullins' medical records, and he acknowledged at hearing that it was unlikely that symptoms of carbon monoxide poisoning would present at the concentration levels detected in Mullins' blood, but not impossible. Tr. 190. I thus do not find his testimony to be dispositive in showing that Mullins was not in a condition that could have been life threatening and merited further investigation in order to ensure the safety of other miners.

Without question, M-Class presented credible evidence demonstrating that no elevated carbon monoxide levels were detected at the MC #1 Mine and that Mullins' original diagnosis may not have risen to the level of carbon monoxide poisoning. The court acknowledges these arguments, but notes that MSHA received this information after Naas issued the initial (k) Order. M-Class' interpretation would require the Secretary to conduct a thorough preliminary investigation into the precise conditions surrounding a potential accident, including questioning the medical diagnosis of an emergency room doctor, prior to issuing a (k) Order. This is contrary to the plain language and the intended purpose of section 103(k). Section 103(k) does not require that "the Secretary must be aware of exactly what the accident entailed let alone have completed an investigation into the accident before issuing a section 103(k) order." *Cf. Jim Walter Res.*, 37 FMSHRC 1868, 1870-71 (Sept. 2015). As Congress noted:

> [t]he unpredictability of accidents in mines and uncertainty as to the circumstances surrounding them requires that the Secretary or his authorized representative be permitted to exercise broad discretion in order to protect the life or to insure the safety of any person. The grant of authority…to issue orders is

> intended to provide the Secretary with flexibility in responding to accident situations, including the issuance of withdrawal orders.

S. Rep. No. 95-181, at 29 (1977), *reprinted in Senate Subcomm. on Labor, Comm. on Human Res., Legislative History of the Federal Mine Safety and Health Act of 1977*, at 617 (1978).

MSHA received information from the local police department that a miner was undergoing medical treatment at a hospital for elevated levels of carbon dioxide in his bloodstream. MSHA quickly acted based on this information to ensure the safety of other miners. The court declines to invalidate MSHA's decision to issue a (k) Order based on the *post hoc* results of the investigation triggered by that Order. Simply because the pursuant investigation did not conclusively demonstrate elevated levels of carbon monoxide in the mine does not render MSHA's decision to issue the (k) Order in response to the information it possessed at the time improper or invalid.

I conclude that the Secretary has proven by a preponderance of the evidence that an accident occurred and that the (k) Order was appropriate to ensure the safety of other miners until the investigation of the Headgate was completed.

B. Whether the Scope of the 103(k) Order was an Abuse of Agency Discretion

I find that Inspector Naas did not abuse his discretion when he issued the (k) Order to close off the Headgate #6 section based upon the available information and the prevailing belief that Mullins sustained elevated carbon monoxide exposure at the mine. Naas issued the Order upon arrival to quickly conduct an investigation of the Headgate #6 section and to ensure that no imminent danger existed and that other miners no longer faced the risk of serious injury. After examining the mine's gas detection data and personally inspecting the section and finding no risk, Naas expediently modified the (k) Order to allow work in the area. The (k) Order was thus promptly narrowed in scope when Naas determined that miners could safely work in the area.

MSHA's subsequent modification to remove the compressor from service was also rationally connected to the available facts based upon Naas' initial investigation and was reasonably tailored to investigating the suspected cause of Mullins' condition. Inspector Naas credibly testified that the compressor's presence in the area was abnormal and was the only piece of equipment that he could not definitely rule out as a potential source of carbon monoxide. Tr. 67-68. MSHA did not close the entire section nor unreasonably halt operations at the mine. It removed a single compressor from service in order to further investigate whether it posed a safety risk to miners. Thus, the initial decision to remove the compressor was reasonably tailored to the investigation.

The sole issue in this matter is whether the (k) Order was validly issued and reasonably tailored in scope given the information MSHA had at the time of the accident. Thus, I affirm the (k) Order. However, the court sympathizes with M-Class' position and has grave reservations regarding MSHA's subsequent refusal to allow the compressor back into service for over a month. Inspector Naas conducted a thorough investigation of the mine in response to the

Escalation Report and modified the (k) Order to allow a resumption of services after discovering no indicia of danger in the Headgate #6 Section. Given the narrow scope of the hearing, neither party presented evidence focused on the compressor's extended removal from service. However, the court struggles to understand how testing of a compressor could take more than a month when Inspector Naas was able to inspect the entire Headgate #6 Section, presumably including the compressor itself, and modify the (k) Order to allow resumption of operations only a few hours after arriving.

Despite this concern, the unique procedural posture of this case does not present an appropriate remedy for MSHA's delay in returning the compressor to service. As explained above, the (k) Order's initial issuance was valid and reasonably tailored to conduct the investigation into Mullins' injury and possible carbon monoxide exposure at the MC #1 Mine. The (k) Order was terminated some ten months ago. The court will defer to the Secretary's determination and declines to vacate a validly issued (k) Order based upon subsequent modifications that are no longer in effect.

Accordingly, the contested Order is **AFFIRMED**.

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

Distribution: (U.S. First Class Mail)

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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January 17, 2019

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner v. RICHMOND SAND & STONE, LLC, Respondent	CIVIL PENALTY PROCEEDING: Docket No. YORK 2018-0031-M A.C. No. 37-00156-453924 Mine: Richmond Sand & Stone

SUMMARY DECISION

Before: Judge Bulluck

This case is before me upon a Petition for Assessment of Civil Penalty filed by the Secretary of Labor ("Secretary") on behalf of the Mine Safety and Health Administration ("MSHA") against Richmond Sand & Stone, LLC ("Richmond"), pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977 ("Mine Act"), 30 U.S.C. § 815(d). The Secretary seeks a civil penalty in the amount of $5,000.00 for an alleged violation of his mandatory safety standard regarding timely accident notification.

Richmond filed a Motion for Summary Decision ("Resp't Mot."); a Memorandum in Support of Respondent's Motion for Summary Decision ("Resp't Mem."), including Peter Robbins' Affidavit ("Robbins Aff."), and a Prehearing Report with a Supplemental Report ("Resp't Rep.") and attached exhibits ("Exs. A through C"). The Secretary filed an Opposition to Respondent's Motion for Summary Decision and Cross-Motion for Summary Decision ("Sec'y Mot."); a Memorandum of Points and Authority in Support of His Opposition to Respondent's Motion for Summary Decision and In Support of Secretary's Cross-Motion for Summary Decision ("Sec'y Mem."); and Parties Stipulations for Summary Judgment ("Jt. Stips.") and attached exhibits ("Exs. P–1 through P–12"), including a copy of the Citation, MSHA Inspector Everett G. Kinser's notes, Inspector Kinser's Affidavit ("Kinser Aff."), the Autopsy Report, EMS Patient Care Report, and Dr. Keith Hilliker's Report. Richmond then filed a Response to Secretary of Labor's Opposition to Respondent's Motion for Summary Decision and Cross-Motion for Summary Decision ("Resp't Reply").

The following are issues for resolution in this case: (1) whether Richmond violated 30 C.F.R. § 50.10(a); and, if so, (2) whether Richmond was moderately negligent in violating the standard; and (3) the appropriate penalty.

Pursuant to Commission Rule 67(b), "[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.

It is well settled that summary decision is an extraordinary measure and the Commission has analogized it to Rule 56 of the Federal Rules of Civil Procedure, which the Supreme Court has construed to authorize summary judgment only "upon proper showings of the lack of a genuine, triable issue of material fact." *Hanson Aggregates New York, Inc.*, 29 FMSHRC 4, 9 (Jan. 2007) (citations omitted). When considering a motion for summary decision, the Commission has noted that "the Supreme Court has stated that 'we look 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.'" *Id.* 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)). Moreover, Commission Judges should not grant motions for summary decision "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." *KenAmerican Res., Inc.*, 38 FMSHRC 1943, 1947 (Aug. 2016) (quoting *Campbell v. Hewitt, Coleman & Assocs., Inc.*, 21 F.3d 52, 55 (4th Cir. 1994)); *but see Scott v. Harris*, 550 U.S. 372, 380 (2007) (holding that there is no genuine issue for trial unless a rational trier of fact could find for the nonmoving party).

Based on agreement of the parties to file cross-motions for summary decision and the facts, as represented by the parties, I find that there is no genuine issue as to any material fact. For the reasons set forth below, I conclude that the Secretary is entitled to summary decision as a matter of law, **AFFIRM** the Citation, and assess a penalty of $5,000.00 against Richmond.

I. Joint Stipulations

Stipulations of Fact:[1]

1. Richmond Sand and Stone ("the mine") is an "operator" as defined in Section 3(d) of the Mine Act, 30 U.S.C. § 802(d), at the crushed stone mining plant at which the Citation at issue in this proceeding was issued.
2. The mine at issue is located at 35 Stolsen Road in Wyoming, Rhode Island.
3. The mine at issue is subject to the jurisdiction of the Mine Act.
4. This proceeding is subject to the jurisdiction of the Federal Mine Safety and Health Review Commission and its designated Administrative Law Judges, pursuant to sections 105 and 133 of the Mine Act, 30 U.S.C. §§ 815, 823.
5. The mine is an open-pit crushed stone plant.

[1] The Joint Stipulations have been numbered for clarity in this Decision.

6. On October 2, 2017, Jose Manuel Ledo, a miner who was operating an excavator, was observed by two other miners to have slumped over the controls at 2:19 p.m.
7. The plant's leadman directed a miner to call "911," and the leadman and another miner attempted cardio-pulmonary resuscitation of Mr. Ledo.
8. The ambulance squad arrived on the scene at 2:24 p.m., attended to Mr. Ledo, removed him from the excavator, and transported Mr. Ledo to the Westerly (Rhode Island) Hospital, leaving the mine site 2:56 p.m.
9. The ambulance squad arrived at the hospital at 3:19 p.m.
10. Mr. Ledo was treated at the Westerly Hospital, but was pronounced dead at 3:35 p.m. by Dr. Hilliker.
11. The first report of Mr. Ledo's death was made to MSHA by telephone at 11:21 a.m. on October 3, 2017, the day after Mr. Ledo died, by Peter Robbins, the Respondent's Health and Safety Director.
12. Mr. Robbins was informed by telephone on October 2, 2017, at 2:34 p.m. about Mr. Ledo's situation.
13. The Citation attached to the Petition for Assessment of Penalty is a true and authentic copy of the Citation at issue.
14. Each of the Secretary's Exhibits, P–1 through P–12, are true and authentic copies of documents prepared or assembled by MSHA's personnel in the course of the investigation of this matter.
15. The deceased, Jose Ledo, died of a natural heart attack on October 2, 2017, and not as a result of any accident while pursuing his employment.
16. The deceased, Jose Ledo, was declared deceased at the Westerly Hospital at approximately 3:10 p.m. on October 2, 2017.[2]
17. The Respondent's pre-marked Exhibits, A, A–1, B, B–1 and C, are made part of the Stipulations.

II. Factual Background

On October 2, 2017, Jose Ledo suffered a fatal heart attack while operating an excavator at the Richmond Sand & Stone Mine, an open-pit crushed stone plant in Wyoming, Rhode Island. Jt. Stips. 1, 6, 15. At approximately 2:19 p.m., the plant's leadman and a front-end loader operator noticed that Ledo's excavator was idle, and when they checked on Ledo, they found him slumped over the controls of the excavator. Jt. Stip. 6; Ex. P−7. The plant's leadman directed another miner to call "911," while he and the loader operator attended to Ledo. Jt. Stip. 7. When they reached him, Ledo was not breathing and had no discernible pulse. Ex. B–1. They began performing cardio-pulmonary resuscitation ("CPR"). Jt. Stip. 7. The Hope Valley Ambulance Squad ("ambulance squad") arrived on the scene at 2:24 p.m., and Ledo was still unresponsive. Jt. Stip. 8; Ex. P–11. The ambulance squad took over CPR, and Ledo did not

[2] The Medical Report was amended to correct the time that Dr. Hilliker declared Ledo dead from 3:10 p.m. to 3:35 p.m. (see Jt. Stip. 10).

respond to their resuscitation efforts. Ex. P–11 at 4; Jt. Stip. 8. Between 2:30 p.m. and 3:24 p.m., he was defibrillated 12 times, six times at the mine and six times en route to the hospital. Ex. P–11 at 6-7; Jt. Stip. 8. The report generated by the defibrillator indicated that there were moments of ventricular fibrillation and pulseless electrical activity, but there was no detectible blood pressure or pulse following any of the 12 defibrillations. Ex. P–11 at 6-7.

The ambulance squad left the mine site at 2:56 p.m., and arrived at Westerly Hospital at 3:19 p.m. Jt. Stips. 8, 9. Dr. Keith Hilliker noted that Ledo had been unresponsive for almost an hour upon his arrival at the hospital. Ex. P–11 at 11-12. Hilliker did not check Ledo's vital signs, and pronounced him dead at 3:35 p.m. Ex. P–11 at 11-12; Jt. Stip. 10. The Autopsy Report indicates that Ledo died of a naturally caused heart attack on October 2, 2017. Ex. P−10 at 4.

Peter Robbins, Richmond's Health and Safety Director, first learned of Ledo's condition at 2:34 p.m., while the ambulance squad was still working on Ledo at the mine. Jt. Stip. 12. Robbins called MSHA to report Ledo's death at 11:21 a.m. on October 3, the day after the accident. Jt. Stip. 11. MSHA Inspector Everett Kinser was assigned to investigate the death on October 4, 2017. Ex. P−3. After inspecting the scene and interviewing witnesses, Kinser issued the Citation in question to Richmond for its failure to report Ledo's death to MSHA within 15 minutes of the accident.

III. Findings of Fact and Conclusions of Law

Inspector Kinser issued 104(a) Citation No. 9367109 on October 11, 2017, alleging a violation of section 50.10(a) that had "no likelihood" of causing an injury, and was due to Richmond's "moderate" negligence.[3] The "Condition or Practice" is described as follows:

> The operator failed to notify MSHA of a fatal accident involving an excavator operator that occurred at Richmond Sand & Stone. At approximately 2:19 p.m. on 10/02/2017, the 58 year old excavator operator suffered a heart attack while working in the quarry at the mine site. MSHA was alerted of the accident from Peter Robbins (Director of Safety for Richmond Sand & Stone) on 10/03/2017 at 11:21 a.m. and MSHA responded to the site on 10/04/2017. Contact was made with Peter Robbins, who stated that he was notified of the accident at 2:34 p.m. (verified on his cell phone) on 10/02/2017.

Ex. P−3. Kinsler terminated the Citation on October 11, 2017, after reviewing MSHA's accident reporting requirements with the mine operator. Ex. P−3.

[3] 30 C.F.R. § 50.10(a) states that: "[t]he operator shall immediately contact MSHA at once without delay and within 15 minutes . . . once the operator knows or should know that an accident has occurred involving: (a) A *death* of an individual *at the mine*." (emphasis added).

A. Fact of Violation

Richmond contends that it is entitled to summary decision because Ledo's fatal heart attack was the result of a non-occupational illness from natural causes rather than any work-related "accident" within the meaning of sections 50.10(a) and 50.2(h)(1) and, therefore, no immediate reporting was required. Resp't Rep. at 2-4; Resp't Reply at 1-2. On the other hand, the Secretary takes the position that he is entitled to summary decision because any death occurring at a mine is a reportable accident under section 50.10(a). Sec'y Mem. at 1.

Section 103(j) of the Mine Act provides, in relevant part that, "[i]n the event of any accident occurring in any coal or other mine, the operator shall notify the Secretary thereof . . . . For purposes of the preceding sentence, the notification required shall be provided by the operator within 15 minutes of the time at which the operator realizes that the death of an individual at the mine . . . has occurred." 30 U.S.C. § 813(j). Section 3(k) of the Mine Act defines "accident" to include "a mine explosion, mine ignition, mine fire, or mine inundation, or injury to, or *death of, any person*." 30 U.S.C. § 802(k) (emphasis added).

Section 50.10(a) of the Secretary's regulations largely mirrors the text of the Mine Act, requiring that the operator report a death at a mine once it is known or should have been known within 15 minutes. One of the definitions of "accident" in section 50.2 is "[a] death of an individual at a mine." 30 C.F.R. § 50.2(h)(1). Moreover, the Commission has emphasized that questions of whether an operator should report an accident to MSHA "must be resolved in favor of notification." *Signal Peak Energy, LLC*, 37 FMSHRC 470, 476-77 (Mar. 2015).

When the language of a provision is plain, the plain language is the meaning of the provision, and the sole function of the courts is to enforce the language, as written. *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000). Here, the plain language of the Mine Act and the Secretary's Part 50 regulations requires any death at a mine to be reported to MSHA within 15 minutes of discovery, regardless of the cause of death. Compare, for example, section 50.2(h)(2), which distinguishes "*an injury* to an individual at a mine which has a *reasonable potential to cause death*," with section 50.10(a)'s broader category of death at a mine due to any cause. 30 C.F.R. § 50.2(h)(2) (emphasis added).

Richmond relies on *Vulcan Construction Materials* and *Hanson Aggregates Midwest* to support its contention that there was no reportable accident. In these cases, ALJs found that *nonfatal* heart attacks were not *injuries* for purposes of mandatory MSHA reporting under section 50.10(b).[4] Resp't Rep. at 3-4 (citing *Vulcan Constr. Materials*, 35 FMSHRC 2868, 2874-75, 78 (Aug. 2013); *Hanson Aggregates Midwest*, 35 FMSHRC 2412, 2416 (Aug. 2013)). Further, Health and Safety Director Robbins claims that he did not know that he was required to report the death to MSHA because he believed that only work-related accidents were reportable. Robbins Aff. at 1. In fact, he claims that the report made to MSHA was merely informational rather than the result of any perceived duty. Robbins Aff. at 1. Richmond also argues that sections 50.10 and 50.2(h)(1) do not provide a usable definition of "accident" because the sections presuppose a predicate accident, which is not defined by the regulations. Resp't Reply at

[4] 30 C.F.R. § 50.10(b) requires the operator to immediately contact MSHA within 15 minutes of "[a]n *injury* of an individual at the mine which has a *reasonable potential to cause death*." (emphasis added).

1-2. Therefore, according to Richmond, the word "accident" should be construed according to its ordinary meaning.[5] Resp't Reply at 1. Finally, Richmond argues that the regulations' inclusion of "natural death" in the definition of "accident" is overly broad. Resp't Reply at 2.

Richmond cites to my decision in *Nyrstar Gordonsville, LLC*, arguing that it was wrongly decided, and the Secretary expresses the contrary view. Resp't Rep. at 5; Sec'y Mem. at 3-4. *Nyrstar* involved an apparent suicide at the mine site, and turned on *when* the mandatory reporting period was triggered after the operator had conducted a cursory investigation upon notice of the accident. 38 FMSHRC 1819, 1821-22, 24 (July 2016). Richmond's argument that the apparent suicide was not the result of a work-related accident and, therefore, not reportable, is consistent with its challenge to the instant Citation, and is contrary to the clear mandate of the Mine Act and regulations.

Likewise, Richmond's reliance on *Vulcan* and *Hanson* is misplaced because these cases involve violations of section 50.10(b), requiring reporting of injuries occurring at a mine that have a reasonable potential of death, not deaths occurring from natural causes at a mine. Therefore, these cases are not helpful. Moreover, Richmond's claim that Robbins had no notice that he was required to report to MSHA is belied by the clarity of the standard, itself, and the regulatory definition of "accident," as well as Robbins' own admission that he knew of the standard.[6]

While neither party has addressed whether Ledo actually died at the mine or later in the hospital, it is undisputed that Ledo had been unresponsive and without a pulse for 37 minutes at the mine before being taken to the hospital and, ultimately, declared dead. The report generated by the defibrillator indicated that there was no circulation during the 12 defibrillations, six of which had occurred at the mine. Further, the fact that Dr. Hilliker did not take Ledo's vital signs upon his arrival at Westerly Hospital is another indication that Ledo was already dead. Based on these facts, I find that Richmond knew or should have known of Ledo's apparent death by 2:56 p.m. at the very latest, the time at which the ambulance squad left the mine to transport him to the hospital; at that time, the 15-minute reporting interval began to run.

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[5] Richmond's reliance on a dictionary definition of "accident" as "an undesirable or unfortunate happening that occurs unintentionally and usually results in harm, injury, damage, or loss; casualty; mishap" is of no supportive value because that definition is in conflict with the plain language of the Mine Act's and regulations' definition of "accident," insofar as it excludes a meaning that the Act and regulations expressly intend. See Resp't Reply at 1 (quoting Dictionary.com, *accident*, https://www.dictionary.com/browse/accident (last visited Oct. 27, 2018)).

[6] There is a contradiction between Kinser's Affidavit, which states that Robbins was aware of the reporting requirement but believed that he had 24 hours to make a report, and Robbins' Affidavit, which indicates that he knew of the reporting requirement but believed that the 15-minute rule did not apply to the situation. See Kinser Aff. at 1-2; compare with Robbins Aff. at 1. This inconsistency is largely immaterial to the fact of the violation, but, taking Robbins at his word, his knowledge of the reporting requirement and failure to comply are considered in assessing Richmond's negligence.

Richmond failed to report Ledo's death to MSHA even after he had been declared dead at Westerly Hospital at 3:35 p.m. Although there is no basis upon which to conclude that the operator had a reasonable doubt as to whether Ledo had died on-site, the reasonable and prudent response, with or without doubt, would have been to report the accident to MSHA when Ledo *appeared* dead. As the Commission has emphasized, reporting is critical because the subsequent MSHA investigation ensures prospective safety at the mine. In the moment, a miner or the operator may not be able to readily ascertain the cause of death and, therefore, failure to report could expose more miners to unknown or unidentified hazards. *See Signal Peak*, 37 FMSHRC at 477 (citing *Emergency Mine Evacuation*, 71 Fed. Reg. 71430, 71431 (Dec. 8, 2006)).

Under these circumstances, having found that Richmond knew or should have known that it had experienced a reportable accident at the mine by 2:56 p.m., it had a duty to notify MSHA by 3:11 p.m. Richmond failed to contact MSHA until the next day, and well into the morning at 11:21 a.m. Accordingly, I conclude that Richmond violated the reporting requirement in section 50.10(a).

B. Gravity and Negligence

Given the clarity of the standard and regulatory definition of "accident," and the importance of timely notice to MSHA, Richmond's failure to report Ledo's death for 21 hours was an egregious breach of duty. The record establishes, however, that Ledo's death did not arise from an ongoing hazard affecting miners' safety, and that the delay in reporting the accident to MSHA had no likelihood of putting other miners in peril. The Secretary argues that moderate negligence is appropriate because Richmond mitigated the violation by immediately calling "911" and employing life-saving measures to resuscitate Ledo, and I credit Richmond's timely attention to Ledo's condition. See Sec'y Mem. at 5. Therefore, although this was a very serious violation, considering the mitigating factors, I find that Richmond was moderately negligent.

IV. Penalty

While the Secretary has proposed a civil penalty of $5,000.00, the judge must independently determine the appropriate assessment by proper consideration of the six penalty criteria set forth in section 110(i) of the Act, 30 U.S.C. § 820(i). *See Sellersburg Co.*, 5 FMSHRC 287, 291-92 (Mar. 1983), *aff'd* 736 F.2d 1147 (7th Cir. 1984). Notwithstanding application of *Sellersburg* criteria, however, the Mine Act imposes a minimum penalty of $5,000.00 for section 50.10 violations. 30 C.F.R. § 110(a)(2).[7] The Commission has found that

[7] Section 110(a)(2) of the Mine Act states that an operator "who fails to provide timely notification to the Secretary as required under 103(j) of [the Mine Act] (relating to the 15-minute requirement) shall be assessed a civil penalty by the Secretary of not less than $5,000 and not more than $60,000." 30 U.S.C. § 820(a)(2). Similarly, section 100.4(c) of the Secretary's penalty regulations states that the penalty for failure to provide timely notification to MSHA "will not be less than $5,000 and not more than $65,000 for the following accidents: (1) the death of an individual at the mine." 30 C.F.R. § 100.4(c). In January 2018, the minimum penalty was increased to $5,903 and the maximum penalty was increased to $70,834 to account for inflation.
(continued…)

Commission ALJs are bound by the statutory minimums imposed by the Mine Act. *Consol Pennsylvania Coal Co., LLC*, 40 FMSHRC 998, 1008 (Aug. 2018).

Applying the penalty criteria, and based upon a review of MSHA's online records, I find that Richmond is a small operator, with no prior violations of section 50.10(a), and an overall violation history that is not an aggravating factor in assessing an appropriate penalty. There was no evidence proffered that the civil penalty proposed by the Secretary will affect Richmond's ability to continue in business. I also find that Richmond demonstrated good faith in achieving rapid compliance after notification of the violation. The remaining criteria involve consideration of the gravity of the violation and Richmond's negligence in committing it. I have found that this was a very serious violation, and that Richmond was moderately negligent in committing it. Therefore, I find that a penalty of $5,000.00, the statutory minimum proposed by Secretary, is appropriate.

ORDER

ACCORDINGLY, the Secretary's Cross-Motion for Summary Decision is **GRANTED**, Respondent's Motion for Summary Decision is **DENIED,** and it is **ORDERED** that Richmond Sand & Stone, LLC, **PAY** a civil penalty of $5,000.00 within 30 days of the date of this Decision.[8]

/s/ Jacqueline R. Bulluck
Jacqueline R. Bulluck
Administrative Law Judge

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/adh

[7] (…continued)
30 C.F.R. § 100.4(c); see also *Department of Labor Federal Penalties Inflation Adjustment Act Annual Adjustments for 2018*, 83 Fed. Reg. 7, 15 (Jan. 2018). The instant violation predated these adjustments.

[8] Payment should be sent to: Mine Safety and Health Administration, U.S. Department of Labor, Payment Office, P.O. Box 790390, St. Louis, MO 63179-0390. Please include docket number and AC number.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
1331 PENNSYLVANIA AVENUE, NW, SUITE 520N
WASHINGTON, DC 20004

February 7, 2019

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), on behalf of JASON WYLIE, Petitioner, v. ALLEGHENY MINERAL CORPORATION, Respondent.	DISCRIMINATION PROCEEDING Docket No. PENN 2018-0158-DM MSHA No. NE MD 2018-01 Mine Name: Bison Mine Mine ID: 36-10107

DECISION
and
REDACTION ORDER

Appearances: Jason Wylie, pro se, Bridgeville, Pennsylvania;
Oscar Hampton III, Regional Solicitor, Andrea Appel, Deputy of the Regional Solicitor, Matthew Epstein, Esq., Office of the Solicitor, Philadelphia, Pennsylvania for the Secretary of Labor;
Patrick Dennison, Esq., Jackson Kelly, PLLC, Pittsburgh, Pennsylvania for Respondent.

Before: Judge Feldman

This case is before me based on a discrimination complaint filed pursuant to section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, as amended, 30 U.S.C. § 815(c)(2) (the "Act"), by the Secretary of Labor ("the Secretary") on behalf of Jason Wylie against the Allegheny Mineral Corporation ("Allegheny"). Before me is a Settlement and General Release Agreement between Wylie and Allegheny that resolves all matters at issue with respect to Wylie's compensatory relief. This proceeding is limited to the issue of Wylie's entitlement to compensatory relief. Both Wylie and the Secretary remain as parties in this case until disposition of this matter through settlement or adjudication.[1] Due to the extraordinary circumstances of this case in which the Secretary continues to object to the propriety of Wylie's decision to settle, it is necessary to provide the procedural history in this matter.

The captioned discrimination proceeding in Docket No. PENN 2018-0158-DM was initially assigned to Judge Paez. Order of Assignment, unpublished Order (April 5, 2018). During Judge Paez's consideration of this matter, on or about August 16, 2018, Judge Paez was

[1] Commission Rule 4(a) states, in pertinent part, "[i]n a proceeding instituted by the Secretary under section 105(c)(2) of the Act . . . the complainant on whose behalf the Secretary has filed the complaint is a party . . . ." 29 C.F.R. § 2700.4(a).

informed by the Secretary that the discrimination case brought by the Secretary on Wylie's behalf had settled. Second Amended Notice of Hearing, unpublished Order at 1 (Oct. 3, 2018) (ALJ Paez). However, Judge Paez was subsequently informed that the Secretary had withdrawn his settlement offer. *Id*. Judge Paez summarized his understanding of the rationale for the withdrawal by noting, "[a]lthough the case [had] settled in all other respects," the Secretary subsequently withdrew his consent to the settlement agreement because "the Secretary object[ed] to a confidentiality agreement between Wylie and Allegheny Mineral Corporation that would keep confidential Wylie's back-pay settlement amount." *Id*. (footnote omitted).

Shortly after the Secretary advised Judge Paez that the tentative settlement agreement resolving the issue of Wylie's compensatory relief had been withdrawn, Wylie communicated to the Commission his continuing desire to settle. Specifically, in an email dated September 28, 2018, Wylie advised the Commission:

> This settlement proceedings [*sic*] is getting way out of control now. I agreed to a[n] amount [of compensatory relief] and now feel like it has stalled out to nothing. I have tried to move on but [it is getting] ridiculous. When I agreed to settle I was and am ready to move on but have yet to get anywhere as far as finalizing or receiving my settlement. I don't want to go to court and I just want to move on. *It has been long enough and for the* [*sic*] *MSHA to fight the court and without my settlement is absurd*. Thank you for reading my email I just want my thoughts on the matter known.

Allegheny's Resp. to Sec'y's Mot. to Recons., Ex. C at 1, (Nov. 5, 2018) (emphasis added).

This matter was reassigned to me from Judge Paez on October 11, 2018, after Judge Paez contemporaneously recused himself from further deliberations. Order Placing Documents Under Seal and Notice of Recusal, unpublished Order (Oct. 11, 2018) (ALJ Paez); Order of Reassignment to Judge Feldman, unpublished Order (Oct. 11, 2018).

Given Wylie's clearly expressed desire to settle, the captioned discrimination proceeding in Docket No. PENN 2018-0158-DM was severed from the Secretary's civil penalty proceeding in the newly created Docket No. PENN 2018-0275. Severance Order 40 FMSHRC ___ Slip. op. at 4 (Oct. 23, 2018). The Severance Order noted that the captioned discrimination proceeding in Docket No. PENN 2018-0158-DM was solely limited to issues concerning the merits of Wylie's discrimination complaint and his claim for relief. *Id*.

The Secretary challenged the procedural basis for severance of the compensatory relief and civil penalty issues in a Motion for Reconsideration filed on October 26, 2018. *See* Sec'y's Mot. to Recons. Severance Order. The Secretary's Motion to Reconsider the October 23, 2018, Severance Order was denied on November 8, 2018. Order Denying the Sec'y's Mot. for Recons., 40 FMSHRC, ___ Slip op. at 3. The Secretary's motion was denied because severance was consistent with the Commission's Rules, the Federal Rules of Civil Procedure, and relevant Commission case law. *Id*. at 2-3. Specifically, Commission Rule 1(b) provides, in pertinent part: "on any procedural question not regulated by the Act . . . the Commission and its Judges

shall be guided so far as practicable by the Federal Rules of Civil Procedure . . . ." 29 C.F.R. § 2700.1(b). Rule 42 of the Federal Rules of Civil Procedure authorizes a judge to issue orders avoiding unnecessary delay or prejudice, or such orders that expedite and/or economize proceedings. Fed. R. Civ. P. 42(a)(3), 42(b).

With respect to case law, the Commission eschews prejudicing a complainant as a consequence of actions taken by the Secretary in a 105(c)(2) proceeding. *See Sec'y of Labor on behalf of Hale v. 4-A Coal Co.*, 8 FMSHRC 905, 908 (June 1986). Severance enables Wylie to expeditiously receive the identical compensatory relief that was tentatively accepted but subsequently withdrawn by the Secretary in August, 2018. Moreover, it is inexplicable that the impediment to Wylie's timely receipt of compensatory relief has been based on the Secretary's adamant refusal to accept confidentiality of settlement terms as a quid pro quo for settlement despite the Secretary's history of routine acquiescence to confidentiality of settlement terms that resolved 105(c)(2) proceedings. *See*, *e.g.*, *Secretary of Labor o/b/o Pedro Iglesias v. Titan Florida*, *LLC*, 39 FMSHRC 1678 (Aug. 2017) (ALJ); *Secretary of Labor o/b/o Jerry M. Caudill v. Leeco, Inc.*, 20 FMSHRC 532 (May 1998) (ALJ); *Secretary of Labor o/b/o Frank Scott v. Leeco, Inc.*, 18 FMSHRC 648 (April 1996) (ALJ); *Secretary of Labor o/b/o Danny Shepherd v. Adena Fuels, Inc.*, 15 FMSHRC 1438 (July 1993) (ALJ).

Finally, severance is consistent with the Commission's decision in *Sec'y of Labor o/b/o Clemmie Callahan v. Hubb Corp.*, 20 FMSHRC 832 (Aug. 1998) ("*Callahan*"). In *Callahan* the Commission distinguished a discrimination complainant's interest in resolving his complaint in a 105(c)(2) proceeding from the Secretary's interest in establishing a violation of section 105(c) in a pertinent civil penalty proceeding. *See Callahan*, 20 FMSHRC at 837-39. In other words, Wylie's settlement with Allegheny would not preclude the Secretary from prosecuting his civil penalty case. However, consistent with *Callahan*, Wylie does not need the Secretary's approval to settle his discrimination claim. *Id*. Moreover, as a party in a 105(c)(2) proceeding, Wylie has an unfettered right to settle his discrimination case.

In support of his opposition to the severance, the Secretary asserts, contrary to Wylie's September 28, 2018, email representations to the Commission, that Wylie "has embraced [the] desire to serve the broader public purpose of deterring future discrimination and does not want his to be the test case allowing the routine confidential resolution [of] discrimination cases." Sec'y's Mot. to Recons. Severance Order at 5 (Oct. 26, 2018). The Secretary's portrayal of Wylie as a trailblazing miner who is committed to subordinating his receipt of significant compensatory relief to his purported "desire to serve the broader public purpose of deterring future discrimination" strains credulity. This is particularly so in view of the frustration expressed by Wylie in his September 28, 2018, email regarding the 'absurdity' of MSHA (the Secretary) interfering with his desire to settle.

In view of the questionable statements the Secretary has attributed to Wylie, it became clear that a telephone conference with Wylie, as well as with all attorneys of record, was necessary to ascertain Wylie's wishes. *See* Order Scheduling Prehr'g Tel. Conf., 41 FMSHRC ___ Slip op. (Jan. 9, 2018). Consequently, a recorded conference call was conducted on

January 22, 2019, to hear directly from Wylie whether he wished to accept the settlement terms proposed by Allegheny, or, whether he wished to pursue his discrimination claim at an evidentiary hearing.[2]

During the January 22, 2019, telephone conference, Wylie readily and without hesitation indicated he wished to agree to the settlement terms, including that the settlement terms remain confidential. Tr. 7-9. Wylie stated, "[a]t first the terms were fine" but he did not understand the "confidentiality thing." Tr. 7. Consistent with his September 28, 2018, email, Wylie expressed his regret that "[i]t dragged on. I felt like I was pushed into a corner, but it is what it is. I'm going to be happy that we can all walk away from this as soon as possible, sir." Tr. 11.

To place the divergent interests of Wylie and the Secretary in perspective, it is necessary to reconcile Wylie's September 29, 2018, affidavit submitted to the Commission by the Secretary from Wylie's repeated unequivocal statements made directly to the Commission concerning his interest in settlement. The Secretary acknowledges that he does not represent Wylie in this proceeding. Tr. 14. Nevertheless, Wylie's affidavit was submitted as an exhibit to the Secretary's opposition to the settlement motion for the purpose of demonstrating Wylie's strong opposition to confidentiality. Sec'y's Opp'n to Settlement Mot., Ex. A (Nov. 29, 2018). The affidavit is instructive for several reasons. For example, paragraph eight of the affidavit avers:

> I understand and agree *with the concerns of the Secretary* that any resolution of this matter without public inclusion of the amount of back wages due makes it harder for miners to assert their rights in future Mine Act discrimination cases by decreasing awareness of successful enforcement actions.

Sec'y's Opp'n to Settlement Mot., Ex. A at 4 (Nov. 29, 2018) (emphasis added).

Paragraph eight is revealing in two respects. First, it is apparent that the Secretary has been the driving force behind the demand for public disclosure, as the Secretary's interest in public disclosure preceded Wylie's. Second, the Secretary's reliance on paragraph eight to evidence Wylie's overriding concern for public disclosure is an apparent attempt to mask the Secretary's self-serving interest in this unfortunate situation.[3]

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[2] Transcript references to the January 22, 2019, telephone conference will be cited as "Tr." followed by the page number.

[3] As discussed herein, I am concerned about the Secretary's efforts to act in Wylie's best interests. For example, obviously administering the oath encourages truthfulness that is essential to the judicial process. Yet the Secretary objected to the fact that Wylie's statements during the telephone conference would be given under oath based on the disconcerting claim that the swearing-in process is intimidating. Tr. 5. In fact, it is clear that Wylie did not feel intimidated, as he appeared to be relieved that he had the opportunity to "speak freely" during the conference call. Tr. 6, 7.

The Secretary also relies on paragraph seven of Wylie's affidavit that states that Wylie "understand[s] that [he] ha[s] the right to settle [his] claim for back wages regardless of whether the Secretary wishes to do so." *Id*. at 3. However, the extent of Wylie's understanding in this regard is suspect as there is no evidence that Wylie was aware that confidentiality terms have historically been agreed to by the Secretary in 105(c)(2) proceedings.

In attempting to insulate himself from Wylie's expressed frustrations regarding feeling "pushed into a corner" and Wylie's desire to extricate himself from his dilemma "as soon as possible," the Secretary provides a self-serving explanation that seeks to blame the Commission for Wylie's predicament:

> [T]he most important thing that's occurred thus far is the statement by Mr. Wylie that he said he was pushed in the corner. There is absolutely no basis either in the current case law that has been promulgated by the Commission or any statutory promulgation by the United States Congress nor in the rules that allows a court sua sponte to impose a settlement on a complainant who is not represented. The Callahan case involves a complainant that was represented from the beginning of that litigation. Mr. Wylie does not have a lawyer as the court indicated in his initial comments to Mr. Wylie expressing the concern about Mr. Wylie being intimidated, and Mr. Wylie actually stating that he was somewhat intimidated by this process. The court has used its authority, I believe, inappropriately to get a settlement to force Mr. Wylie into a settlement.

Tr. 14.

The objections proffered on behalf of the Secretary during the telephone conference are noted. Suffice it to say, there is nothing in the procedural history of this matter to support the Secretary's claim that "the court has used its authority . . . to force Mr. Wylie into a settlement." *Id*. On the contrary, it is significant that, but for the issue of confidentiality, the Secretary previously agreed to identical settlement terms with respect to Wylie's compensatory relief as early as August 2018. Second Amended Notice of Hearing, unpublished Order at 1 (Oct. 3, 2018) (ALJ Paez). It is regrettable that Wylie has yet to receive his compensatory relief during this approximate six month intervening period. Finally, I am not aware of, nor has the Secretary cited, any case law that supports the proposition that the Commission disfavors confidentiality of settlement terms in discrimination cases brought pursuant to section 105(c) of the Act.

It is the initial November 6, 2017, Complaint Wylie filed with MSHA that serves as the predicate for this discrimination proceeding. Compl., Ex. A (Feb 23, 2018). As previously noted, as a party, Wylie has the right to settle his discrimination complaint. To hold otherwise would be inconsistent with the Commission's holding in *Callahan*. Placing the procedural history in this proceeding in perspective will be helpful in the event that the Secretary continues to believe that severing these matters is unjustified, or, that he is otherwise aggrieved by the approval of the subject settlement terms between Wylie and Allegheny.

ORDER

Consistent with Wylie's eagerness to accept the settlement terms, including confidentiality, expressed during the telephone conference, less than 24 hours after the telephone conference, Wylie provided the Commission with a signed copy of his Settlement and General Release Agreement with Allegheny on January 23, 2019. During the Conference call, counsel for Allegheny agreed that the performance of the terms of the settlement with respect to Wylie's compensatory relief would be completed within 30 days of the date of this Decision. Tr. 9.

The subject settlement terms resolve all matters in issue with respect to Wylie's relief. Consequently, **IT IS ORDERED** that the Settlement and General Release Agreement between Allegheny and Wylie **IS APPROVED** and that Allegheny provide Wylie with the compensatory relief provided for in the settlement agreement within 30 days of the date of this Decision.

IT IS FURTHER ORDERED that upon confirmation of Wylie's timely receipt of his compensatory relief, the subject discrimination proceeding in Docket No. PENN 2018-0158-DM **SHALL BE DISMISSED**.

IT IS FURTHER ORDERED that unredacted copies of the settlement terms and the January 22, 2019, telephone conference transcript shall be placed under seal.

IT IS FURTHER ORDERED that a redacted copy of the January 22, 2019, telephone conference transcript deleting all references to the amount of Wylie's compensatory relief will not be sealed.[4]

Nothing herein shall preclude the Secretary from pursuing the civil penalty case in Docket No. PENN 2018-0275. In this regard, the Secretary has requested a hearing in the civil penalty mater in Docket No. PENN 2018-0275. The date and location of the hearing will be specified in a subsequent order.

/s/ Jerold Feldman
Jerold Feldman
Administrative Law Judge

[4] To preserve the pending issue of confidentiality, the parties were initially advised that the transcript of the telephone conference would be placed under seal. Order Scheduling Prehr'g Tel. Conf., 41 FMSHRC ___ Slip op. at 2 (Jan 9, 2019). However, the parties were subsequently advised that a redacted copy that deletes all references to the amount of the agreed upon compensatory relief sufficiently preserves the issue of confidentiality, and thus would not be placed under seal. Tr. 3.

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/nm

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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February 8, 2019

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner, v. CORMIER CONSTRUCTION, Respondent.	CIVIL PENALTY PROCEEDING Docket No. YORK 2017-0047 A.C. No. 17-00609-425848 Mine: Church Quarry

DECISION AND ORDER

Appearances: James L. Polianites, Esq., U.S. Department of Labor, Office of the Regional Solicitor, Boston, Massachusetts, for Petitioner;

Mark Cormier, Pro Se, Cormier Construction & Granite, Deer Isle, Maine, for Respondent.

Before: Judge L. Zane Gill

This proceeding 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" or "Act"), 30 U.S.C. § 815. This case involves three section 104(a) citations issued by the Secretary to Respondent Cormier Construction.

I. STATEMENT OF THE CASE

On November 2, 2016, the Secretary issued Citation Nos. 9311390, 9311393, and 9311394 following an E01 MSHA inspection. Citation No. 9311390 alleges a violation of 30 C.F.R. § 56.11003[1] for not maintaining a ladder in good condition. Citation No. 9311393 alleges a violation of 30 C.F.R. § 56.11002[2] for failing to provide a railing on a bench. Citation No. 9311394 alleges a violation of 30 C.F.R. § 56.11001[3] for failing to provide safe access to two

[1] Section 56.11003 reads, "Ladders shall be of substantial construction and maintained in good condition."

[2] Section 56.11002 reads, "Crossovers, elevated walkways, elevated ramps, and stairways shall be of substantial construction provided with handrails, and maintained in good condition. Where necessary, toeboards shall be provided."

[3] Section 56.11001 reads, "Safe means of access shall be provided and maintained to all working places."

benches. Based on the penalty conversion table in 30 C.F.R. § 100.3(g), the Secretary proposed a penalty of $2,043.00 for each violation for a total combined proposed penalty of $6,129.00.

I held a hearing on April 24, 2018, in Portland, Maine. The Secretary presented testimony from MSHA Inspector Michael Powers. Respondent presented testimony from Quarry Foreman Mark Cormier. The parties each submitted post-hearing briefs.

II. ISSUES

The Secretary asserts that Cormier Construction violated sections 56.11003, 56.11002, and 56.11001. (Sec'y Br. 2–3) The Secretary also asserts that the violations were significant and substantial ("S&S"), inasmuch as they were reasonably likely to result in a fatality and were the result of the operator's moderate negligence. (*Id.* at 6–7) In contrast, Respondent argued at the hearing that the Secretary's negligence and gravity determinations were over-assessed. (Tr.14:6–13) Specifically, Respondent argued that MSHA did not prove that a fall, as contemplated in the citations, would reasonably be expected to be fatal. (Tr.61:23–25; Resp't Br. 1) Additionally, Respondent argued that the recommended penalty amount is too high, especially considering its long history of not having lost-work accidents and its small size. (Tr.66:22–67:11) Respondent did not dispute MSHA's jurisdiction.

The following issues are before me: (1) whether Cormier Construction violated sections 56.11003, 56.11002, and 56.11001 as alleged in Citation Nos. 9311390, 9311393, and 9311394; (2) whether the Secretary's gravity and S&S determinations are proper for the three citations; (3) whether Respondent's negligence is properly designated as "moderate"; and, (4) whether the proposed penalties are appropriate.

III. STIPULATIONS AND FACTUAL BACKGROUND

The parties agreed to 14 stipulations, which were read into the record at hearing. They are as follows:

> (1) On November 2, 2016, the Mine Safety and Health Administration, MSHA, conducted a regular safety inspection of the Church Quarry Mine on Deer Isle, Maine, by Inspector Michael Powers.
>
> (2) Mr. Powers held a pre-inspection conference with Tim Ray and also spoke to the owner Francis Cormier and Mark Cormier.
>
> (3) Mr. Powers conducted a general inspection of the quarry and its equipment.
>
> (4) With respect to the part of the quarry for which the subject citations were issued, the quarry was composed of benches from which the granite was cut.
>
> (5) Photographs taken by Mr. Powers are fair and accurate depictions of the quarry during his inspection.

(6) Mr. Powers observed that an aluminum ladder used to access bench number 1 in the quarry was bent and deformed at the 8th rung, and left and right rails were bent at the 9th rung.

(7) Mr. Powers also observed that there was no railing in place for 40 feet along the right side of bench number 1.

(8) Bench number 1 was used by employees to access the ladders to benches 2 and 3; and employees had been working at the end of bench number 1 splitting stone from bench number 2.

(9) The area of bench number 1 depicted in the photographs taken by Mr. Powers measures 7 to 8 feet and approximately 4 feet wide where the stone was being split by employees.

(10) The drop from the surface of bench number 1 to the ground below was measured to be 89 inches.

(11) Mr. Powers also observed that safe access was not provided and maintained to access benches 2 and 3. The ladder to bench number 3 had its bases removed and the left rail was broken at the midpoint.

(12) In addition, Mr. Powers observed that there was no railing along the right side of bench number 2, which was measured to be 54 inches wide and 10 feet 6 inches long.

(13) Mr. Powers was informed that this area of bench number 2 was accessed throughout the shift.

(14) Mr. Powers conducted a closing conference in which the fall hazards he observed and described to the foreman were discussed.

(Tr.7:1–8:24)

Powers issued Citation No. 9311390, alleging a violation of 30 C.F.R. § 56.11003, Citation No. 9311393, alleging a violation of 30 C.F.R. § 56.11002, and Citation No. 9311394, alleging a violation of 30 C.F.R. § 56.11001. (Exs. S–4, S–7, S–10) He designated each of the three violations as "S&S" and "reasonably likely" to result in a "fatal injury" to "one miner." (Exs. S–4, S–7, S–10) Additionally, all three citations allege that the operator's negligence was "moderate." (Exs. S–4, S–7, S–10)

Cormier Construction abated Citation No. 9311390 by removing the defective ladder from the worksite and replacing it with an aluminum ladder in good visible condition. (Exs. S–4, S–5 at 4) Cormier Construction abated Citation No. 9311393 by placing a railing along the bench. (Exs. S–7, S–8 at 5) Finally, Cormier Construction abated Citation No. 9311394 by removing and discarding the broken ladder on bench 2, removing access to bench 2, and

providing a new ladder to go from bench 1 to bench 3. (Exs. S–10, S–11 at 4–5) Powers then terminated each of the violations. (Exs. S–4, S–7, S–10)

IV. LEGAL PRINCIPLES

A. Burden of Proof

In order to establish a violation of a safety standard or provision of the Act, the Secretary must prove "by a preponderance of the credible evidence" that a violation occurred. *Keystone Coal Mining Corp*., 17 FMSHRC 1819, 1838 (Nov. 1995), *citing Garden Creek Pocahontas Co.*, 11 FMSHRC 2148, 2152 (Nov. 1989). The Secretary may establish a violation by inference in certain situations, but only if the inference is "inherently reasonable" and there is "a rational connection between the evidentiary facts and the ultimate fact inferred." *Garden Creek Pocahontas Co.*, 11 FMSHRC at 2152–53, *citing Mid-Continent Res., Inc.*, 6 FMSHRC 1132, 1138 (May 1984); *see also Eagle Energy, Inc.*, 23 FMSHRC 1107, 1118 (Oct. 2001).

The weight of evidence is a measure of the believability or persuasiveness of evidence. To satisfy the burden of proof—preponderance of the evidence—the Secretary must convince me that the evidence in support of his case outweighs the evidence offered by the Respondent.

B. Significant and Substantial

A violation is S&S if, based on the facts surrounding that violation, there is "a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981). To establish an S&S violation, the Secretary must prove: "(1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard—that is, a measure of danger to safety—contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature." *Mathies Coal Co.*, 6 FMSHRC 1, 3–4 (Jan. 1984) (footnote omitted); *see also Buck Creek Coal, Inc. v. Fed. Mine Safety & Health Admin.*, 52 F.3d 133, 135–36 (7th Cir. 1995) (affirming ALJ's application of the *Mathies* criteria); *Austin Power, Inc. v. Sec'y of Labor*, 861 F.2d 99, 104 (5th Cir. 1988) (approving the *Mathies* criteria).

The Commission clarified that in analyzing the second *Mathies* element, Commission Judges must determine whether there is a reasonable likelihood of occurrence of the hazard "against which the mandatory safety standard is directed." *Newtown Energy, Inc.*, 38 FMSHRC 2033, 2038 (Aug. 2016). In evaluating the third *Mathies* element, the Commission assumes the hazard identified in the second *Mathies* element exists and determines whether that hazard is reasonably likely to cause injury. *Id.* at 2045 (citing *Knox Creek Coal Corp. v. Sec'y of Labor*, 811 F.3d 148, 161–62 (4th Cir. 2016); *Peabody Midwest Mining, LLC*, 762 F.3d 611, 616 (7th Cir. 2014); *Buck Creek Coal*, 52 F.3d at 135). The Commission has specified that evaluation of the reasonable likelihood of injury should be made assuming continued normal mining operations. *U.S. Steel Mining Co.*, 7 FMSHRC 1125, 1130 (Aug. 1985) (quoting *U.S. Steel Mining Co.*, 6 FMSHRC 1573, 1574 (July 1984)).

C. Negligence

The Commission evaluates negligence using "a traditional negligence analysis." *Am. Coal Co.*, 39 FMSHRC 8, 14 (Jan. 2017) (quoting *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 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.* (citing *Mach Mining, LLC*, 809 F.3d at 1263–64). Under a traditional negligence analysis, an operator is negligent if it fails to meet the requisite standard of care. *Brody Mining, LLC*, 37 FMSHRC 1687, 1702 (Aug. 2015). In determining whether an operator met its duty of care, 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 regulation. *Id.* at 1702 (citation omitted). In making a negligence determination, a Judge is not limited to an evaluation of allegedly "mitigating" circumstances, but may consider the totality of the circumstances holistically and thus find "high negligence" in spite of mitigating circumstances or "moderate" negligence without identifying mitigating circumstances. *Id.*

D. Penalty

Administrative Law Judges are given broad discretion in assessing civil penalties under the Mine Act. *Westmoreland Coal Co.*, 8 FMSHRC 491, 492 (Apr. 1986). When assessing a civil penalty, section 110(i) of the Mine Act requires that the Commission consider six criteria: (1) the operator's history of previous violations; (2) the appropriateness of the penalty relative to the size of the operator's business; (3) the operator's negligence; (4) the penalty's effect on the operator's ability to continue in business; (5) the violation's gravity; and, (6) the demonstrated good faith of the operator in attempting to achieve rapid compliance after notification of a violation. 30 U.S.C. § 820(i).

In addition, deterrence is a relevant factor that judges may consider separately from the statutorily-prescribed criteria in assessing penalties. *See Black Beauty Coal Co.*, 34 FMSHRC 1856, 1864–69 (Aug. 2012).

The Commission has repeatedly held that substantial deviations from the Secretary's proposed assessments must be adequately explained using the section 110(i) criteria. *E.g.*, *Hubb Corp.*, 22 FMSHRC 606, 612 (May 2000); *Cantera Green*, 22 FMSHRC 616, 620–21 (May 2000); *Sellersburg Stone Co.*, 5 FMSHRC 287, 293 (Mar. 1983). A judge need not make exhaustive findings, but the judge must provide an adequate explanation of how the findings contributed to his or her penalty assessments. *Cantera Green*, 22 FMSHRC at 621.

Although all of the statutory penalty criteria must be considered, they need not be assigned equal weight. *Thunder Basin Coal Co.*, 19 FMSHRC 1495, 1503 (Sept. 1997). Generally speaking, the magnitude of the gravity of a violation and the degree of negligence are important factors, especially for more serious violations for which substantial penalties may be imposed. *Musser Eng'g, Inc.*, 32 FMSHRC 1257, 1289 (Oct. 2010) (judge justified in relying on gravity and gross negligence in imposing substantial penalty); *Spartan Mining Co.*, 30 FMSHRC 699, 725 (Aug. 2008) (appropriate for judge to raise a penalty significantly based upon findings

of extreme gravity and unwarrantable failure); *Lopke Quarries, Inc.*, 23 FMSHRC 705, 713 (July 2001) (judge did not abuse discretion by weighing the factors of negligence and gravity more heavily than the other four statutory criteria).

With regard to the penalty's effect on the operator's ability to continue in business, the Commission has held that "[i]n the absence of proof that the imposition of authorized penalties would adversely affect [an operator's] ability to continue in business, it is presumed that no such adverse [e]ffect would occur." *John Richards Constr.*, 39 FMSHRC 959, 965 (May 2017), *citing Sellersburg Co.*, 5 FMSHRC at 294 (citing *Buffalo Mining Co.*, 2 IBMA 226, 247–48 (Sept. 1973)). Evidence of an operator's financial condition is relevant to the ability to continue in business criterion. *Georges Colliers, Inc.*, 23 FMSHRC 822, 825 (Aug. 2001)

Finally, the Commission alone is responsible for assessing final penalties. *See Sellersburg Stone Co. v. FMSHRC*, 736 F.2d 1147, 1151–52 (7th Cir. 1984) ("[N]either the ALJ nor the Commission is bound by the Secretary's proposed penalties [. . .] . [W]e find no basis upon which to conclude that [MSHA's Part 100 penalty regulations] also govern the Commission.").

V. ANALYSIS AND CONCLUSIONS OF LAW

A. Citation No. 9311390

1. Fact of the Violation

For Citation No. 9311390, the Secretary asserts that Cormier Construction violated 30 C.F.R. § 56.11003 by using a 10-foot portable aluminum ladder that was not maintained in good condition. (Ex. S–4) The cited standard provides: "Ladders shall be of substantial construction and maintained in good condition." 30 C.F.R. § 56.11003.

According to the Secretary, the #8 rung was bent and deformed and the left and right rails were bent at the #9 rung. (Tr.25:11–18; Jt. Stip. 6; Ex. S–4) Additionally, the bottom rung was broken and a steel rod was stuck through it. (Tr.26:8–24; Ex. S–4) Inspector Powers stated there was nothing there to keep the steel rod from sliding through or falling out. (Tr.27:6–8)

In contrast, Respondent suggested at the hearing that it did not violate the standard because this ladder was previously inspected by other inspectors and deemed to be sufficiently safe in this condition. (Tr.15:11–23; 50:19–21) Additionally, Respondent argued the #9 rung would not bear any weight because it was above the bench. (Tr.51:19–25) Finally, Respondent argued that the rod at the bottom rung was a steel drill rod, which fit snuggly into the rung. (Tr.52:1–53:4)

Regarding Respondent's contention that previous inspectors had not cited the ladder at issue, it is long established that MSHA cannot be estopped from enforcing its regulations simply because it did not previously cite the mine operator. *See Mainline Rock & Ballast, Inc. v. Sec'y of Labor*, 693 F.3d 1181, 1187 (10th Cir. 2012) (citing *Emery Mining Corp. v. Sec'y of Labor*, 744 F.2d 1411, 1416–17 (10th Cir. 1984)). The Mine Act is a strict liability statute. As long as a

regulation is sufficiently specific that a reasonably prudent person, familiar with the conditions the regulation is meant to address and the objective the regulation is meant to achieve, would have fair warning of what the regulation requires, then the due process requirements for notice are satisfied. *Id.* at 1187 (citing *Walker Stone Co. v. Sec'y of Labor*, 156 F.3d 1076, 1083–84 (10th Cir. 1998)). While the terms "substantial construction" and "good condition" are inherently subjective, the obvious bend at rung #9, the damage in the middle of rung #8, and broken bottom rung would give a reasonably prudent person familiar with the regulation notice that this ladder violated the safety standard. Respondent's contentions about rung #9 being non-weight bearing and the nature of the steel drill rod involve the gravity analysis and will be addressed below.

Based on the photographic evidence depicted in the exhibit photos, I agree that the ladder was not of substantial construction and had not been maintained in good condition. I conclude that Respondent violated 30 C.F.R. § 56.11003 as alleged in Citation No. 9311390.

2. S&S and Gravity

To establish the first element of the *Mathies* test, the Secretary must prove an underlying violation of a mandatory safety standard. Cormier Construction's violation of section 56.11003 establishes the first element of an S&S violation.

In regard to the second *Mathies* element, the Secretary must show that the violation created a reasonable likelihood the hazard that section 56.11003 aims to prevent would occur. Section 56.11003 requires that ladders be of substantial construction and maintained in good condition; thus, the standard aims to prevent a fall hazard. (*See* Tr.29:7–10; Jt. Stip. 14; Ex. S–6)

The ladder was the means of accessing bench 1 (Tr.26:7–11; Jt. Stip. 6; Ex. S–5), and it was used numerous times throughout the shift and on a regular basis. (Tr.28:25–29:1) Beyond this, however, the Secretary failed to illustrate with convincing specificity the reasonable likelihood of the occurrence of the hazard. Regarding this important step in the *Mathies* test, the Secretary's brief makes the following arguments: (1) the "broken rungs and deformed rails [. . .] presented a hazard of failing to bear the weight put upon it" (Sec'y Br. 4); the "iron rod had been inserted, ostensibly to strengthen the rung to bear weight" (*Id.*); and, (3) "the degree of damage [. . .] put the miners who climbed those ladders at risk of falling if the ladder should fail." (*Id.* at 7)

In contrast, Respondent argued at the hearing that the bend at the #9 rung would not bear any weight because it was above the bench. (Tr.51:19–25) Respondent also suggested that the steel drill rod used to enforce the broken bottom rung made the ladder usable and safe. (Tr.52:2–53:4)

The Secretary carries the burden of establishing all of the claims he brings. The Secretary did not address the strength and efficacy of the steel-rod-enforced broken bottom rung, did not discuss how the bend at the rail above the #9 rung would contribute to a fall, given that it was above bench 1, and did not describe the extent of the damage at rung #8 to supplement the view provided by the close-up photo. (Ex. S–5 at 1) The Secretary has not established that the ladder,

in its current condition, would fail to bear the weight put upon it. Nevertheless, two factors persuade me that a fall was reasonably likely to occur.

First, the ladder was used frequently and on a regular basis. Because the ladder was used to access bench 1 from the ground level (Tr.26:7–11; Jt. Stip. 6; Ex. S–5), miners would have to use it to get to and leave the active working section. Even with a single miner working at the time, frequent, daily use would increase exposure to potential harm and accelerate wear and tear.

Second, even assuming the ladder's condition at the time of the citation was safely jury-rigged as depicted by Cormier, its future condition would likely have become hazardous. The Commission has specified that evaluation of the reasonable likelihood of injury should be made assuming continued normal mining operations. *U.S. Steel Mining Co.*, 7 FMSHRC at 1130 (quoting *U.S. Steel Mining Co.*, 6 FMSHRC at 1574). The Commission has held that the S&S inquiry considers "the violative conditions as they existed both prior to and at the time of the violation and as they would have existed had normal operations continued." *Mach Mining, LLC v. Sec'y of Labor*, 809 F.3d 1259, 1267 (D.C. Cir. 2016), *citing Knox Creek Coal Corp.*, 36 FMSHRC 1128, 1132 (May 2014); *McCoy Elkhorn Coal Corp.*, 36 FMSHRC 1987, 1991 (Aug. 2014).

Cormier's hearing testimony suggested these problems had existed for a significant period of time without being properly addressed. (*See* Tr.15:11–23; 52:24–25) It is thus reasonable to conclude this ladder would have continued to deteriorate beyond its current state without replacement but for the citation issued by Inspector Powers. Indeed, Mr. Cormier admitted at the hearing that he now uses the ladder, in its cited condition, at his home. (Tr.52:10–12) The normal wear and tear of the ladder, especially given its frequent, daily use, in conjunction with the attitude of mine management strongly indicate that the problems with this ladder would get worse. I determine that it was reasonably likely for the hazard to occur.

Regarding the third and fourth *Mathies* elements, the Secretary must demonstrate a reasonable likelihood the hazard will result in a reasonably serious injury. In analyzing the third element, I must assume that the hazard identified in the second *Mathies* element exists. *Newtown*, 38 FMSHRC at 2045. A fall from a ladder of any height is reasonably likely to result in an injury to a miner. Consequently, I determine that the hazard of a miner falling from the ladder would be reasonably likely to result in an injury, thus satisfying the third *Mathies* element.

The primary reason Powers gave at the hearing for the fatal designation was a statistic that, between 2013 and 2016, five fatal injuries occurred with falls of less than 8 feet in metal/non-metal mining. (Tr.29:7–10) The Secretary did not brief the severity of injury with any specificity. The severity of injury for all three citations was addressed in a single sentence: "Since a miner falling from a ladder would likely land on a solid granite surface, or on to the waste rock, the prospect of a serious, even fatal injury was ever-prevalent on the day of Mr. Power's inspection." (Sec'y Br. 7)

The evidence does not support the Secretary's argument by a preponderance of the evidence that an injury in this citation could reasonably be expected to be fatal for three reasons.

First, the Secretary failed to provide specific information on the fatality data Powers relied on. During cross-examination by Respondent, Inspector Powers was unable to discuss or provide additional, useful fall data. (Tr.51:5–7) Notably, Powers was unable to discuss the total number of falls. The Secretary's citation language—"could reasonably be expected to be"—indicates probability. The concept of "likelihood" is necessarily probabilistic. The five fatalities cited let us know that a fatality is possible, which Respondent fully acknowledged (Tr.64:21–65:1), but the information is not sufficient to determine probability without establishing the denominator of total falls. I realize, and as the parties discussed at hearing, the difficulty in collecting this data since near-misses or non-serious injuries are not reported to MSHA. (Tr.51:3–18) While not dispositive, more data on the number of falls during that multi-year period would have been helpful and instructive.

Second, the Secretary's statistic does not necessarily apply here. Powers' data on fatalities from falls of less than 8 feet does not parse the numbers to show the likelihood of a fatality from a fall of 89 inches (7.42 feet)—the distance from the surface of bench 1 to the ground below. For example, I would be less convinced of the Secretary's conclusion that a fall could reasonably be expected to result in a fatal injury if the data showed that all five of the noted fall fatalities between 2013 and 2016 occurred in the range of 7.50 feet and 7.99 feet.

In any event, the Secretary's calculation of a fall height of 89 inches for this citation is unreasonable. As evident from the photographic evidence, rung #9 was positioned four inches above bench 1. (Ex. S–5 at 1) In agreement with Respondent's argument (*see* Tr.51:19–25; Ex. S–5), the Secretary failed to prove why a miner would need to stand on rung #9 to get to bench 1. Miners likely stood on rung #8, which was measured five inches below bench 1 (*see* Ex. S–5 at 1), or possibly rung #7 before stepping up to bench 1. While the specifics of weight distribution on the ladder are not clear, what is clear, however, is that any fall would most likely occur at rung #8 or below: a height lower than the 89 inches cited by the Secretary.

Third, the Secretary focused solely on fall height and failed to discuss other important factors involved in the cited fatalities. For example, inspectors considering fall hazards have previously taken into account where the miner might fall, what he might fall into, what he might fall on, the height of the miner, the weight of a miner, the surface the miner was standing on, and the types of the tools the miner might be carrying. *See, e.g.*, *Boart Longyear Co.*, 36 FMSHRC 106, 120 (Jan. 2014) (ALJ) (inspector theorized that toolbox door on the side of a truck was not strong enough to support the weight of the driver and could snap); *Granite Rock Co.*, 34 FMSHRC 261, 264 (Jan. 2012) (ALJ) (inspector testified that he took into account the surface itself, the tools, loose rock, dust conditions, height of the miner, configuration of equipment, and possibility of falling on different surfaces depending if the fall was to the left side or right side in determining the likelihood and severity of an injury); *D. Holcomb & Co.*, 33 FMSHRC 1435, 1451–52 (June 2011) (ALJ) (where the inspector testified a rung on a ladder could give way, resulting in a fall that would either involve a hit to the head or result in contact with the nearby jaw crusher's moving parts).

While the lack of detail provided by Powers here is not dispositive, more information on the circumstances in each of the cited fatalities, which served as the primary basis for the fatality

designation in this violation (Tr.29:7–10), would have been helpful in guiding my analysis, especially when compared to the facts in this case.

Here, given the area surrounding the ladder as depicted in Exhibit S–5, a falling miner might fall onto a collection of large tires (on the left), onto the ground below (directly behind), or onto a lone sledgehammer (on the right). (*See* Ex. S–5 at 2–4) Contrast this with the fall area in Citation No. 9311393, which was filled with jagged waste rock (*see* Ex. S–8 at 1) or the potential fall heights in Citation No. 9311394. (*See* Ex. S–11 at 4–5) The Secretary does not distinguish between these important factual considerations in his brief, instead bundling them as factually identical violations. Thus, while a fall would undoubtedly be serious here, the Secretary has not sufficiently met his burden to prove the fall could reasonably be expected to be fatal in this case. Instead, I determine that such injuries could reasonably be expected to be permanently disabling given the likely height a miner might fall from and the types of surfaces and objects below.

The Secretary has satisfied all four elements of the *Mathies* test. I conclude that Citation No. 9311390 was appropriately designated as S&S. However, for the reasons stated above, I determine the gravity for this citation to be "reasonably likely" to result in a "permanently disabling" injury to "one miner."

3. Negligence

The Secretary asserts that Cormier Construction's conduct involved moderate negligence. (Ex. S–4) Interestingly, the Secretary's post-hearing brief does not discuss negligence. At the hearing, Inspector Powers testified that mine management was not aware because the condition was not reported or listed in the daily workplace examination. (Tr.28:10–13) However, the fact that somebody had put a bar in the bottom rung suggests that somebody on the mine property knew about the structural problems of the ladder. (Tr.28:5–15)

In an attempt to argue against the occurrence of a violation, Cormier stated at the hearing that the ladders had been in place and in the cited damaged condition for years and were never cited by previous MSHA inspectors. (Tr.15:11–23) Cormier's own words cut sharply against the argument that mine management was not aware of the condition, which admittedly existed for a long period of time.

While reliance on a previous MSHA inspector's incorrect interpretation cannot estop MSHA from issuing a citation, it can be considered in reducing the level of negligence and penalty amount for a violation. *Mach Mining, LLC*, 809 F.3d at 1266, *citing Mettiki Coal Corp.*, 13 FMSHRC 760, 770–71 (May 1991); *U.S. Steel Mining Co.*, 6 FMSHRC 2305, 2310 (Oct. 1984); *King Knob Coal Co.*, 3 FMSHRC 1417, 1422 (June 1981). The three structural problems with this ladder were obvious. Additionally, according to Cormier's testimony, the problems existed for years and were known about by mine management. (Tr.15:11–23) However, I deem Respondent's reliance on previous inspectors' statements about the condition of this ladder an important mitigating factor.

Considering the totality of the circumstances, I conclude that the operator's conduct involved moderate negligence.

B. Citation No. 9311393

1. Fact of the Violation

For Citation No. 9311393, the Secretary asserts that Cormier Construction violated 30 C.F.R. § 56.11002 by failing to have a railing in place. (Ex. S–7) The cited standard provides: "Crossovers, elevated walkways, elevated ramps, and stairways shall be of substantial construction provided with handrails, and maintained in good condition. Where necessary, toeboards shall be provided." 30 C.F.R. § 56.11002.

The parties stipulated: (1) there was no railing in place for 40 feet on the right side of bench 1 (Jt. Stip. 7); (2) bench 1 was active at the time of inspection (Jt. Stip. 8); and, (3) the drop-distance to the ground below bench 1 was 89 inches. (Jt. Stip. 10) At the end of bench 1, employees split stone from bench 2. (Jt. Stip. 8) The area of bench 1 depicted in the photographs taken by Powers measured 7–8 feet and approximately 4 feet wide where the stone was being split by employees.[4] (Jt. Stip. 9; Ex. S–8 at 1, 4) A wooden scaffold was in place at the narrow (i.e., 4 foot) end of bench 1. (Ex. S–8 at 1, 4, 5) The scaffold was elevated about a foot above bench 1, 6–7 feet wide, and the platform planks were approximately 16 inches deep. (Tr.31:5–7; *see* Ex. S–8 at 1) Additionally, bench 1 was used by employees to access the ladders to benches 2 and 3. (Jt. Stip. 8)

Powers testified a railing existed, but it had been taken down the day before at the end of the shift to remove a block on bench 2. (Tr.33:13–14) Powers did not see anybody working in the area at the time of the inspection, but Ray stated they had broken stone from bench 2 on the previous shift. (Tr.30:16–19) Additionally, Ray stated to Powers they had been up on the benches to retrieve some tools during the shift on the morning of the inspection. (Tr.55:4–10)

In contrast, Respondent argued at the hearing that factors outside of its control created a conundrum. Respondent stated the railing had to be removed in order to pull granite slabs with a lifting crane; if the railings were not removed, they would be destroyed in the process. (Tr.54:3–8) Accordingly, the railing was removed at the end of the shift the day before. (Tr.54:8–9) However, because of a noise ordinance, diesel equipment and air equipment could only be used at the mine from 10 a.m. to 2 p.m. (Tr.53:22–25) Thus, until 10 a.m., Respondent was not able to use air drills or compressors and could not reinstall the railing.[5] (Tr.54:10–13) Respondent stated that inspectors often show up earlier in the morning—at 7:00 or 8:00 a.m.—which has resulted in Respondent being cited on multiple occasions for not having a railing in place. (Tr.54:18–22)

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[4] Despite stipulating to these dimensions, Mr. Cormier testified at the hearing that the planks were 12 inches wide; thus, the width of the narrow portion of bench 1 was wider than estimated by Inspector Powers. (Tr.55:12–22) Upon viewing the exhibit photo (Ex. S–8 at 1) at the hearing, I noted that there were at least a few feet on either side of the planks. (Tr.55:23–56:1) Ultimately, this discrepancy—whether the narrow portion of bench 1 was 4 feet or 5–6 feet—does not change my analysis here.

[5] During this "quiet" period before 10 a.m., miners are generally directed to do cleanup, maintenance, and things of that nature. (Tr.54:13–15)

Based on the photographic evidence (*see* Ex. S–8 at 1, 3, 5), I determine that bench 1 was an elevated walkway. Further, the parties stipulated that no handrail existed at the time of the citation. (Jt. Stip. 7) As bench 1 was an elevated walkway with no handrail provided at the time of the citation, I conclude that Respondent violated 30 C.F.R. § 56.11002 as alleged in Citation No. 9311393.

2. S&S and Gravity

To establish the first element of the *Mathies* test, the Secretary must prove an underlying violation of a mandatory safety standard. Cormier Construction's violation of section 56.11002 establishes the first element of an S&S violation.

To satisfy the second *Mathies* element, the Secretary must show that the violation created a reasonable likelihood the hazard that section 56.11002 aims to prevent would occur. Section 56.11002 requires that elevated walkways be of substantial construction, provided with handrails, and maintained in good condition; specifically, the standard aims to prevent a fall hazard. (*See* Tr.30:6–7; Jt. Stip. 14; Ex. S–9) Powers stated that he designated this citation as "reasonably likely" because workers had been working on the bench multiple times throughout the shift and were not using any fall protection equipment. (Tr.34:16–18) Specifically, Powers testified that Ray told him that they went up on the benches to retrieve tools earlier that morning. (Tr.55:4–10) Powers also testified that there were no tie-off points in lieu of a railing at the scaffolding. (Tr.34:19–25)

Respondent's contention that the railing would have been reinstalled after 10 a.m. does not change the fact that miners were accessing the benches to collect tools earlier that morning. (Tr.55:4–10) It is reasonable to infer that miners collected tools from the narrow end of bench 1 since they were working there the day before to split stone from bench 2. (Tr.30:16–19; Jt. Stips. 8, 9) Given the narrow 4 foot width and the existence of the elevated wooden scaffolding situated in the walkway, it is also reasonably likely that a miner collecting tools from this area could misstep, slip, or trip and fall.

For these reasons, a fall was reasonably likely to occur, particularly at the narrow end of bench 1, where employees had been splitting stone the day before.

To satisfy the third and fourth *Mathies* elements, the Secretary must demonstrate a reasonable likelihood the identified hazard would result in a reasonably serious injury. In analyzing the third element, I must assume the hazard identified in the second *Mathies* element existed. *Newtown*, 38 FMSHRC at 2045. Unlike a fall in the previous citation, a fall in this case would be from a higher point, either from a standing position on bench 1 (89 inches) or possibly from the elevated wooden scaffold (101 inches). (Ex. S–8 at 1–3; *see* Tr.31:5–6) Further, as evident from the photographic evidence, granite waste rock, metal bars, and other sharp-edged objects lay in the area parallel to the right-side edge of bench 1. (Ex. S–8 at 1–3) Assuming a fall, an injury would be certain and could reasonably be expected to be fatal.

Accordingly, the Secretary has satisfied all four elements of the *Mathies* test. I conclude that Citation No. 9311393 was appropriately designated as S&S. For the reasons stated above, I

determine the gravity for this violation to be "reasonably likely" to result in "fatal" injuries to "one miner."

3. Negligence

The Secretary asserts that Cormier Construction's conduct involved moderate negligence. (Ex. S–7) At the hearing, Inspector Powers stated that he chose the moderate designation because a railing had been provided, but somebody had removed it and failed to properly put it back up. (Tr.35:16–20) Powers believed Cormier Construction just forgot to reinstall the railing. (Tr.33:18) As mentioned above, the Secretary's post-hearing brief does not discuss negligence.

In response, Respondent stated that the railings had to be removed in order to pull the blocks with the lifting crane. (Tr.54:3–8) If the railings were not removed prior to pulling the granite blocks with the lifting crane, they would be destroyed. (Tr.54:5–6) According to Respondent, the railings were removed at the end of the shift the previous day. (Tr.54:8–9) However, the company is only able to run diesel equipment or air equipment between 10 a.m. and 2 p.m. due to noise concerns with the town. (Tr.53:22–25) Powers acknowledged that he had been told about the noise ordinance. (Tr.54:1)

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). In cases where a rank-and-file miner has violated the Act or its mandatory standards, the Commission examines the operator's supervision, training, and disciplining of its employees to determine whether the operator had taken reasonable steps necessary to prevent the rank-and-file miner's violative conduct. *S. Ohio Coal Co.*, 4 FMSHRC 1459, 1464 (Aug. 1982) ("SOCCO"), *citing Nacco Mining Co.*, 3 FMSHRC 848, 850–51 (Apr. 1981). The Commission also considers the foreseeability of the miner's conduct and the risks involved when determining whether the operator was negligent. *A.H. Smith*, 5 FMSHRC at 15, *citing SOCCO*, 4 FMSHRC at 1463–64; *Nacco*, 3 FMSHRC at 850–851.

Here, Respondent claims to have found itself between a regulatory Scylla and Charybdis—seemingly forced to choose between violating the town noise ordinance by using heavy equipment before 10 a.m. or MSHA's safety regulation requiring the railing. It is clear from the record that this problem has led to Respondent being cited before. (Tr.54:17–22) It is also clear that mine management was aware of the standard and the reasons for having a railing as evident by the fact that they normally had railings installed on the benches. (Tr.33:10–14; 34:3–9; 56:2–3) It is not clear, however, how frequently the railing was taken down and for how long. It is also not clear if Ray's accessing the railing-less benches to collect tools was done in conformance with or defiance of management's instructions or policies.

Although life presents things outside of our control, whether noise ordinance regulations or rogue rank-and-file miners, Respondent did not take the necessary, reasonable steps it should have taken to create a safer environment. Respondent stated that workers used the period prior to 10 a.m. to do clean up and maintenance work. (Tr.54:13–15) It is foreseeable that miners doing cleanup and maintenance work might clean and maintain the area they were last working at. Thus, in order to ensure no miners accessed the benches while the railing was down, a

reasonably prudent operator would have taken actions—perhaps removing the first ladder, placing signs and warnings, adding a barricade—to prevent miners from accessing the benches before the railing was reinstalled. However, no preventative measures were taken to deter access to the benches while the railing was down.

Further, Ray is listed in the MSHA Post-Inspection Report as the mine foreman. (Ex. S–2 at 1) As a foreman, Ray is held to a higher standard of care. *E.g.*, *Midwest Material Co.*, 19 FMSHRC 30, 35 (Jan. 1997) ("[A] foreman [. . .] is held to [a] high standard of care"); *see also Lehigh Anthracite Coal*, 40 FMSHRC 273, 280, 280 n.12 (Apr. 2018) (holding a supervisor to a higher standard of care because he was the only supervisor on duty at the time of the incident and was thus "the agent responsible on behalf of the operator for the health and safety of each of [the] miners").

Considering the totality of the circumstances, I conclude the operator's conduct involved moderate negligence.

C. Citation No. 9311394

1. Fact of the Violation

With Citation No. 9311394, the Secretary asserts that Cormier Construction violated 30 C.F.R. § 56.11001 by failing to provide and maintain safe access to benches 2 and 3. (Ex. S–10) The cited standard provides: "Safe means of access shall be provided and maintained to all working places." 30 C.F.R. § 56.11001.

The parties stipulated that the ladder to bench 3 had its bases removed, and the left rail was broken at the midpoint.[6] (Jt. Stip. 11) Powers testified that the ladder had been put in place at the end of the previous shift after Cormier Construction removed a section of bench 2. (Tr.36:11–13)

In addition, Inspector Powers observed that there was no railing along the right side of bench 2, which measured 54 inches (4.5 feet) wide and 10 feet 6 inches (10.5 feet) long. (Jt. Stip. 12; Ex. S–10) Powers was informed that this area of bench 2 was accessed throughout the shift. (Jt. Stip. 13)

[6] The ladder's bases were also referred to as "feet" or "shoes" during the hearing. (*See* Tr.38:4; 56:15–25; 57:4–16) To distinguish this ladder from the ladder in Citation No. 9311390, I will refer to the ladder here as the "footless ladder."

Respondent argued at the hearing that its understanding of "a safe means of access" was informed by prior inspectors over the years as not applying to falls less than 6 feet.[7] (Tr.48:21–50:22)

The Commission has held that section 56.11001 comprises the "dual requirements of providing and maintaining safe access to working places." *Watkins Eng'g & Constructors*, 24 FMSHRC 669, 680 (July 2002) (citation omitted). The Commission has previously used a plain meaning approach when interpreting this safety standard. *See W. Indus. Inc.*, 25 FMSHRC 449, 452 (Aug. 2003) (applying the judge's definition of "safe" as "secure from threat of danger, harm, or loss"); *Lopke Quarries, Inc.*, 23 FMSHRC 705, 707–08 (July 2001) (using the plain meaning of the word "maintained" in the regulation). Unlike OSHA, MSHA has not specified a specific height requirement, instead opting for the more general language of "safe means of access." Thus, a "five foot elevation is neither inherently safe nor inherently unsafe; site specific conditions must be taken into account." *Boart Longyear Co.*, 36 FMSHRC 106, 113 (Jan. 2014) (ALJ) (challenging respondent's contention that an elevation of five feet does not create a danger of falling for a section 56.15005 citation).

As discussed previously, MSHA cannot be estopped from enforcing its regulations simply because it did not previously cite the mine operator. *See Mainline Rock & Ballast, Inc.*, 693 F.3d at 1187. Instead, reliance on an MSHA inspector's incorrect interpretation can reduce the level of the operator's negligence, which will be discussed in the section below.

Here, there was a risk of falling from bench 2 to bench 1 given that there was no railing in place on the right side of bench 2. Additionally, the ladder to bench 3 was both footless and significantly damaged on its left rail, which presented the possibility of a slip or collapse while in use. Neither of these conditions allowed miners accessing bench 2 to be secure from threat of danger, harm, or loss. Accordingly, I determine that Cormier Construction failed to provide and maintain a safe means of access for benches 2 and 3 and violated 30 C.F.R. § 56.11001 as alleged in Citation No. 9311394.

2. S&S and Gravity

To establish the first element of the *Mathies* test, the Secretary must prove an underlying violation of a mandatory safety standard. Cormier Construction's violation of section 56.11001 does that.

For the second *Mathies* element, the Secretary must show that the violation created a reasonable likelihood the hazard section 56.11001 aims to prevent would occur. In this case, the standard aims to prevent a fall. (*See* Tr.40:9–12; Jt. Stip. 14; Ex. S–12) Powers assessed that a fall was reasonably likely since the footless ladder was used multiple times per shift. (Tr.39:19–

[7] Cormier at hearing was likely referring to the language in OSHA's fall protection standard, which states: "Each employee on a walking/working surface (horizontal and vertical surface) with an unprotected side or edge which is 6 feet (1.8 m) or more above a lower level shall be protected from falling by the use of guardrail systems, safety net systems, or personal fall arrest systems." 29 C.F.R. § 1926.501(b)(1) (emphasis added).

22) He also noted on his citation documentation (MSHA Form 4000–49E) that no tie-off points were available. (Ex. S–12)

On cross examination, Powers clarified that he based his assessment that the footless ladder on bench 2 was used multiple times solely on statements made by Ray that miners had been going up to bench 3 to retrieve tools and do some cleanup. (Tr.58:16–23) However, Powers testified that the ladder had been put in place at the end of the previous shift (Tr.36:11–13), and his citation documentation noted the footless ladder was placed on bench 2 for temporary use. (Ex. S–12) Nevertheless, his understanding was that this was a repeat process. (Tr.59:7–10)

Powers testified that the footless ladder could slide out while in use. (Tr.38:8) Moreover, the work environment was wet, increasing the possibility that the ladder would slide out. (Tr.38:9–13) Cormier countered by suggesting the footless ladder was actually secure—and possibly more secure than a footed ladder—due to the notched texture at the top of bench 2. (Tr.56:21–57:16) According to Cormier, when the block was lifted, drill lines and perforations were created on the top surface of bench 2, which functioned as divots to hold the footless ladder in place. (Tr.57:12–24)

Respondent did not provide further evidence to support its argument that the alleged drill lines and perforations created a safe surface on bench 2 for the footless ladder. But even assuming the surface of bench 2 was safer for a footless ladder than a footed ladder, Respondent did not address the severe damage on the ladder's left rail. Unlike the damage on rung #8 of the ladder from Citation No. 9311390, the damage on the left rail of the footless ladder was significant, possibly affecting the structural integrity of the ladder. (*Compare* Ex. S–5 at 1, *with* Ex. S–11 at 1–3)

Weighing these factors—with the temporary use of the ladder on one hand and the railing-less edge of bench 2 and the multiple problems with the ladder, especially the damaged left rail, on the other—and assuming continued normal mining operations, I conclude that a fall was reasonably likely to occur.

Vis-à-vis the third and fourth *Mathies* elements, the Secretary must demonstrate a reasonable likelihood the hazard will result in a reasonably serious injury. In analyzing the third element, I must assume the existence of the hazard identified in the second *Mathies* element. *Newtown*, 38 FMSHRC at 2045.

Assuming a fall from the footless ladder, a miner could be expected to fall in one of three ways: to the right side, backward, or to the left side.[8] A fall to the right side would result in a fall to bench 2, a distance of up to 7 feet. (*See* Ex. S–11 at 1, 2, 4) A fall backward would result in a fall to either bench 2 or down to bench 1, a distance of up to 13 feet. (*See* Exs. S–8 at 3–5, S–11 at 2, 4) A fall to the left side would result in a fall to bench 2 or, more likely, bench 1, a fall of up to 13 feet. (*See* Exs. S–8 at 3–5, S–11 at 1, 2, 4) Assuming a fall from a standing position on

[8] While the parties discussed and measured bench 1 at 89 inches, there were no stipulations or testimony pertaining to the heights of benches 2 or 3. Thus, I am forced to estimate the possible fall heights from bench 2 and bench 3 based solely on the photographic evidence provided in Exhibits S–8 and S–11.

bench 2, a miner would fall to bench 1, a fall of approximately 6 feet. (*See* Exs. S–8 at 3–5, S–11 at 2, 4)

In all of these scenarios, the fall would be directly onto the flat granite surfaces of the benches, which would undoubtedly result in serious injury. If a miner were to fall from the ladder, given the range of possible fall heights, it could reasonably be expected to result in a fatal head injury.

Accordingly, the Secretary has satisfied all four elements of the *Mathies* test. I conclude that Citation No. 9311394 was appropriately designated as S&S. For the reasons stated above, I determine the gravity for this violation to be "reasonably likely" to result in a "fatal" injury to "one miner."

3. Negligence

The Secretary asserts that Cormier Construction's conduct involved moderate negligence. (Ex. S–10) Inspector Powers testified that he designated moderate negligence because Respondent had previously installed a railing on bench 2 and understood that the railing was removed the day before, on November 1, 2016. (Tr.40:13–20) Again, the Secretary's post-hearing brief does not discuss negligence.

As with Citation No. 9311390, Respondent argued at the hearing that it relied on the incorrect interpretation of former MSHA inspectors. (Tr.50:17–22) And, as with Citation No. 9311393, Respondent argued it could not replace the rail because it is only able to run diesel equipment or air equipment between 10 a.m. and 2 p.m. due to noise concerns with the town. (Tr.53:22–25)

Cormier Construction knew it was supposed to have a railing as evident by the fact it previously had a railing in place on bench 2 the day before. Additionally, the damage on the left rail of the footless ladder was extensive and obvious, which would have given notice to a reasonably prudent operator that it was unsafe for use. I determine Respondent's reliance on previous MSHA inspector statements as to what constitutes a "safe means of access" to be a slightly mitigating factor.

Considering the totality of the circumstances, I conclude that the operator's conduct involved moderate negligence.

D. Penalty

Respondent was concerned about the proposed penalty and, specifically, the severity of injury or illness criterion. (Tr.14:16–15:6; 66:8–13) Cormier stated at the hearing that this was the first time Cormier Construction had ever contested citations. (Tr.65:24–66:6)

Under Section 110(i) of the Mine Act, I must consider six criteria in assessing a civil penalty: (1) the operator's history of previous violations; (2) the appropriateness of the penalty relative to the size of the operator's business; (3) the operator's negligence; (4) the penalty's

effect on the operator's ability to continue in business; (5) the violation's gravity; and, (6) the demonstrated good faith of the operator in attempting to achieve rapid compliance after notification of a violation. 30 U.S.C. § 820(i).

1. Gravity, Negligence, and Good Faith Abatement

I have affirmed the Secretary's S&S and negligence determinations. However, I lowered the severity of injury or illness from "fatal" to "permanently disabling" for Citation No. 9311390. Additionally, Cormier Construction demonstrated good faith by abating the citations quickly after notification of the violations. (Exs. S–5 at 4, S–8 at 5, S–11 at 5)

2. History of Previous Violations, Appropriateness of Penalty Relative to Size, and Ability to Continue in Business

Respondent contested these three citations because the penalties were significantly higher than those it had received in the past. (Tr.65:24–66:13) Indeed, the 15 citations prior to this inspection had a range in penalties from $100 to $270, with an average penalty of $152.07. (Ex. S–15 at 4–6) However, after looking at Cormier Construction's history of violations (Ex. S–15), while it is clear that the "fatal" designation significantly increased the Secretary's proposed penalties, the most notable factor for this inspection was the high VPID ("Violations Per Inspection Day") score. (*See* Exs. S–14, S–15 at 1)

The VPID is calculated by first dividing the number of violations that have been paid, finally adjudicated, or have become final orders during the Violation History Period[9] by the number of inspection days.[10] The resulting number is then applied to Table VI of 30 C.F.R. § 100.3(c)(1) and converted into a penalty point number ranging from 0 to 25.

Here, Respondent's history of violations shows 15 violations with a final order date in the preceding 15 months.[11] (Ex. S–15 at 1) Per the formula, the VPID on November 2, 2016, was 2.50, resulting in a maximum 25 penalty points. (*Id.* at 1–2; 30 C.F.R. § 100.3(c) (Table VI)) By way of comparison, the national average during that same time period for surface metal/nonmetal operators was 1.06, or 10 penalty points. (Ex. S–15 at 2; 30 C.F.R. § 100.3(c) (Table VI)) I have previously held that a VPID score, as calculated by the Secretary's algorithm, was unfairly high.

[9] The "Violation History Period" covers the preceding 15 months. 30 C.F.R. § 100.3(c).

[10] "Inspection Days" are calculated by dividing the total MSHA on-site inspection hours for Authorized Representatives of the Secretary for certain types of inspection activities by five. *History of Previous Violations: Violations Per Inspection Day (VPID); Repeat Violations Per Inspection Day (RPID)*, MSHA (last visited Feb. 4, 2019), https://arlweb.msha.gov/drs/ASP/MineAction.asp. Any remainder amount increases the number of inspection days by one. *Id.*

[11] Respondent had previously violated sections 56.11001 and 56.11002 within the preceding 15 months. (Exs. S–14, S–15 at 1) This had no effect on the penalty points for the RPID ("Repeat Violations Per Inspection Day") column since the repeat aspect of the history criterion applies only after a nonmetal mine operator has received 10 violations and has accrued a minimum of six repeat violations. 30 C.F.R. § 100.3(c)(2).

Oil-Dri Prod. Co., 40 FMSHRC 876, 891–92 (June 2018) (ALJ). In that case, the timing of the inspection a day earlier or later would have made a significant difference in the VPID score. *Id.* at 891. That discrepancy arose from the timing of a series of five final orders, which were added to the violation history table the day immediately preceding the inspection. *Id.* at 892. I found that those conditions created a "perfected storm" scenario for a short-lived spike in the VPID and held that the "process cannot be deemed fair in the rare instance where the mere order of operations or the random timing of an investigation—issues completely outside the control of the mine operator—yields vastly different results." *Id.*

The unique circumstances in *Oil Dri* that warranted lowering the VPID score are not present in this case. While I am sympathetic to the struggles of small operators like Cormier Construction, the continued issues at the Church Quarry are concerning. The VPID formula was designed to address continued and numerous violations over time. It has done so appropriately here.

Respondent is a small operator. (Tr.67:6–11) The Church Quarry, Respondent's only mine, had 3,131 annual hours worked (Ex. S–14), with only two full-time employees in the spring. (Tr.67:8–9) Cormier Construction is a solely owned corporation with one shareholder. (Tr.67:19–21) Although the Secretary's Exhibit A allocated zero penalty points for Mine Size and Controller Size for all three citations, I find the particular facts here justify a slight reduction in the penalty.[12]

Respondent asserts that the Secretary's proposed penalty would create significant financial hardship (Resp't Br. 1; Tr.67:4–18; 68:10–11), and it has provided tax information regarding its ability to pay. (Ex. R–3) However, upon my questioning at hearing, Respondent admitted that the company would continue to operate if the Secretary's full proposed penalty were assessed. (Tr.68:5–11) As the Secretary argued in his brief, mere financial discomfort is not a sufficient reason to reduce the penalty.

Taking into account Cormier Construction's small size, its history of violations, the effect of the penalty on its ability to continue in business, its good faith efforts to abate the violations, its negligence, and the gravity, including the modification to Citation No. 9311390, as well as considering all the facts and circumstances set forth above, I assess a civil penalty of $800.00 for Citation No. 9311390 and $1,600.00 each for Citation Nos. 9311393 and 9311394, for a total penalty of $4,000.00.

[12] Table IV shows the smallest operator size as measured by annual hours worked are those operators with 0–50,000 hours. 30 C.F.R. § 100.3(b) (Table IV). This means, theoretically, an operator with nearly 16 times as many hours worked (i.e., 50,000 hours) is treated identically as Cormier Construction (3,131 hours) per the Secretary's regulation.

VI. ORDER

Based on the above discussion, it is hereby **ORDERED** that Citation No. 9311390 be **MODIFIED** to reduce the severity of injury or illness from "fatal" to "permanently disabling."

IT IS FURTHER ORDERED that Respondent pay a total penalty of $4,000.00 within forty (40) days of the date of this order.[13]

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

Distribution:

James L. Polianites, Esq., U.S. Department of Labor, Office of the Regional Solicitor, JFK Federal Bldg, 15 New Sudbury St, Ste E375, Boston, MA 02203-0018

Mark Cormier, Cormier Construction & Granite, P.O. Box 97, Deer Isle, ME 04627-0097

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

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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February 11, 2019

PETE TARTAGLIA, JR., Petitioner, v. FREEPORT-MCMORAN BAGDAD INC., Respondent.	DISCRIMINATION PROCEEDING Docket No. WEST 2018-0362-DM MSHA Case No. RM-MD-18-07 Mine: Freeport-McMoRan Bagdad Inc. Mine ID: 02-00137

DECISION APPROVING SETTLEMENT UNDER SEAL
ORDER ENFORCING SETTLEMENT AGREEMENT

Before: Judge Simonton

This case 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). Pete Tartaglia, Jr. ("Tartaglia" or "Complainant") alleges that Freeport-McMoran Bagdad Inc., ("Freeport" or "Respondent") violated the Mine Act when it terminated him. Tartaglia has since been reinstated and is seeking transfer.

A hearing was held on September 19-20, 2018 in Phoenix, Arizona. The parties reached a settlement at the hearing and read the terms of the agreement into the record. The parties also agreed to confidentiality as to its terms. Respondent produced a written version of the settlement which Tartaglia reviewed and, in fact, signed. In the following months, however, Complainant allegedly encountered other conflicts at the mine and determined that he no longer wished to and was no longer required to adhere to the terms of that agreement. The court held a number of conference calls to address Tartaglia's concerns, none of which were successful.

On January 14, 2019, this court issued an Order presenting Tartaglia with two options. He could either provide the court with proof that he complied with the settlement terms or he could notify the court and Respondent within seven days of that Order that he wished to submit post-hearing briefs and pursue a decision on the merits. Tartaglia did not comply with that Order and did not notify Respondent or the court of his choice.

On January 25, 2019, Freeport submitted a motion to enforce the settlement agreement as stated on the record and to file that portion of the hearing transcript under seal. Respondent's Motion to Enforce Settlement Agreement and Motion to File Hearing Transcript Under Seal, at 2-3. Freeport contended that under Arizona state law, Freeport's offer and consideration and Tartaglia's recognition and assent to the settlement terms on the record rendered the agreement

enforceable. *Id*. at 3. Freeport thus argued that the court should approve the settlement agreement and enforce its terms as stated in the record. *Id*.

The court acknowledged receipt of Freeport's motion and allowed Tartaglia to respond as to why the settlement should not be approved and this case dismissed. On February 1, 2019, Tartaglia filed a brief response that reiterated that he would not comply with the settlement terms. Tartaglia cited alleged "fraudulent criminal activity" that occurred after the agreement was reached on the record. Complainant's Response to Order of Acknowledgement, at 2.

I find that the agreement on the record is valid and should be enforced accordingly. The Commission and its Judges have the authority to enforce settlement agreements and to reopen those cases in instances of breach. *Morealle v. Veris Gold USA. Inc.*, 38 FMSHRC 410, 413 (Mar. 2016); *Johnson v. Lamar Mining Co. et. al.*, 10 FMSHRC 506, 508-09 (Apr. 1998). In order to approve a settlement motion, the record must reflect and the Commission should be assured that the motion in fact represents a genuine agreement between the parties. *Tarmann v. Int'l Salt Co.*, 12 FMSHRC 1291 (June 1990) (ALJ) (citing *Peabody Coal Co.*, 8 FMSHRC 1265, 1266 (Sept. 1986)). The validity of a settlement agreement is generally governed by the applicable contract law of the place where it was made, in this case Arizona. *Golden v. California Emergency Physician Med. Grp.*, 782 F.3d 1083, 1086-87 (9th Cir. 2015); *United Commercial Ins. Serv., Inc. v. Paymaster Corp.*, 962 F.2d 853, 856 (9th Cir. 1992); *Eastern Associated Coal Corp.*, 19 FMSHRC 659, 659-60 (Mar. 1997) (ALJ). Under Arizona law, settlement agreements made orally in court are enforceable. *See Robertson v. Alling*, 237 Ariz. 345, 346 (2015). The state requires a valid enforceable contract to consist of an offer, an acceptance, consideration, and sufficient specification of terms. *See, e.g.*, *Savoca Masonry Co. v. Homes & Son Const. Co.*, 112 Ariz. 392, 394 (1975).

Here the parties' agreement on the record constituted a valid settlement contract. The record unambiguously reflects that Freeport and Tartaglia willingly entered into an agreement to settle the matter. Freeport offered explicit terms in exchange for a general and specific release of claims, which shows offer and consideration. Ex. 1. Tartaglia accepted the offer after a full explanation of those terms. *Id*. There is no evidence that Tartaglia misunderstood the terms of the agreement or declined to accept any of those terms on the record. He subsequently reviewed and signed a written version of the same agreement. There is likewise no evidence that Freeport misrepresented or failed to comply with its responsibilities under the settlement. The parties therefore entered into a valid and mutual settlement agreement.

Tartaglia did not provide any valid legal justification to void or otherwise set aside the agreement. Complainant's allegations of "fraudulent criminal activity" are vague and unrelated to the specific terms of the settlement agreement and to the events that prompted his initial section 105(c)(3) complaint. The record on this matter is closed and the court will not accept new evidence regarding those allegations. The alleged facts behind Complainant's allegations are hence not before the court in any capacity, and the court will not reach those issues in a decision on the merits.

The court therefore finds no good cause to set aside the settlement that Freeport and Tartaglia reached on the record. Valid settlement agreements are binding and must be fulfilled in

good faith. The court will not set aside a settlement or excuse noncompliance and permit a party to tarnish the integrity of the settlement process on a whim. Simply because Tartaglia no longer wishes to adhere to the agreement he made does not mean that he is no longer required to do so.

WHEREFORE, the Respondent's motion for approval of the settlement is **GRANTED**. It is **ORDERED** that Freeport and Tartaglia comply with the terms of the settlement agreement entered into the record, and this case is **DISMISSED**. The agreement made on the record is to be placed under seal with the understanding that it may be subject to review by the Commission.

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

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February 13, 2019

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner, v. NORTHSHORE MINING COMPANY, Respondent.	CIVIL PENALTY PROCEEDINGS Docket No. LAKE 2017-0224 A.C. No. 21-00831-434118 Docket No. LAKE 2017-0248 A.C. No. 21-00831-435608 Mine: Northshore Mining Company
SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner, v. MATTHEW ZIMMER, employed by NORTHSHORE MINING COMPANY, Respondent.	CIVIL PENALTY PROCEEDING Docket No. LAKE 2018-0141 A.C. No. 21-00831-457528 A Mine: Northshore Mining Company
SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner, v. ROGER PETERSON, employed by NORTHSHORE MINING COMPANY, Respondent.	CIVIL PENALTY PROCEEDING Docket No. LAKE 2018-0146 A.C. No. 21-00831-457527 A Mine: Northshore Mining Company

DECISION AND ORDER

Appearances: Barbara M. Villalobos, U.S. Department of Labor, Office of the Solicitor, Chicago, Illinois, for Petitioner;

R. Henry Moore, Arthur M. Wolfson, Jackson Kelly PLLC, Pittsburgh, Pennsylvania, for Respondent.

Before: Judge Miller

These cases are before me upon petitions for assessment of civil penalties filed by the Secretary of Labor pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d) ("the Act"). These dockets involve a citation and an order issued to Northshore Mining Company ("Northshore") pursuant to Section 104(d) of the Act with originally proposed penalties totaling $199,600.00. The alleged violations involve a failure to maintain a walkway in good condition and a failure to barricade the walkway from access by miners. MSHA also seeks to impose personal liability under section 110(c) of the Mine Act, 30 U.S.C. § 820(c), against two section managers, Matthew Zimmer and Roger Peterson, for the failure to maintain the walkway. The parties presented testimony and evidence regarding the citations and orders at a hearing held in Duluth, Minnesota. Based upon the parties' stipulations, my review of the entire record, my observation of the demeanors of the witnesses, and consideration of the parties' legal arguments, I make the following findings and order.

I. FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Northshore Mining Company is an iron ore mine located in Lake County, Minnesota. The parties have stipulated that Northshore is an "operator" as defined in Section 3(d) of the Mine Act, 30 U.S.C. § 803(d), and is subject to the jurisdiction of the Commission. Jt. Stips. ¶¶ 2-4.

This case involves an outer east walkway of the 62/162 conveyor gallery at the mine's pellet processing plant in Silver Bay, Minnesota. The facility processes iron ore pellets for use in steel production. The conveyor gallery is a covered gallery with two conveyors, a primary walkway between the two conveyors, and an outer walkway on each side. The citations here involve the east outer walkway.

The citations at issue stem from an accident at the mine on September 7, 2016 that resulted in the failure of the elevated east outer walkway. The accident involved a contract miner, Evander King, who testified at hearing on behalf of the Secretary. King was employed in 2016 by VanHouse Construction as a contractor at the Northshore processing facility. He primarily performed clean-up work at the mine with a number of other contractors. He and the other contractors were supervised by John Gornik, a Northshore employee responsible for coordinating the day crew, and Dennis Lehtinen, a senior operations technician employed by Northshore. Tr. 47, 61, 480.

On September 6, 2016, the VanHouse contract crew checked in with Gornik at the beginning of the shift to receive work orders for the day. Gornik informed King and two other VanHouse employees that they would be doing clean-up on the 62 conveyor ramp. Gornik and the VanHouse miners then went to the office of Roger Peterson, the section manager for operations on the "hot side," which includes the conveyor gallery. Peterson informed the miners that they should use fall protection to work on the walkway because there was a danger of slipping on the pellets or getting caught in the moving conveyor. Lehtinen, the Northshore employee who frequently acted as a liaison between Gornik and the contract workers, walked with the VanHouse workers to the transfer tower at the top of the 62/162 conveyor. He demonstrated how to put on the safety harnesses and then demonstrated how to wrap a canvas wrap with D-rings onto a vertical support beam and use it to tie off with the lanyard from the harness. Lehtinen told the contractors to work their way down the walkway and keep tying off to successive beams. Tr. 50, 486. Because of the dusty and steamy conditions, along with the width of the walkway, only one of the three contractors could work on the walkway at a time.

Therefore, the contractors rotated the duty every fifteen minutes and the two not on the walkway waited in the transfer tower. King explained that the miners worked on the east walkway, hosing the pellets and mud down toward the bottom of the ramp. The walkway was covered in 6 to 12 inches of muddy pellets and the floor was not visible to the miners. They clipped onto a D-ring on the anchor strap wrapped around a beam, cleaned until there was not enough water pressure to move the pellets, then unclipped and moved the anchor strap farther down the walkway. Tr. 51. The contract miners could not see the walkway under the accumulated pellets, were not aware of any problems with the walkway, and did not see any hazard or warning signs on the walkway. Tr. 69.

King explained that while moving up and down the outer conveyor walkway, there were times between support beams when he was not tied off. Lehtinen, however, testified at hearing that he had shown the miners how to use two lanyards in alternation in order to stay tied off the entire time. Lehtinen also claimed that the miners used the process in reverse to remain tied off while walking back up the walkway to the transfer tower. Tr. 487. King disagreed and explained that the miners were not tied off the entire time because they had to unclip their harnesses to move down the walkway when they reached the end of the lanyard. He did not recall being told that he could be tied off continuously by using a lanyard borrowed from one of the other miners, and denied that Lehtinen had instructed them to be clipped on the entire time. Tr. 52, 77. Instead, King stated in an interview with an MSHA inspector that when the miners walked up the ramp to switch places, they were not tied off. Lehtinen indicated that he did not observe King or the other contractors while they were working on the walkway, and that he had told them only that they should be tied off, assuming they would understand that they needed to be tied off the entire time. Lehtinen also explained that he was not told directly why the miners needed to be tied off, but he assumed it was because of the slip hazard presented by the pellets and the slope of the walkway. Tr. 492. However, in an interview with Inspector Norman, Lehtinen observed that Gornik told him to have the workers tie off both because of the pellets and because of concerns over bad decking. Tr. 107. Norman also interviewed Gornik, who confirmed that the workers were required to tie off because of the bad floor. Tr. 125. However, at hearing, Gornik believed the fall protection was required because of the slip hazard from the pellets. Tr. 129, 479. Given the contradiction in testimony, I find that both Gornik and Lehtinen understood that the decking

was bad on the east walkway and asked the miners to tie off for that reason, along with the slip hazard. I also credit King's testimony that the three contract miners did not understand that they were to be tied off the entire time while working and while walking off the east walkway, primarily because they were told only that there was a slip hazard on the pellets. I find that there were times when they were not tied off while standing or walking on the conveyor walkway.

King and the other VanHouse workers spent the remainder of the shift on September 6 cleaning the east outer walkway and completed about half of the cleaning work. The following day, on September 7, the VanHouse employees were given other work assignments and, when those were complete, they returned to the east walkway to resume cleaning the bottom half of the walkway. On one of King's first turns at hosing the pellets down the walkway, he heard a loud bang and felt the building begin to shake. Sheets of caked mud and buildup from around the structure began to fall on him. King, who was standing on pellets, crouched down to protect himself from the falling material. When the shaking stopped, there was a hole in the floor of the walkway directly in front of him. He recalled looking down and seeing a front-end loader below. He also recalled seeing the outer walls and conveyor buckling. He believed he was about 45 or 50 feet above ground when the incident occurred and that he would have been seriously injured if he had not been tied off. King waited to be certain that the shaking had stopped, then unhooked his fall protection and ran back up the walkway to the transfer tower. Tr. 59.

King met with the other contractors in the transfer tower and they were joined by Matt Bailey, a maintenance technician employed by Northshore. Bailey told King he never should have been working on the walkway. He believed the conveyor should have been shut down, and also stated that the walkway had been in terrible condition for years and that it had been reported to management. Bailey then drove the contractors to the breakroom in the pelletizer. There, King discussed the accident with several other miners. Steven Floen, a second maintenance technician employed by Northshore, became angry and replied that he had been telling the people upstairs about this problem for a long time. Tr. 61. Floen told King he had carried heavy equipment on that ramp many times and was lucky it hadn't collapsed on him. The shaking King experienced was due to a fall or buckling of the conveyor walkway, along with a broken beam and bolts that were sheared.

King provided an incident report to the company that day describing what had happened. At first report, King did not believe he had not been injured, but later discovered that he had incurred a spinal cord contusion, which required pain medication and physical therapy. King also suffered from mild post-traumatic stress disorder and sleep disturbances after the accident. Tr. 71-73.

The next day that King was scheduled to work, he met with Gornik to receive his work orders. King recalled that Gornik was nervous, and told King that he had been discussing the incident with other miners. Gornik explained that people at the company had known about the potential for a collapse and had been hoping that removing the weight of the pellets would allow the ramp to last longer before it had to be replaced. At hearing, Gornik denied making any such statement, claiming instead that he had no knowledge that the walkway was in danger of collapsing and would not have sent workers onto the outer walkway if he had. Tr. 475.

As a result of the accident, King filed a hazard complaint with MSHA on September 8, 2016, and Inspector Terrance Norman was assigned to investigate. His investigation resulted in the issuance of the citation and order at issue here, and was the basis for the 110(c) investigation regarding Peterson and Zimmer. Norman has been a mine inspector since 2014, and previously worked for 20 years in the mining industry. His investigation into the hazard complaint and the incident involving King lasted approximately eight weeks. He conducted interviews with Northshore employees, management, contract laborers, the contract safety director, and the owner of the contracting company. Tr. 98. He also worked with a special investigator from MSHA and an engineer from the MSHA technical support division regarding the safety of the east walkway.

Norman determined that concerns about the walkway had been ongoing for several years. Daniel Scamehorn, a structural engineer with Northshore, testified that he first learned of a problem with the 62/162 gallery in 2013. An engineer supervised by Scamehorn submitted a work order in October 2013 reporting that concrete panels on the underside of the gallery had been falling. The work order mentioned that steel plates had been installed sometime earlier under the center walkway, but that the two outer walkways had not been reinforced and thus needed repair. Sec'y Ex. 18. Scamehorn testified that around the same time, the company had to do repairs on another conveyor at the mine, the No. 2, which had a similar problem with concrete falling from the bottom of the conveyor. The company prioritized the work on the No. 2 conveyor and put the repairs for the 62/162 on a project list to be considered in the future. Tr. 339.

In November 2014, another work order concerning a walkway in the 62/162 gallery was initiated by Jason Betzler, then the hot side maintenance planner at the mine. Betzler noticed cracking in the concrete and observed that in places along the walkway, the concrete had settled up to four inches. Resp. Ex. A. Betzler testified at hearing that the work order was in reference to the center walkway and did not concern the outer walkways. Upon receiving the work order, Scamehorn reviewed the maintenance records for the 62/162 gallery, and learned that steel plates had been installed under the center walkway in 2010. Scamehorn also examined the center walkway himself, and observed that it was cracked and that the edges of the walkway were settling. Scamehorn believed that the middle of the walkway was being heaved upward by material trapped by the steel plates. He did not examine the outer walkways. Subsequently, Scamehorn contacted the engineering firm Krech Ojard and Associates, Inc. ("KOA") to contract with the firm to evaluate the condition of the 62/162 conveyor walkway. An engineer from KOA visited the mine and conducted a visual inspection of the conveyor gallery. As a result, a report was prepared and sent to Scamehorn in June 2015. Tr. 324-25; Sec'y Ex. 12.

The KOA report was introduced as Secretary's Exhibit 12. As part of their work, KOA engineers reviewed structural design documents for the gallery, and learned that the center and outer walkways were constructed of 2 5/8 inch perlite panels reinforced with wire mesh fabric and a 1 1/2 inch plain concrete topping. KOA structural engineer Patrick Leow visited the gallery to conduct the evaluation for KOA. He visually inspected the gallery from the ground level inside and outside the gallery, then walked the center and east walkways and a portion of the west walkway. He observed cracking and heaving on the outer walkways. Tr. 367.

Following the examination of the walkway, an engineer-in-training from KOA prepared the written report that was submitted to the mine. The report states that Leow observed damage over large areas of the walkway slab underside, which included spalled concrete, delaminated concrete, debonded reinforcement, and corroded reinforcement. Sec'y Ex. 12. Leow clarified at hearing that this description referred to the perlite panels forming the underside of the walkway and did not refer to the concrete topping. Tr. 366. The damage was observed on the outer walkways but it was not visible on the center walkway because of the steel plate reinforcement on that walkway's underside. The report further states that the topping slab was in poor condition with large surface cracks and heaving, and that it was in need of replacement. The engineers believed that the damage was caused by the freeze-thaw cycle and water seeping into the space between the perlite and the concrete. The report also includes an evaluation of the load rating for the center walkway. KOA found that the perlite slabs, as well as the concrete, were compromised and provided little to no structural support. Thus, the report found that the center walkway was "potentially reliant upon the structural capacity of the steel plate reinforcing alone." With respect to the outer walkways, the report found that the concrete was damaged but lacked the steel panels. The report states that without steel plate reinforcing, the outer walkways "may not contain adequate structural support for the use of these walkway areas." Sec'y Ex. 12. Therefore, the outer walkways "cannot be found to be structurally adequate for use." *Id.* The report concludes with the recommendation that Northshore "restrict access to these [outer] walkways as they are not safe for personnel to be using until a repair has been completed." *Id.* KOA also recommended that the company prohibit use of a heavy equipment cart on the center walkway, and limit the use of that walkway to personnel performing minor maintenance activities due to the tripping hazard from cracked concrete. The report recommends that Northshore replace the walkway slabs.

After receiving the report, Scamehorn discussed the findings with Leow, the structural engineer from KOA. Based upon their conversation, Scamehorn supposed that the condition of the gallery was not as severe as the report had indicated. Scamehorn believed that Leow's main concern with the gallery was the cracking on the top concrete slab of the outer walkways, which created the potential for a "very finite failure," meaning a small foot hole, if the cracks were to align a certain way. Tr. 328-29. Leow gave the impression that there was a potential for a small hole, but not a hole large enough for a person to fall through, nor did he indicate that it was necessary to completely prohibit access to the outer walkways. Scamehorn understood that access to the outer walkways should be limited to maintenance activities, with no casual traffic permitted. Tr. 330.

Scamehorn conveyed the KOA report, along with information from the conversation with Leow, to Matthew Zimmer and Roger Peterson, the section managers of hot side maintenance and operations. Scamehorn explained that the potential issue with the walkways was a finite failure in the form of a foot hole. While there was cracking visible, it was nothing that he believed formed any present concern. Based on that information, the three decided to require fall protection on the outer walkways to mitigate any risk of a person falling through to the ground. Scamehorn said that he believed it to be a conservative approach because there was no actual risk of a person falling through to the ground. The three did not discuss installing warning signs or barriers on the outer walkways.

In November 2015, the mine was idled due to economic conditions in the steel industry, and most of the workforce was laid off. Workers were rehired and the plant was restarted beginning in March 2016. Tr. 552. Around that time, Erik Ollila, a maintenance supervisor, received a report from one of the maintenance workers that material was falling from the underside of the 62/162 gallery. Ollila went to look at the gallery and observed that there were pieces of perlite on the ground that had fallen from the gallery. Ollila directed miners to install jersey barriers in the areas where material was falling from above so that miners traveling under the walkway would not be hit by falling debris. However, the roadway under a portion of the conveyor walkway was not blocked off. Around the time the jersey barriers were installed, Northshore discontinued a practice of using front-end loaders to knock icicles down from under the gallery during the winter months. Tr. 127. There is no evidence of further maintenance or safety measures taken to address the condition of the conveyor walkways.

Inspector Norman interviewed several miners at Northshore to determine how the east outer walkway was used prior to the accident in September 2016. Steve Floen, a miner employed as a maintenance mechanic at Northshore, informed Norman that he had worked in the gallery the week prior to the accident, changing idlers on the conveyor. He stated that the miners were afraid to walk down the outer walkways, and instead climbed over the conveyors to reach them. He explained that while changing the rollers there was not always a place to tie off, so sometimes they worked on the outer walkways without being tied off. Tr. 116, 196. Floen claimed that he had brought these issues to the attention of his supervisor, Erik Ollila, as well as to Roger Peterson. Inspector Norman confirmed that the central walkway rather than the outer walkways was the usual route for travel for maintenance work, but some limited access to the outer walkways was necessary.

As part of his inspection, Norman took photographs of the site where the accident occurred. The photos were introduced as the Secretary's Exhibit 7. A photograph of the exterior of the gallery taken from the mine road shows that about halfway down the length of the gallery, the roof of the gallery had settled and a piece of siding was missing. Sec'y Ex. 7, 00015. A photograph taken closer to the area where the siding is missing shows that the upper and lower beams on the gallery have settled significantly. Sec'y Ex. 7, 00019. Norman determined that the failure point of the walkway was at a height of 50 feet and was located above the roadway through the gallery. Norman also took photographs of the underside of the east outer walkway, which show that the perlite had deteriorated to the point of falling, and the internal wire mesh of the floor was exposed. Sec'y Ex. 7, 00086, 00088. Photographs of the west outer walkway also show deteriorating perlite. Sec'y Ex. 7, 00097.

An engineer from MSHA Technical Support, Michael Superfesky, inspected the mine after the accident and took photographs. One of his photographs taken from a manlift shows mesh in one area of the walkway. Sec'y Ex. 7, 000921. There is no perlite in the mesh as there should be; instead, the floor is visible through the mesh. There is also a significant crack in the concrete, which Superfesky believed had been there for some time. Tr. 247-48. Another photograph shows the underside of the walkway 15 to 30 feet up the walkway from where the accident occurred. Sec'y Ex. 7, 000950. The mesh is showing through in this part of the walkway as well, and much of the perlite is missing. Sec'y Ex. 7, 000950. Superfesky noted that the upper layer of concrete showing through the mesh was stained red from taconite pellets, indicating that

it had been exposed for some time. Tr. 251. Superfesky explained that the mesh broke easily, either during or before the accident, and thus must have been corroded. Tr. 254. In Superfesky's view, the weight of the pellets as they were being moved with high compression water added to the cause of the failure of the walkway.

Following the accident, David Franseen, an engineer at KOA, visited the mine site to investigate the accident and assist with remediation. He took photographs of the gallery over the course of several weeks. Respondent's Exhibit M3 illustrates the east side of the gallery after the exterior cladding had been removed. There are two vertical support beams with a diagonal beam between them. The diagonal beam is broken and no longer connected to the left beam. Resp. Ex. M3. The photograph also shows that a horizontal board used to attach the cladding is broken, and bolts are sheared in the lower right hand corner at the connection point of two horizontal beams. Franseen believed the horizontal beam had moved significantly during the accident. Respondent's Exhibit M1 shows the piece of steel that the walkway would have been resting on, known as the "clip angle." Tr. 526-27. It is bent downward to an angle of approximately 48 degrees. Resp. Ex. M1. Franseen opined that the pellets that were being hosed down the walkway were a component of the failure of the beam and the walkway. The entire conveyor structure was compromised and could no longer be used following the failure of the beam and the walkway in September 2016.

A. Order No. 8897220

Following his inspection, Inspector Norman issued Order No. 8897220 to Northshore for failing to maintain the 62/162 outer walkways in good condition. The Secretary alleges a violation of 30 C.F.R. § 56.11002, which provides that "[c]rossovers, elevated walkways, elevated ramps, and stairways shall be of substantial construction provided with handrails, and maintained in good condition. Where necessary, toeboards shall be provided."

The parties disagree as to whether the walkways were "maintained in good condition" prior to the accident on September 7, 2016. The Secretary argues that the walkway had extensive cracking, spalling concrete, delaminated concrete, and debonded and corroded reinforcements, which diminished the carrying load strength. The walkways had been deteriorating over a long period of time and, given the conclusions of the KOA report, the walkway was not safe. The mine operator argues that the actual condition of the walkway was substantial and had been maintained. The condition of the perlite panels and concrete did not support the Secretary's view that the walkway was not maintained.

Several expert witnesses testified regarding the condition of the east outer walkway. Michael Superfesky,[1] a civil engineer with MSHA Technical Support, testified for the Secretary. Superfesky visited the Northshore mine after the accident to determine the cause of the collapse and whether the structure was safe for continued use. Superfesky discussed the accident with Inspector Norman and mine personnel, and inspected the gallery, primarily the outside from a manlift and from the ground. Superfesky observed that the east outer walkway was about four

[1.] Superfesky holds a master's degree in civil engineering with an emphasis in structural engineering. Tr. 234. He is a licensed professional engineer. He has conducted around 28 accident investigations for MSHA.

inches thick and was composed of two layers. The bottom layer was a 2.6-inch layer of perlite containing 10-gauge, bi-directional wire mesh. Above the perlite was a 1.6-inch layer of concrete. Superfesky observed that the mesh in the perlite layer had detached or de-bonded from the perlite. He explained that the mesh is essential to the structure because it provides tensile strength, which is lacking in concrete. That tensile strength was significantly diminished when the mesh de-bonded from the perlite. Superfesky estimated that the de-bonded mesh had reduced the load-carrying capacity of the walkway by as much as 50 percent. Superfesky also observed cracking or spalling in the top layer of concrete in isolated areas as a result of the freeze/thaw cycle. Superfesky noted that the structure was old and would have been through many freeze/thaw cycles. He explained that with the loss of the tensile strength, the concrete would be distressed and the cracking would accelerate.

Superfesky concluded that prior to the accident the walkway was structurally deficient for foot traffic. He reviewed the mine's maintenance records and found that there had been no maintenance to the walkways other than to add steel plates to the center walkway. He also reviewed the KOA report and observed that the KOA engineers had noted many of the same indicators of deterioration in 2015 that he noted in the fall of 2016. He interpreted the KOA report as recommending that no one access the outer walkways until repairs were made. The KOA report referred to a strength of 3,000 psi for the top concrete layer and Superfesky explained that such strength was insufficient to support the weight of a person along with the weight of the large amount of taconite pellets observed on the walkway.

Superfesky explained that the east walkway was in deteriorating condition, and that the walkway failed due to its condition. Contrary to the assertion of Northshore, the problem with the walkway was not caused by the beam that broke but, instead, had the walkway been maintained, it would not have failed. I find Superfesky to be a credible and knowledgeable witness. His opinion is based on sound scientific principles and sound reasoning. He demonstrated the various ways in which the walkway was compromised through the photographs in Secretary's Exhibit 17. He also testified that fall protection does not completely mitigate the fall; the use of fall protection can result in a number of serious, if not fatal, injuries.

Patrick Leow,[2] one of the engineers who prepared the 2015 KOA report, testified on behalf of Northshore about the condition of the walkway at the time of the report. Leow's testimony implied that he did not believe that the walkway was in as bad of a condition as his report had indicated in 2015. That KOA report explained that the outer walkways in the gallery "cannot be found to be structurally adequate for use." Sec'y Ex. 12. Leow explained that it is difficult to calculate the load carrying capacity of concrete, and this statement simply meant that he could not provide calculations to definitively show the load carrying capacity of the walkways. The report also recommended "that Northshore Mining restrict access to these [outer] walkways as they are not safe for personnel to be using until a repair has been completed." Sec'y Ex. 12. Leow testified that he intended that Northshore limit access to the walkways to authorized personnel only, and not that the mine completely prohibit use of the walkways. He stated that his primary concern was that excessive cracks could lead to deformation of the

[2.] Leow holds a master's degree in civil engineering and is a licensed professional engineer. He works in structural engineering. Tr. 362. His testimony was not offered as that of an expert witness.

walkway or that small chunks could fall out, and not that someone would fall through the walkway. While the deterioration of the walkways would continue, it would be slow, according to Leow. Nevertheless, he concluded that there was some risk with the outer walkways and that mitigation was necessary. He proposed limiting use of the walkways to reduce exposure and also suggested that the mine provide protective measures for people who did use the walkway. I do not find Leow to be a credible witness given that his testimony in 2018 departs dramatically from the written conclusions of the 2015 KOA report.

A second engineer with KOA, David Franseen,[3] provided expert opinion as to the cause of the September 7 accident. Franseen testified that due to the cleaning work being done at the time of the accident, there was a significant amount of taconite pellets on the walkway, more than the walkway was designed to carry. Resp. Exhibit O. Franseen determined that the concentrated weight of the pellets caused the diagonal beam in the gallery to fracture. The fracture of the beam then caused one of the vertical beams in the gallery to be displaced downward. *Id.* The vertical displacement of the beam created an increased vertical load on the clip angle, a piece of steel below the concrete and perlite of the walkway. These forces caused the clip angle to bend and rotate away and the bolts of the walkway support beam to shear off. With the left edge of the walkway no longer supported, the concrete and perlite portions fell. Franseen stated that the concrete portion was mainly intact with no significant holes when it was removed after the accident. He believed the walkway would have failed as a result of the beam failure even if it had been in brand new condition. He acknowledged that the perlite was deteriorating, but stated that the perlite is primarily used during the construction stage as a form to pour the concrete into and is not intended to last. Franseen explained, that in addition to the mesh in the perlite layer, there was also mesh reinforcement in the concrete layer providing additional strength to the walkway. Franseen's ultimate conclusion was that the walkway was in fact capable of supporting more weight than the primary structure of the gallery. Thus, he believed that the weight of the taconite pellets on the walkway led to the failure of the beam rather than to the failure of the walkway. Tr. 539. The Secretary suggests the opposite, that the weight of the pellets caused the walkway to fail, resulting in the failure of the beam. In any event, the failure of the beam is not definitive evidence of the condition of the walkway itself. Instead, I rely on the KOA report, along with eye witness testimony regarding the condition of the walkway.

The issue here is whether the elevated walkway, specifically the east side walkway of the conveyor, was maintained in good condition. There is ample evidence to demonstrate that it was not. Even if it had not failed during the moving of the taconite pellets, the evidence demonstrates that the walkway was not in good condition at the time of the KOA report in June 2015 and no action to correct the condition of the walkway had been taken up to the time the walkway failed in September 2016. Inspector Norman learned through interviews that the maintenance crew would not walk on the east walkway, but walked up the middle walkway and climbed over the conveyor to maintain it. Floen, one such maintenance worker, explained to Norman that they worked in that manner because the outside walkway was in bad condition. They understood that because of its bad condition, they should use fall protection when on the east walkway but they

[3.] Franseen holds a bachelor's degree in civil engineering and has done work in concrete testing and the forensics of concrete. Tr. 512-13. He was accepted as an expert witness in the field of structural engineering.

were often not able to do so. Lehtinen explained that he learned from Gornik that workers must tie off on that outer walkway because the floor was bad. Most importantly, the KOA engineering report clearly indicates that the outer walkways were in bad condition and, at best, protective measures should be used when accessing the outer east walkway.

The KOA report, Secretary's Exhibit 12, indicates that the walkways were not safe for personnel to use until repaired. All of the evidence—the falling chunks of cement, the cracks, and the heaving, for several years—points to the fact the walkway was not maintained. Respondent argues that the fall protection requirement was a mitigating factor but fall protection is not a substitute for keeping the walkway in good condition. It may lessen an injury, but it does not prevent the walkway from being dangerous. Norman relied upon the findings in the KOA report in issuing the violation and specifically referred to the report's conclusion that "the deteriorated condition of the conveyor walkway slabs is significant . . . access to the outer walkway slabs be restricted." I find that there is substantial evidence to support the alleged violation. Further, I find that the violation was significant and substantial.

Significant and Substantial

The Secretary alleges that the violation was highly likely to result in fatal injury and was significant and substantial ("S&S"). An 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)(l). A violation is properly designated S&S "if based upon the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in, an injury or illness of a reasonably serious nature." *Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981).

In *Mathies Coal Co.*, the Commission established the standard for determining whether a violation is S&S:

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

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

The second element of the *Mathies'* test addresses the likelihood of the occurrence of the hazard the cited standard is designed to prevent. *Newtown Energy, Inc*., 38 FMSHRC 2033, 2036 n.8 (Aug. 2016). The Commission has explained that "hazard" refers to the prospective danger the cited safety standard is intended to prevent. *Id.* at 2038. For example, *Newtown* involved a violation of a standard requiring that equipment be locked out and tagged out while electrical work is being performed. *Id.* The Commission determined that the hazard was a miner working

on energized equipment. *Id*. The likelihood of the hazard occurring must be evaluated with respect to "the particular facts surrounding the violation." *Id.*; *see also McCoy Elkhorn Coal Corp*., 36 FMSHRC 1987, 1991-92 (Aug. 2014); *Mathies*, 6 FMSHRC at 4. At the third step, the judge must assess whether the hazard, if it occurred, would be reasonably likely to result in injury. *Newtown*, 38 FMSHRC at 2037. The existence of the hazard is assumed at this step. *Id*.; *Knox Creek Coal Corp. v. Sec'y of Labor,* 811 F.3d 148, 161-62 (4th Cir. 2016). As with the likelihood of occurrence of the hazard, the likelihood of injury should be evaluated with respect to specific conditions in the mine. *Newtown,* 38 FMSHRC at 2038. Finally, the Commission has found that the S&S determination should be made assuming "continued normal mining operations." *McCoy*, 36 FMSHRC at 1990-91.

Inspector Norman explained that based upon his investigation, he concluded that using the outer walkways would result in an accident. The cited standard is designed to protect persons from having to walk in an area that is not maintained in good condition. The lack of such maintenance would result in any number of hazards, including a fall on the walkway, or a fall through any holes in the walkway. Given that the walkway was covered in mud and taconite pellets, the miners could not see the condition of the floor below and all accounts indicate that the walkway floor was in poor condition. The fact that the concrete was in poor condition, and that the walkway was covered in mud and pellets, both indicate a violation of the requirement to keep the walkway maintained in good condition. Each condition created a separate hazard. First, the pellets and mud contributed to a fall hazard in an area next to a moving conveyor. Second, the condition of the walkway created a hazard of material falling to the ground below, as well as uncertain footing and walking in the area with cracks and missing portions. Finally, the condition of the walkway would cause it to give way, causing the miner to fall 50 feet to the area below. I find it likely that all of these hazards were created in this instance and find further that each of the hazards is likely to result in a serious injury.

Norman explained that if the floor gave way, a fall to the ground below would be fatal. Even if tied off, the miner would be jolted and strike his head. He could hit equipment below and injure his back or neck, or cement could fall and hit the miner. The use of fall protection, therefore, does not mitigate the seriousness of the injury. Nor is the hazard mitigated by the fact that the primary walkway was the center one, and not the east side walkway. Miners were often sent out into the area of the east walkway, and were not tied off. Certainly the crew on September 7 was only tied off a portion of the time, and King was fortunate that he was not more seriously injured. The standard is designed to keep walking areas in good condition to prevent fall hazards. Here, the hazard of falling was likely and a fall would result in a serious, if not fatal injury. The violation is properly designated as S&S.

Negligence

The Commission has recognized that "[e]ach mandatory standard … carries with it an accompanying duty of care to avoid violations of the standard, and an operator's failure to meet the appropriate duty can lead to a finding of negligence if a violation of the standard occurs." *A.H. Smith Stone Co.*, 5 FMSHRC 13, 15 (Jan. 1983). In determining whether an operator met its duty of care, the judge must consider "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 regulation." *Newtown*, 38 FMSHRC at 2047; *Brody Mining, LLC*, 37 FMSHRC1687, 1702 (Aug. 2015); *U.S. Steel Corp.*, 6 FMSHRC 1908, 1910 (Aug. 1984).

The Mine Act places primary responsibility for maintaining safe and healthful working conditions in mines on operators, and they are thus expected to set an example for miners working under their direction. *Newtown*, 38 FMSHRC at 2047; *Wilmot Mining Co.*, 9 FMSHRC 684, 688 (Apr. 1987); *see also* 30 U.S.C. § 801(e). "Such responsibility not only affirms management's commitment to safety but also, because of the authority of the manager, discourages other personnel from exercising less than reasonable care." *Wilmot*, 9 FMSHRC at 688.

Reckless disregard is "the closing of the eyes to or deliberate indifference toward the requirements of a mandatory safety standard, which standard the (mine) should have known and have reason to know at the time of the violation." *United States v. Jones*, 735 F.2d 785, 790 (4th Cir. 1984). The Commission has recognized that negligence is properly characterized as reckless disregard where a supervisor directs a miner into a situation knowing that the situation poses an immediate and appreciable risk to the safety of that miner. *Lehigh Anthracite Coal*, 40 FMSHRC 273, 283-84 (Aug. 2018).

The Secretary alleges that the violation involved reckless disregard for the safety of miners. The Secretary bases his argument on the fact that Scamehorn understood there could be a localized failure of the walkway and that both Peterson and Zimmer, agents of the operator, were aware of the deteriorated condition of the walkway and took no reasonable steps to correct the condition. Northshore argues that the negligence was lower because the mine made reasonable efforts to address the safety hazard by requiring miners to wear fall protection. The Secretary believes the fall protection measures were "wholly inadequate," and did not mitigate the negligence in this case.

Northshore received the engineering report from KOA in June 2015, after it had received a number of complaints about the condition of the outer walkways on the 62/162 conveyor. There was no indication that anything was done to shore up or otherwise repair the aging outer walkways. Steel reinforcement had been installed to support the center walkway, but the outer walkways did not receive such reinforcement. The center walkway was the primary access to the conveyor and was used most often. Nonetheless, miners were required to use the east outer walkway and to work on that walkway.

The mine argues that the miners were directed to use fall protection, that access to the walkway was restricted, and that employees had been trained on the use of the fall protection, thereby mitigating the negligence. However, nothing was done to directly correct the condition of the walkway or make it safer to use. Instead, it continued to deteriorate. Further, for miners who were not familiar with the area, there was no sign posted to indicate that fall protection was required. The miners were often not tied off when doing maintenance or changing the rollers, and on the day of the accident, the worker hosing down the pellets was not continually tied off. Inspector Norman indicated that the mine was reckless in continuing to allow access to the east walkway, even if miners were tied off. In his view, fall protection may have been discussed at

one time, but it was not made clear to the miners or the contractors how and when to tie off. Management was aware of the condition of the walkway, yet made no effort to correct or maintain the walkway in a safe condition.

Failure to maintain the walkway resulted in the walkway crumbling and falling away while workers were on it. On the day of the accident, the contract miners were using hoses to wash the pellets down the 300 feet of the outer walkway ramp, and in doing so, the pellets built up in some locations, causing a heavy load on the walkway. The condition of the walkway was such that it could not withstand the weight of the pellets as they washed down. Mine management knew of the condition of the area yet demonstrated indifference to the violation, thereby placing the contract miners in a hazardous position. I credit Superfesky's testimony that the condition of the walkway was the primary reason for its failure, and find that the failure of the mine to correct the condition and maintain the walkway in good condition was the result of reckless disregard.

Unwarrantable Failure

The Secretary alleges that the violation was the result of an unwarrantable failure to comply with the regulation.

The unwarrantable failure terminology is taken from Section 104(d) of the Act, 30 U.S.C. § 814(d). The Commission has explained that unwarrantable failure is "aggravated conduct constituting more than ordinary negligence. [It] is characterized by conduct described as 'reckless disregard,' 'intentional misconduct,' 'indifference,' or a 'serious lack of reasonable care.'" *Consol. Coal Co*., 22 FMSHRC 340, 353 (Mar. 2007) (citing *Emery Mining Corp.*, 9 FMSHRC 1997, 2001-04 (Dec. 1987)) (citations omitted). In determining whether a violation is an unwarrantable failure, the Commission has instructed its judges to consider all of the relevant facts and circumstances in the case and determine whether there are any aggravating or mitigating factors. *Id.* Aggravating factors to be considered include the length of time that the violation has existed, the extent of the violative condition, whether the operator has been placed on notice that greater efforts were necessary for compliance, the operator's efforts in abating the violative condition, whether the violation was obvious or posed a high degree of danger, and the operator's knowledge of the existence of the violation. *IO Coal Co.*, 31 FMSHRC 1346, 1352 (Dec. 2009); *see also Consol*., 22 FMSHRC at 353.

The Secretary submits that the violation was extensive, that both outer walkways were dangerously deteriorated, and because it was unknown when a failure would occur, miners were exposed to a hazard for the entire length of both walkways. Miners doing work over the previous year were exposed to the same hazard as those in September 2016. The amount of time that the mine knew of the hazard is significant, along with the obviousness of the condition. Northshore argues that the violation was not an unwarrantable failure to comply because the mine took what it viewed as effective remedial measures to address a known condition. The walkways were in usable condition and there was no significant hazard.

Length of time that the violation has existed. In *IO Coal Co.*, the Commission emphasized that the duration of time that the violative condition existed is a "necessary element"

of the unwarrantable failure analysis. 31 FMSHRC at 1352. The condition in *IO Coal* had existed for four or five days, and the Commission remanded to the judge to consider whether such duration was an aggravating factor. 31 FMSHRC at 1352. The Commission noted that analysis of the duration factor may be affected by the operator's good-faith, reasonable belief that the condition did not exist. *Id*. at 1352-53.

The problem with the outer walkways had existed for several years, at least from the time in June 2015 when the KOA report had been completed. In all likelihood, the problem also existed prior to the report, as there is evidence that a number of miners complained about the walkways. Even after the mine was made aware of the deteriorating condition of the walkways from the 2015 KOA report, no maintenance or repair had occurred by the time of the accident in September 2016. During the time between the report and the accident, the walkway continued to crack and deteriorate. The length of time figures prominently in the evaluation of the unwarrantable failure.

Extent of the violative condition. The extent factor is intended to "account for the magnitude or scope of the violation" in the unwarrantable failure analysis. *Dawes Rigging & Crane Rental*, 36 FMSHRC 3075, 3079 (Dec. 2014). Facts relevant to the extent of the condition include the size of the affected area and the number of persons affected. *Id*. at 3079-80. In *Dawes*, the Commission found that where only one miner endangered himself by walking under a suspended load, the violation was not extensive. *Id*. at 3080.

Here, the violation included the entire 300 feet on the east outer walkway, as well as the west outer walkway. Accessing the conveyor system was most often done by using the reinforced, center walkway. Still miners explained that they used the outer walkway to perform maintenance tasks and on the day of the accident, the contract miners had been using the walkway for two days. The violation was thus extensive and workers were called to use the entire area.

Whether the operator has been placed on notice that greater efforts were necessary for compliance. A mine operator may be put on notice that it has a recurring safety problem in need of correction where there is a history of similar violations. *Black Beauty Coal Co. v. FMSHRC,* 703 F.3d 553, 561 (D.C. Cir. 2012); *IO Coal*, 31 FMSHRC at 1353; *Peabody Coal Co.,* 14 FMSHRC 1258, 1264 (Aug. 1992). Prior violations may be relevant even though they did not involve the same regulation or occur in the same area of the mine within a continuing time frame. *IO Coal*, 31 FMSHRC at 1354; *San Juan Coal Co*., 29 FMSHRC 125, 131 (Mar. 2007); *Peabody*, 14 FMSHRC at 1263. It is not required that the past violations were the result of unwarrantable failure. *IO Coal*, 31 FMSHRC at 1354; *Consol. Coal Co*., 23 FMSHRC 588, 595 (June 2001). Past discussions with MSHA can also serve to place the operator on notice that greater efforts were necessary to assure compliance with the safety standard. *Consol. Coal Co.,* 35 FMSHRC 2326, 2342 (Aug. 2013) (citations omitted).

The Secretary did not present evidence that the mine had been told to correct the condition of the walkway or that it had been cited for similar violations prior to September 2016. However, the mine was put on notice of the defective walkway through complaints made by

miners, and through the KOA engineering report in June 2015, Secretary's Exhibit 12. The report explains that the load bearing capability could not be determined and that access to the walkway should be restricted. Therefore, notice has some effect on the finding of an unwarrantable failure.

Operator's efforts in abating the violative condition. An operator's efforts in abating the violative condition are also relevant as to whether a violation is unwarrantable. *Consol*., 35 FMSHRC at 2342; *IO Coal*, 31 FMSHRC at 1356; *San Juan,* 29 FMSHRC at 134. Abatement efforts prior to or at the time of the inspection may support a finding that the violation was not unwarrantable. *Utah Power & Light Co*., 11 FMSHRC 1926, 1933-34 (Oct. 1989). Conversely, where the operator has notice of a condition, such as through previous violations or conversations with an inspector, a failure to remedy the problem weighs in favor of an unwarrantable failure finding. *Consol*., 35 FMSHRC at 2343; *Enlow Fork Mining Co*., 19 FMSHRC 5, 17 (Jan. 1997). Abatement efforts relevant to the unwarrantable failure analysis are those made prior to the issuance of the citation or order. *Consol.*, 35 FMSHRC at 2342; *IO Coal*, 31 FMSHRC at 1356.

Northshore argues that instituting a policy of using fall protection when accessing the outer walkways was an attempt to abate the condition. Peterson and Zimmer, the managers who determined that fall protection should be used, testified that they did not understand that access should be prohibited, but merely restricted. They agreed that the use of fall protection would protect against injury. Even though they are trained mine managers and supervisors, they did not consider repairing the walkway and did not see that it was maintained in a safe condition. While the use of fall protection has some mitigating purpose, it does not correct the condition. Therefore, no effort was made to address the deteriorating walkway itself.

Whether the violation posed a high degree of danger. A high degree of danger posed by a violation can be an aggravating factor that supports an unwarrantable failure finding. *IO Coal*, 31 FMSHRC at 1355-56. In some cases, the degree of danger may be "so severe that, by itself, it warrants a finding of unwarrantable failure. However, the converse of this proposition—that the absence of significant danger precludes a finding of unwarrantable failure—is not true." *Manalapan Mining Co.*, 35 FMSHRC 289, 294 (Feb. 2013). The degree of danger is greater when there is a chronic problem that is ignored. *Consol.*, 35 FMSHRC at 2343.

The hazard created by a failure to maintain the east walkway in good condition, created a high degree of danger. The KOA engineering report explained that the outer walkways were not safe for use until repairs could be made. A number of hazards had been created, including falling through the walkway, stumbling and falling on the uneven surface, and walking on the taconite pellets. All of these examples indicate that the violation created a serious safety hazard and thus a high degree of danger.

Whether the violation was obvious. The obviousness of the violative condition is an important factor in the unwarrantable failure analysis. *IO Coal*, 31 FMSHRC at 1356. However, when a condition is non-obvious because of actions of the operator, the Commission generally does not recognize lack of obviousness as a mitigating factor. *Consol.*, 35 FMSHRC at 2343

(upholding judge's unwarrantable failure finding where the operator deliberately ignored testing requirements in the mine's ventilation plan).

The hazard was obvious to many of the miners who spoke with Inspector Norman. They indicated that chunks of the walkway had fallen to the ground below and that they crawled across the conveyor to do maintenance in order to avoid the outer walkways. The violation was also obvious to the mine and particularly to the engineers who made complaints, including Scamehorn, who requested an engineering report. The managers who reviewed the report were aware of the hazard. The obviousness of the deteriorating and unsafe condition of the outer walkways is one of the primary factors in finding this violation to be unwarrantable.

Operator's knowledge of the existence of the violation. In *IO Coal,* the Commission reiterated the well-settled law that an operator's knowledge of the existence of a violation may be established not only by demonstrating actual knowledge, but also by showing that the operator "reasonably should have known of the violative condition." *IO Coal Co.,* 31 FMSHRC at 1356-1357; *see also Drummond Co*., 13 FMSHRC 1362, 1367-68 (Sept. 1991); *E. Associated Coal Corp*., 13 FMSHRC 178, 187 (Feb. 1991); *Emery Mining Corp*., 9 FMSHRC at 2002-04.

As discussed above, even if the mine denies knowledge of the violation—that is, the condition of the outer walkway based upon their observation—the engineering report made it clear that the walkway was not safe for use. The mine managers received the KOA report in June 2015 and understood that, at best, the outer walkways should be restricted. Yet no action was taken to repair or maintain the walkways. Knowledge is an important factor in determining that the violation is unwarrantable.

Based upon the factors listed here, I find that the violation was a result of the mine's unwarrantable failure to comply with the Mine Act and its standards.

Flagrant Violation

The Secretary has designated this violation as flagrant and assessed a penalty of $130,000.00 as a result.

The Act provides that

> Violations under this section that are deemed to be flagrant may be assessed a civil penalty of not more than $220,000. For purposes of the preceding sentence, the term "flagrant" with respect to a violation means a reckless or repeated failure to make reasonable efforts to eliminate a known violation of a mandatory health or safety standard that substantially and proximately caused, or reasonably could have been expected to cause, death or serious bodily injury.

30 U.S.C. § 820(b)(2). Thus, in order to establish that a violation was flagrant, the Secretary must prove that:

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

Am. Coal Co., 38 FMSHRC 2062, 2066-67 (Aug. 2016). As discussed below, I find that the Secretary has not established the elements of a flagrant violation.

The Secretary argues that the violation was flagrant because Northshore management knew of the condition of the walkway, failed to make reasonable efforts to eliminate a known violation, and displayed reckless disregard toward miners. Scamehorn, Peterson, and Zimmer were on notice of the violation based upon the 2015 engineering report they received from KOA, but ignored the report's findings, as well as the miners' concerns about the walkways. Northshore takes the position that the violation is not flagrant because the condition of the walkway was not the cause of the accident and that there was no injury here. The mine also asserts that the condition of the walkway would not lead to a serious injury because the miners wore fall protection.

As set forth above, the Secretary has established that a violation of a mandatory standard occurred. Next, the Secretary has shown that the violation was known by the operator. The discussion regarding the unwarrantable failure established that there is substantial evidence to demonstrate that the mine knew that the outer walkways were in a dangerous and deteriorating condition, in violation of 30 C.F.R. § 56.11002. Work orders dating back to 2013 detail concerns about cracks, debonding, and spalling of concrete on the 62/162 walkways. The June 2015 KOA report warned the mine that the load bearing capacity of the outer walkways could not be determined and that access to the walkways should therefore be restricted. While the center walkway had, at some point, been reinforced with steel plates, the outer walkways had not received the same repairs. Mine managers, employees, and engineers all testified that they were aware that the east walkway was not being maintained in a safe condition. Therefore, the knowledge required for the second element of the flagrant assessment is met.

The third element of the flagrant discussion identified in *Am. Coal Co.*, 38 FMSHRC at 2066-67, requires the Secretary to show that the violation either substantially caused or reasonably could have been expected to cause death or serious bodily injury. This part of the analysis is similar to the third and fourth prongs of the *Mathies* test, which is used to evaluate whether a violation is properly designated as significant and substantial. As discussed above, the hazards created as a result of this violation were likely to result in serious injury. These hazards include tripping or falling on the walkway or through to the ground below.

The parties disagree over whether a fall due to the failure of the walkway floor would reasonably have been expected to cause death or serious bodily injury. The mine argues that the potential for such a fall from the elevated walkway must be evaluated in the context of a miner using fall protection. The mine's argument assumes that miners were always correctly and appropriately tied off when using the outer walkways. The testimony in this case has shown otherwise. King was clear that he and the other contractors were not tied off for the entire time and gave two examples. First, they were not tied off when they walked up the ramp in order to take turns cleaning the walkway. Second, they could not tie off for the entire time while using a high pressure hose to move the pellets down the walkway because they had to unclip in order to move down the walkway. Furthermore, the contract miners did not appear to understand that they needed to be tied off for the entire time that they used the east walkway. Thus, based on the facts surrounding the violation, I find that the violation reasonably could have been expected to cause death or serious bodily injury.

Finally, a flagrant violation involves a "reckless or repeated" failure to make reasonable efforts to eliminate the violation. 30 U.S.C. § 820(b)(2). This component of the flagrant violation relates to the degree of negligence with which the operator acted. The unwarrantable failure analysis above also relates to negligence. However, the Commission in *Am. Coal* found that based on the heightened penalties available under the flagrant provision, the violations should be distinguishable from those addressed under the S&S and unwarrantable failure provisions of the Act. 38 FMSHRC at 2069-70. Thus, the "reckless failure" component of a flagrant violation requires a higher negligence showing than that required under the unwarrantable failure analysis.

The mine's conduct amounts to reckless disregard when analyzed in the context of the negligence and unwarrantable failure frameworks, but the same conduct does not rise to the heightened recklessness contemplated by a flagrant designation. In *Stillhouse Mining,* Judge Paez noted that a reckless failure to make reasonable efforts to eliminate a violation occurs when "in light of all the facts and circumstances surrounding the violation, the operator does not take the steps a reasonably prudent operator would have taken to eliminate the known violation of a mandatory health or safety standard and consciously or deliberately disregards an unjustifiable, reasonably likely risk of death or serious bodily injury." *Stillhouse Mining, LLC*, 33 FMSHRC 778, 804 (Mar. 2011) (ALJ). The analysis is in line with the Commission's discussion in *Am. Coal*, 38 FMSHRC 2062.

While it is true that Northshore failed to take steps that a reasonably prudent operator familiar with the mining industry would have taken to protect miners from the risks related to using the walkways in their deteriorated condition, they made some effort to address their concerns. Respondent could have repaired the walkway but the mine chose to use fall protection as a solution. Given that decision, there is no evidence to suggest a conscious or deliberate indifference to the risks on the part of the mine. Instead, the evidence indicates that the mine was limited at best in its evaluation of the risks. In other words, rather than ignoring the problem, the mine did not fully consider the appropriate steps to take to mitigate the risk posed by the condition of the walkways. Respondent believed, albeit wrongly, that requiring miners to wear safety harnesses would solve the problem with the walkways until repairs were completed. This type of conduct, while careless and indicative of reckless disregard, does not meet the heightened negligence showing required under *Am. Coal*, 38 FMSHRC 2062. Therefore, I find that the

violation of section 56.11002 cited in Order No. 8897220 is not flagrant within the meaning of section 110(b)(2) of the Act.

B. Citation No. 8897219

Based upon his observations and the interviews conducted at the mine following the accident in September 2016, Inspector Norman issued Citation No. 8897219 for a failure to barricade the east outer walkway. The Secretary alleges a violation of 30 C.F.R. § 56.20011, which provides that "[a]reas where health or safety hazards exist that are not immediately obvious to employees shall be barricaded, or warning signs shall be posted at all approaches. Warning signs shall be readily visible, legible, and display the nature of the hazard and any protective action required." There is no dispute that there were no warning signs or barricades at the east walkway. The only barricades related to the walkway had been placed below the walkway when chunks of cement were observed falling from the walkway onto the area below where miners traveled. Those barriers had been removed at the time of the incident and had no effect, in any event, on the walkway above.

The Secretary alleges that the violation is proven because there were no barricades or warnings to alert miners to the hazards of the walkway. The condition of the walkway, while perhaps known to some workers, was not obvious to contractors and miners who did not routinely work in the area. The condition was not immediately obvious because the walkway was covered in mud and 6 to 12 inches of pellets. The mine defends that the Secretary did not prove that the condition of the walkway was not obvious. Further, the walkway was in good condition and it was not often used.

I find that the Secretary has shown that the walkway created a safety hazard to miners that was not immediately obvious due to the mud and pellets on the surface. The area should, therefore, have had barricades or warning signs and none were present. The discussion regarding the first violation cited by Norman relates to the safety hazard of the walkway and is incorporated here, along with the S&S discussion related to the hazards. A number of miners told Norman that the walkway was a safety hazard and they avoided it. Floen advised the inspector that it was necessary to access the outer walkways at least every four to six weeks to change the conveyor rollers or idlers. Other maintenance was done from the walkway as necessary, including hosing down the pellets to clear the walkway.

The walkway created a safety hazard, as evidenced by the cracks, the chunks of cement that had fallen to the ground below, and the lack of reinforcement similar to that on the center walkway. In addition, the KOA report specifically said that the load bearing capacity could not be determined, and the area should be restricted. The cracks in the concrete, coupled with the spalling and uneven surface, created a hazard on the walkway. In addition, the walkway was in such poor condition that holes could develop leading to a miner putting a foot through the floor or falling through the floor onto the roadway 50 feet below. Hence, the Secretary has demonstrated that the area was a safety hazard.

Next the Secretary has demonstrated that the hazard was not obvious to all miners and particularly the contractors working at the mine. The contractors were not told about the

condition of the walkway, except to say that fall protection was needed to avoid the fall hazard of walking on the pellets. King explained that the condition of the walkway was not obvious because it was covered in mud and pellets and he could not see the surface. The contractors and miners who did not routinely use the walkway would not be aware of the hazardous condition of the walkway because it could not be seen. Even miners who worked in the area claimed that they did not know that the walkway was in bad condition. For example, Lehtinen explained that he learned from Gornik that the floor of the walkway was bad when they were discussing the use of fall protection by the contractors in September 2016. Therefore, it was not obvious to him that the cement floor beneath the pellets was a hazard. For miners or contractors who did not routinely work in the area, there was no indication of a hazard or of a requirement to use fall protection. Given that the walkway created a safety hazard, and that hazard was not obvious, barricades or warning signs were required at either end of both outer walkways. I find that the violation, as alleged, has been shown.

Significant and Substantial

The Secretary alleges that Citation No. 8897219 was highly likely to cause a fatal injury and was significant and substantial. I have found that there is a violation and I find further that the standard violated is meant to protect miners from entering unsafe areas where the hazard is not obvious so that miners can avoid the area or take other precautions. The KOA report, Secretary's Exhibit 12, includes a statement that the outer walkways of the conveyor area are not safe for personnel to use until repaired. The conclusion of the report includes "the deteriorated condition of the conveyor walkway slabs is significant… access to the outer walkway slabs be restricted." Thus, the outer walkways were compromised and the condition created a hazard to anyone who entered the area. The lack of warnings and barriers created a hazard by not warning workers to stay out of the area. The mandatory standard is intended to prevent access, or at least provide caution, when miners must access an area where a hazard exists, yet is not obvious. The evidence here demonstrates that there is a strong likelihood that a miner, who is not familiar with the area, would enter into an unsafe walkway and likely be injured.

Inspector Norman suggests that unknowingly using the floor of the walkway would result in an accident if the floor gave way. In addition, the condition of the concrete under the mud and pellets added to the slip and fall hazard. Without notice, miners will not avoid the area or take precautions if they do decide to access the area. The miners also explained to Inspector Norman that tying off to use the walkway was difficult at best and, often times, miners were without fall protection. The decision to require fall protection was not effective in this case, and did not mitigate the hazard created by the lack of barriers or warning signs.

Norman also testified that a hazard is likely to lead to an accident which would in turn result in a serious injury. A miner who wanted to use the walkway, would not be aware of the floor under the pellets, and could trip on the uplifted cement floor, or stumble on one of the cracks, resulting in a fall. But most importantly, when the walkway heaves or gives way, as it did for King, there is a real danger of falling through the walkway to the ground below. Falling through a hole from 50 feet to a concrete surface below would lead to a fatal injury. In the event a miner only put a leg through the hole, a serious injury would still likely occur. Similarly, if a miner is tied off when the floor gives way, a hole opens up, or he trips, a serious injury can

occur. A safety line may stop the miner from falling 50 feet, but it can lead to other hazards, such as being jostled or yanked by the lanyard resulting in back and neck injuries. A miner who is tied off could also strike his head, hit equipment below, or be hit by falling cement. The presence of the fall protection may lessen the injury in some circumstances, but does not remove the likelihood of a serious injury. Further, the miners agreed that even if they used fall protection, there were not always tied off. Therefore, I find that it is reasonably likely that an accident would occur, and result in a serious, if not fatal, injury. The violation is therefore, significant and substantial.

Negligence

The Secretary alleges that Citation No. 8897219 involved reckless disregard on the part of the operator and cites to the same arguments as those for the negligence in the violation cited above in Order No. 8897220. The arguments include the miners' complaints about the condition of the walkway and the subsequent engineering report that indicated that the walkway was not safe for use. The Secretary argues that both Gornik and Lehtinen say they did not know about the condition of the walkway, but were the persons assigned to direct the contractors. They were told by Zimmer to have the contractors use fall protection, but only for purposes of protecting against a fall on the pellets. Both Zimmer and Peterson failed to consider the serious consequences of their actions. Northshore, too, makes the same arguments as to the negligence of the order discussed above. That is, that the mine required fall protection and therefore made some effort to protect the safety of miners. In addition, the mine argues that the managers understood from Leow that the condition may not have been as bad as the report suggested and were not negligent in relying on those representations.

A reasonably prudent miner would have understood that telling miners to wear fall protection was not enough. Instead signs should have been posted advising miners about the condition of the walkway and, if the fall protection was required, to have a sign advising of the requirement. The primary support for a finding of reckless disregard is the fact that the mine commissioned the 2015 KOA engineering report to address concerns about the condition of the conveyor walkway. The resulting report from KOA found that the walkway was not safe for personnel to use and access should be restricted. The mine, through its engineers and two of its managers, knew of the poor and dangerous condition of the walkway, yet failed to put up any warning or barricade to at least limit access to the area until repairs could be completed. The area was open and available to anyone who was in the conveyor area, and it could have been accessed without any warning. The mine knew of the problem with the east walkway but took no steps to limit access and those actions demonstrate an indifference to a known violation. The managers put the miners in a situation that posed a significant risk to safety. Therefore, I agree that the violation is the result of reckless disregard on the part of the mine.

Unwarrantable Failure

The unwarrantable failure terminology is taken from Section 104(d) of the Act, 30 U.S.C. § 814(d). The Commission has explained that unwarrantable failure is "aggravated conduct constituting more than ordinary negligence. [It] is characterized by conduct described as 'reckless disregard,' 'intentional misconduct,' 'indifference,' or a 'serious lack of reasonable

care.'" *Consol. Coal Co*., 22 FMSHRC at 353 (citing *Emery*, 9 FMSHRC at 2001-04) (citations omitted). In determining whether a violation is an unwarrantable failure, the Commission has instructed its judges to consider all of the relevant facts and circumstances in the case and determine whether there are any aggravating or mitigating factors. *IO Coal Co.*, 31 FMSHRC at 1352; *see also Consol*., 22 FMSHRC at 353. Both the Secretary and Northshore refer to the arguments made when discussing the unwarrantable nature of the violation in Order No. 8897720. Many of those arguments apply here.

Length of time that the violation has existed. The problem with the outer walkways had existed for several years, at least from the time in June 2015 when the KOA report had been completed. As a result of the report, the mine was made aware of the deteriorating condition of the walkway in 2015 and nothing was done to correct the condition. The walkway continued to crack and deteriorate up until the accident on September 7, 2016. For more than a year, the mine failed to put any barriers in place to prohibit access, or post any warning signs to prevent access, to warn of the dangerous condition, or to provide notice of a requirement to wear fall protection. The length of time figures prominently in the evaluation of the unwarrantable failure designation.

Extent of the violative condition. The extent of the violative condition included the entire walkway, on both the east and west side of the conveyor, each extending about 300 feet. No barriers or warnings were used at either of the two walkways, leaving it accessible to anyone. The entire area was open to use by any person at the mine. Therefore, the violative condition was extensive.

Whether the operator has been placed on notice that greater efforts were necessary for compliance. In this case, the mine was put on notice of the defective walkway, first by complaints by miners and then by the KOA engineering report in June 2015, Secretary's Exhibit 12. The report indicated that the load bearing capability of the outer walkway could not be determined. The KOA report indicated that the mine should restrict access to the outer walkways, and yet no barriers or warnings were put in place following that notice. The mine did determine that fall protection should be used on the outer walkways, but again did not post a warning or notice in that regard.

Operator's efforts in abating the violative condition. The only effort made to address the deteriorating walkway and its unsafe condition was to tell miners to use a safety harness when accessing the outer walkways. Although mine management may have told workers at the location to use safety harnesses, they did not post a notice explaining the requirement. Nor did mine management place any barriers to restrict access to the walkways as suggested by the report. Therefore, I find that no efforts were made to abate the condition.

Whether the violation posed a high degree of danger. This violation, the failure to warn miners of the unsafe condition of the walkway, posed a high degree of danger. A contractor or a miner who did not usually work in or around the conveyor walkways would not understand that access to the area was restricted, or that there was a safety hazard to be considered. Anyone using the walkway would be subjected to a number of hazards, including the cracks, uneven concrete, and the possibility of falling through a hole in the walkway floor.

Whether the violation was obvious. The hazard regarding the walkway was obvious to many of the miners who spoke with Inspector Norman, but the unsafe condition of the walkway was not obvious to each miner or contractor who may have been required to use the walkway. Although the condition of the walkway was not obvious to all miners or contractors due to the mud and pellets, the condition, and hence the violation, was obvious to mine management.

Operator's knowledge of the existence of the violation. The mine had knowledge of the existence of the violation and failed to take any action. The mine received a number of complaints from miners and engineers about the condition of the outer walkways, including complaints about falling cement and debris. The mine managers received the KOA report in June 2015 and understood that, at best, the outer walkways should be restricted from use. Yet no action was taken to barricade or otherwise provide a warning about the condition of the walkways. A reasonable prudent miner, and manager, familiar with the requirements of the Act, would understand that to limit access or require the use of fall protection, requires a barricade or some kind of notice at each end of each walkway.

Based upon the factors discussed, I find that the violation was a result of an unwarrantable failure to comply with the standard.

C. Liability of the Agents

The Secretary also seeks to impose personal liability under Section 110(c) against two employees of the mine: Matthew Zimmer, Section Manager for Hot Side Asset Management, and Roger Peterson, Section Manager for Hot Side Operations and Maintenance. The Secretary alleges that both Zimmer and Peterson, acting as agents of the mine, knew of the violative condition addressed by Order No. 8897220, the failure to maintain the walkway, and failed to act on the basis of that information to protect worker safety and health.

The negligence of an operator's agent is imputable to the operator for penalty assessment and unwarrantable failure purposes. *Nelson Quarries, Inc*., 31 FMSHRC 318, 328 (Mar. 2009); *Whayne Supply Co*., 19 FMSHRC 447, 450 (Mar. 1997); *Rochester & Pittsburgh Coal Co*., 13 FMSHRC 189, 194 (Feb. 1991). The Mine Act defines an "agent" as "any person charged with responsibility for the operation of all or a part of a coal or other mine or the supervision of the miners in a coal or other mine." 30 U.S.C. § 802(e). In analyzing whether an employee is an agent of an operator, the Commission has considered factors including "the ability of the employee to direct the workforce, whether the employee holds himself out as a person with supervisory responsibilities and is so regarded by other miners, and whether the actions of the employee in directing the workforce have an impact on health and safety at the mine." *Nelson Quarries*, 31 FMSHRC at 328.

Section 110(c) provides that when a corporate operator violates a mandatory health or safety standard . . . any director, officer, or agent of such corporation who knowingly authorized, ordered, or carried out such violation . . . shall be subject to the same civil penalties, fines, and imprisonment that may be imposed upon a person under subsections (a) and (d) [providing for assessment of civil and criminal penalties against mine operators]. 30

U.S.C. § 820(c). The Commission has explained that an agent is liable under Section 110(c) when the agent, "knew or had reason to know of a violative condition." *McCoy*, 36 FMSHRC at 1996. The relevant question is whether the agent knowingly acted; the Secretary need not prove that the individual knowingly violated the law. *Id*.; *Warren Steen Const. Inc.*, 14 FMSHRC 1125, 1131 (July 1992).

The Commission has determined that "[a]n individual acts knowingly where he is, 'in a position to protect employee safety and health [and] fails to act on the basis of information that gives him knowledge or reason to know of the existence of a violative condition.'" *McCoy*, 36 FMSHRC at 1996 (quoting *LaFarge Constr. Materials*, 20 FMSHRC 1140, 1148 (Oct. 1998)) (alteration in original). Liability under Section 110(c) "is generally predicated on aggravated conduct constituting more than ordinary negligence" but, "does not hinge on whether an agent engaged in 'willful' conduct." *Matney, employed by Knox Creek Coal Co.*, 34 FMSHRC 777, 783 (Apr. 2012). For the purposes of Section 110(c), "knowing" conduct includes deliberate ignorance and reckless disregard as well as actual knowledge. *Freeman United Coal Mining Co. v. FMSHRC*, 108 F.3d 358, 363 (D.C. Cir. 1997).

Zimmer and Peterson have worked at the mine for 13 and 25 years, respectively, and both have shared an office and worked in managerial roles since at least 2015. As part of their responsibilities, they both assigned and directed the work of other miners. Zimmer's team was normally comprised of seven miners, while Peterson directed three operating supervisors and four maintenance supervisors. Zimmer testified that it was part of his job to plan and coordinate the maintenance and repair work that would take place in the 62/162 gallery, and ensure that his group worked safely. Peterson was largely responsible for reviewing work orders, prioritizing and directing maintenance work, and, when necessary, informing miners of any changes in safety policies or procedures. Both Zimmer and Peterson became aware of the KOA report and its conclusions with respect to the outer walkways shortly after the mine received the report in June 2015.

The KOA report included the recommendation that access to the outer walkways be restricted, "as they are not safe for personnel to be using until a repair has been completed." Sec'y Ex. 12. Following a conversation with Scamehorn, the mine engineer who initially received the KOA report, both Zimmer and Peterson believed that the report's recommendation to restrict access was not an outright prohibition, but rather a limitation on use of the outer walkways. Instead of repairing or prohibiting use of the walkways, together they decided to implement a fall protection policy. Shortly after receiving the report, Zimmer and Peterson informed their crews of the fall protection requirement. When the mine used contractors more than a year later, they were told to use fall protection to avoid tripping on the pellets, but were not warned about the condition of the walkway. There is no indication that the policy was reduced to writing, or that any signs or notices were posted indicating that fall protection was essential. Zimmer and Peterson did not take any steps to repair or maintain the outer walkways after learning of the condition, both from miner complaints and from the written KOA reports. Peterson maintained that he did not believe anyone would fall through the floor of the walkway and was not aware that miners could not

be tied off the entire way while accessing the outer walkways. Nonetheless, as a manager, Peterson is trained in safety and in the requirements of the Mine Act.

The Secretary alleges that both Peterson and Zimmer were agents of the operator based upon their supervisory roles and their authority to hire, fire, discipline miners, assign job duties, shut down operators and direct the workforce. Northshore does not dispute that they are agents as defined by the Act.

The Secretary argues that both Peterson and Zimmer failed to act based upon the KOA report findings and recommendations that detailed the unsafe condition of the walkways. Both participated in conversations with Scamehorn concerning the deteriorating condition of the outer walkways, and agreed to require the use of fall protection rather than repairing or maintaining the walkway as required by the MSHA standard. They were aware that the walkways were used for maintenance and other travel, but subjected miners to an unsafe and unsound work area.

Northshore argues that Peterson should not be charged as an agent because he did not directly interact with Leow regarding the KOA report, but instead acted based upon what he learned from Scamehorn. Further, following the June 2015 KOA report, Peterson was involved in implementing the fall protection requirement and communicated the need for fall protection to the supervisors. The mine makes the same argument on behalf of Zimmer, but adds that on June 1, 2015, Zimmer no longer had responsibility for employees who worked along the outer walkway. I do not find merit in the mine's argument that Zimmer was no longer in charge of employees in that area as of June 1, since it is undisputed that he was involved in making the decisions after receiving the KOA report.

During the accident investigation, Zimmer and Peterson were interviewed by James Hautamaki, a special investigator with MSHA. Based on his interviews with Zimmer and Peterson, Hautamaki concluded that both men had knowledge of the violative condition and failed to act to protect worker safety. Hautamaki testified that he learned that both Zimmer and Peterson knew about the structural concerns with the floor of the outer walkways before KOA was called in to perform the evaluation. Once they received the KOA report, Zimmer, Peterson, and Scamehorn came to the conclusion that fall protection would be sufficient. According to Hautamaki, neither Zimmer nor Peterson personally inspected the area before deciding to implement fall protection, and neither manager thought to put up barricades or warning signs to warn miners about the condition of the walkway or of the need to wear fall protection. Hautamaki also learned that while both managers informed their respective crews about the condition of the walkways and that access was to be restricted, a similar warning was not given to the contractor crew in charge of cleaning the outer walkways.

There is sufficient evidence to demonstrate that both Zimmer and Peterson, acting as agents of the mine, knew that the walkways of the 62/162 gallery were not of substantial construction or maintained in good condition. Many of the actions that resulted in a finding of reckless disregard, for Order No. 8897220, can be attributed to the action or inaction of Zimmer and Peterson as agents of the mine. For example, Zimmer authorized a work order for the 62/162 gallery in September 2015, which stated, in part, "[v]erify the floor is safe on

the east side of the conveyor. Roger [Peterson] says that fall protection is required." Resp. Ex. F. The contractors testified that they were not told of the condition of the floor, only that they needed fall protection to avoid falling on the pellets. Moreover, as managers, Zimmer and Peterson received copies of the KOA report, along with an email from Scamehorn alerting them to the structural issues with the walkways and suggesting that they restrict access.

Similarly, there is sufficient evidence to support the conclusion that Zimmer and Peterson failed to act on the basis of the walkway information to protect worker safety and health. Following receipt of the KOA report, Zimmer and Peterson spoke with Scamehorn. Together, they decided that they would take no corrective action, but instead put the walkways on a list for later repair. More than a year later, when King and the contract crew were assigned to clean the outer walkway, nothing had been done to repair or maintain the walkways. Zimmer and Peterson did agree to require fall protection and instructed the supervisors regarding the need for fall protection on the outer walkways. However, they failed to repair or maintain the walkway. Fall protection was an inadequate solution to address the violative condition here; miners could not be tied off the entire time on the outer walkways and had to unclip their harnesses to move when performing maintenance on the conveyor belts and when hosing down the pellets. Both Zimmer and Peterson did not fully consider the importance of repairing the walkways or warning the miners of the deteriorated state of the walkways, and instead tried to work around the issue by implementing, rather badly, a policy of fall protection. Mine managers who are trained on the requirements of the regulations, and on the importance of safety and health, should have known that the conveyor walkways must be maintained in good condition or, alternatively, restricted from access appropriately. Therefore, I find both Zimmer and Peterson, individually, liable under section 110(c) of the Act.

II. PENALTY

The principles governing the authority of Commission Administrative Law Judges to assess civil penalties de novo for violations of the Mine Act are well established. Section 110(i) of the Mine Act delegates to the Commission and its judges, "authority to assess all civil penalties provided in [the] Act." 30 U.S.C. § 820(i). The duty of proposing penalties is delegated to the Secretary. 30 U.S.C. §§ 815(a), 820(a). The Secretary calculates penalties using the penalty regulations set forth in 30 C.F.R. § 100.3, or following the guidelines for special assessments in 30 C.F.R. § 100.5. When an operator notifies the Secretary that it intends to challenge a penalty, the Secretary then petitions the Commission to assess the penalty. 29 C.F.R. § 2700.28. Commission judges are not bound by the Secretary's penalty regulations or his special assessments. *Am. Coal Co*., 38 FMSHRC 1987, 1990 (Aug. 2016). Rather, the Act requires that in assessing civil monetary penalties, the judge must consider six statutory penalty criteria: the operator's history of violations, its size, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and whether the violation was abated in good faith. 30 U.S.C. § 820(i). In keeping with this statutory requirement, the Commission has held that judges must make findings of fact on the statutory penalty criteria. *Sellersburg Stone Co*., 5 FMSHRC 287, 292 (Mar. 1983), *aff'd*, 736 F.2d 1147, 1152 (7th Cir. 1984). Once these findings have been made, a judge's penalty assessment for a

particular violation is an exercise of discretion, "bounded by proper consideration of the statutory criteria and the deterrent purposes underlying the Act's penalty scheme." *Id*. at 294; *see also Cantera Green*, 22 FMSHRC 616, 620 (May 2000). The Commission requires that its judges explain any substantial divergence from the penalty proposed by the Secretary. *Am. Coal*, 38 FMSHRC at 1990.

The Secretary has proposed a penalty of $130,000 for the violation cited in Order No 8897220, which alleges a failure to maintain the outer walkways. The proposed penalty is based upon a finding that the violation was flagrant, and assessed pursuant to 30 U.S.C. § 820(b)(2). The flagrant aspect is discussed above and I have found that the Secretary has not met his burden of proof with regard to the flagrant finding. However, there is a violation of the mandatory standard, the violation is S&S and unwarrantable. In addressing those issues, I addressed the negligence of the operator and agree that the mine engaged in a reckless disregard of the mandatory standard. I have also addressed the gravity of the violation and found it to be a serious violation that would result in death or serious bodily injury. I have also considered the history of assessed violations. Sec'y Ex. 1. The violation was abated in good faith. The mine has not raised the ability to pay. Northshore is considered a large mine operator. Based upon my findings, I assess a penalty of $60,000 for this violation.

The Secretary has proposed a penalty of $69,400 for the violation cited in Citation No. 8872219, which alleges a failure to provide barricades and/or warning signs at either end of the outer walkways. The proposed penalty was assessed as a special assessment, but in determining the penalty, I have considered and applied the six penalty criteria. Northshore is a large operator and did not raise the ability to pay the penalty as proposed. The history of assessed violations shows three citations for violations of this standard in the 12 months prior to this citation. Sec'y Ex. 1. The good faith abatement has been considered. I have addressed the negligence and gravity in the discussion above and have found the negligence to be reckless disregard and the gravity to be extremely serious. Therefore, I assess a penalty of $60,000.

The two agents named in this matter, Zimmer and Peterson, have been assessed a proposed penalty of $4,300 and $4,500 respectively. I have addressed the negligence of each of the agents above, along with the gravity of the violation. Neither of the agents has raised the issue of the ability to pay, and neither have a history of a violation as an agent of the operator. Based upon all of the findings, I assess a penalty of $4,000 for each.

III. ORDER

Respondent, Northshore Mining, is hereby **ORDERED** to pay the Secretary of Labor the sum of $120,000.00 within 30 days of the date of this decision. Matthew Zimmer is ordered to pay $4,000.00, and Roger Peterson is ordered to pay $4,000.00 as an agent of the operator within 30 days of the date of this decision.

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

Distribution: (U.S. Certified First Class Mail)

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February 15, 2019

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner,	CIVIL PENALTY PROCEEDINGS Docket No. LAKE 2016-0421 A.C. No. 12-02295-416252 Docket No. LAKE 2017-0178 A.C. No. 12-02295-430695
v.	Docket No. LAKE 2017-0382 A.C. No. 12-02295-434929
PEABODY MIDWEST MINING, LLC, Respondent.	Mine: Francisco Underground Pit

DECISION AND ORDER

Appearances: Edward B. Hartman, Esq., Office of the Solicitor, U.S. Department of Labor, Chicago, Illinois, for the Petitioner,

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

Before: Judge Rae

I. INTRODUCTION

A. Statement of the Case

These cases are before me upon three petitions for assessment of civil penalties filed by the Secretary of Labor ("the Secretary") pursuant to § 105(d) of the Federal Mine Safety and Health Act of 1977, as amended, ("the Mine Act" or the "Act"), 30 U.S.C. § 815(d). At issue are five § 104(d)(2) orders issued to mine operator Peabody Midwest Mining, LLC ("Peabody") as a result of two separate inspections conducted by authorized representatives for the Department of Labor's Mine Safety and Health Administration (MSHA).

A hearing was held in Evansville, Indiana, at which time testimony was taken and documentary evidence was submitted. The parties also filed post-hearing briefs. I have reviewed all of the evidence at length and have cited to the testimony, exhibits, and arguments I found critical to my analysis and ruling herein without including a detailed summary of the testimony given by each witness.

After consideration of the evidence and observation of the witnesses and assessment of their credibility, I uphold the five § 104(d)(2) orders as written for the reasons set forth below.

B. Stipulations

The parties have stipulated to the following facts:

1. Peabody Midwest Mining, LLC, is an "operator" as defined in § 3(d) of the Federal Mine Safety and Health Act of 1977, as amended (Mine Act), 30 U.S.C. §803(d), at the coal mine at which the citation at issue in these proceedings was issued.
2. The Francisco Underground Pit mine is operated by Respondent in this case, Peabody Midwest Mining, LLC.
3. The Francisco Underground Pit mine is subject to the jurisdiction of the Mine Act.
4. At all relevant times, the products of the Francisco Underground Pit mine entered commerce or are products that affect commerce, within the meaning of the Mine Act, 30 U.S.C. §§ 802(b) and 803.
5. These proceedings are subject to the jurisdiction of the Federal Mine Safety and Health Review Commission and its designated Administrative Law Judges pursuant to §§ 105 and 113 of the Mine Act, 30 U.S.C. §§ 815 and 823.
6. 30 C.F.R. § 75.202(a) is a mandatory health or safety standard as that term is defined in § 3(l) of the Mine Act, 30 U.S.C. § 802(l).
7. 30 C.F.R. § 75.364(b)(2) is a mandatory health or safety standard as that term is defined in § 3(l) of the Mine Act, 30 U.S.C. § 802(l).
8. 30 C.F.R. § 75.400 is a mandatory health or safety standard as that term is defined in § 3(l) of the Mine Act, 30 U.S.C. § 802(l).
9. 30 C.F.R. § 75.362(b) is a mandatory health or safety standard as that term is defined in § 3(l) of the Mine Act, 30 U.S.C. § 802(l).
10. 30 C.F.R. § 75.360(g) is a mandatory health or safety standard as that term is defined in § 3(l) of the Mine Act, 30 U.S.C. § 802(l).
11. In Docket LAKE 2016-421, payment by Respondent of the proposed penalty of $5,054.00 will not affect Respondent's ability to remain in business.
12. In Docket LAKE 2017-178, payment by Respondent of the proposed penalty of $154,363.00 will not affect Respondent's ability to remain in business.
13. In Docket LAKE 2017-382, payment by Respondent of the proposed penalty of $44,546.00 will not affect Respondent's ability to remain in business.
14. The individual whose signature appears in Block 22 of the Orders at issue in these proceedings was acting in his official capacity and as an authorized representative of the Secretary of Labor when the citation was issued.
15. A duly authorized representative of the Secretary served the subject orders and any termination thereof upon the agent of the Respondent at the date and place stated

therein, as required by the Mine Act, and the citation and termination may be admitted into evidence to establish its issuance.

16. The orders contained in Exhibit A attached to the Petitions for Assessment of Penalty for these dockets are authentic copies of the orders at issue in this proceeding with all appropriate modifications and terminations, if any.

17. The exhibits listed in each party's List of Witnesses and Exhibits are true and accurate copies of the originals.

Joint Ex. 1; Tr. 7.[1]

II. BACKGROUND

Peabody Midwest Mining, Francisco Underground Pit is a large underground bituminous coal mine located in Francisco, Indiana. MHSA inspector Ryan Seitz[2] conducted a quarterly inspection of the mine on June 7, 2016 at the 3rd Southwest Sub-Main R/S Return Entry #8. During his examination, he found what he determined to be hazardous rib conditions for which he issued an order, specifically at crosscuts #64-65 and #89-90 as a violation of 30 C.F.R. § 75.202(a). Upon an inspection of the weekly examination books pertaining to this entryway, he found the hazardous conditions were not properly noted in the examination record, nor were the corrective measures taken by the operator to adequately control the problem. As a result, he issued an order in violation of 30 C.F.R. § 75.364(b)(2) for an inadequate weekly examination of the entryway. Both of these orders were assessed as reasonably likely to result in permanently disabling injuries to one person, significant and substantial (S&S), with high negligence, and an unwarrantable failure to comply with the applicable mandatory standards. The proposed penalty for the violation of § 75.202(a) has been enhanced by a special assessment by MSHA.

On September 20, 2016, MSHA inspector Nicholas Vandergriff[3] conducted a quarterly inspection of the mine at the 4th SE Belt Entry. The belt in this entry had been recently converted from two separate belts to one belt measuring almost one mile long. Along the belt, Vandergriff observed accumulations of coal, belt pressings, and float coal dust in what he determined to be hazardous dimensions over an extensive number of crosscuts. When compared

[1] In this decision, the abbreviation "Tr." refers to the transcript of the hearing. There are two volumes to the transcript and the pages are numbered sequentially therefore they will not be referred to by volume number. The Secretary's exhibits are numbered Ex. S-#, Respondent's Ex. R-#

[2] Seitz had been with MSHA for approximately three years assigned to the Vincennes, Indiana office. He began his mining career in 2008 with Peabody Energy and then moved to Vectren Energy. He held mine foreman papers, methane certification, and respirable dust and impoundment certifications. He then attended the Mine Academy and became an Authorized Representative for MSHA.

[3] Vandergriff had been employed by MSHA since 2015 at the Vincennes, Indiana office. He had worked for Sunrise Coal for nine years running all types of equipment including roof bolters and served as a face boss. He held mine foreman papers while at Sunrise. He then attended the Mine Academy to obtain his Authorized Representative card from MSHA.

to the examination record book, he found the hazards listed as Observed and Corrected did not correspond with the extensive conditions he observed underground. As a result, he issued three orders that day - one for accumulations of combustible materials, one for an inadequate pre-shift/on-shift examination, and the last for improper recordkeeping of pre-shift examination results. Each of these orders was assessed as reasonably likely to result in fatal injury to 30 persons, S&S, with high negligence, and an unwarrantable failure to comply with mandatory health and safety standards.

Peabody contests each violation and asserts that each should be dismissed. In the alternative, it argues that none of the violations should be found as significant and substantial, of high negligence, or an unwarrantable failure. It also argues that there was no basis provided by the Secretary for the specially assessed penalties.

III. LEGAL PRINCIPLES

A. Standard of Proof

A mine operator is strictly liable for Mine Act violations that occur at its mine. *Spartan Mining Co*., 30 FMSHRC 699, 706 (Aug. 2008). The Secretary bears the burden of proving any alleged violation by a preponderance of the credible evidence. *In re: Contests of Respirable Dust Alteration Citations*, 17 FMSHRC 1819, 1838 (Nov. 1995), aff'd sub nom. *Sec'y of Labor v. Keystone Coal Mining Corp.,* 153 F.3d 1096 (D.C. Cir. 1998).

B. Significant and Substantial and Gravity Findings

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

In *Mathies Coal Company*, the Commission set forth the following four-part test to determine whether a violation is properly designated significant and substantial:

> 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 FMSHRC 1, 3-4 (Jan. 1984); *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); *Consolidation Coal Co. v. FMSHRC*, 824 F.2d 1071, 1075 (D.C. Cir. 1987).

The Commission has stated that the focus of the *Mathies* analysis "centers on the interplay between the second and third steps." *Newtown Energy, Inc*., 38 FMSHRC 2033, 2037 (Aug. 2016). The second step "addresses the extent to which the violation contributes to a particular hazard" and "is primarily concerned with likelihood of the occurrence of the hazard against which a mandatory safety standard is directed." *Id.* Thus, the second step requires the judge to first identify the hazard, which the Commission defines "in terms of the prospective danger the cited safety standard is intended to prevent," then determine whether the violation sufficiently contributed to this hazard by considering "whether, based upon the particular facts surrounding the violation, there exists a reasonable likelihood of the occurrence of the hazard." *Id.* at 2038. At the third step, the judge must determine whether the occurrence of the hazard would be reasonably likely to result in injury, assuming the hazard were to occur. *Id.*

The significant and substantial determination must be based on the particular facts surrounding the violation at issue. *Peabody Coal Co*., 17 FMSHRC 508, 511-12 (Apr. 1995); *see, e.g.*, *Wolf Run Mining Co*., 36 FMSHRC 1951, 1957-59 (Aug. 2014). Evaluation of the reasonable likelihood of injury should be made assuming "continued normal mining operations," *U.S. Steel Mining Co*., 6 FMSHRC 1573, 1574 (July 1984), i.e., the evaluation should be made "in consideration of the length of time that the violative condition existed prior to the citation and the time it would have existed if normal mining operations had continued." *Black Beauty Coal Co.,* 34 FMSHRC 1733, 1740 (Aug. 2012); Rushton Mining Co., 11 FMSHRC 1432, 1435 (Aug. 1989). The inspector's judgment is also an important element of the significant and substantial determination. *Wolf Run*, 36 FMSHRC at 1959; *Mathies*, 6 FMSHRC at 5.

The significant and substantial nature of a violation and the gravity of the violation are not synonymous, although they are frequently based on the same or similar factual circumstances. *Quinland Coals, Inc.,* 9 FMSHRC 1614, 1622 n.11 (Sept. 1987). The Secretary assesses gravity in terms of the reasonable likelihood of injury, the severity of the expected injury, the number of persons affected, and whether the violation is significant and substantial. The Commission generally expresses gravity as the degree of seriousness of the violation. *Hubb Corp*., 22 FMSHRC 606, 609 (May 2000); *Consolidation Coal Co*., 18 FMSHRC 1541, 1549 (Sept. 1996). The Commission has pointed out that the focus of the gravity inquiry "is not necessarily on the reasonable likelihood of serious injury, which is the focus of the significant and substantial inquiry, but rather on the effect of the hazard if it occurs." *Consolidation*, 18 FMSHRC at 1550; *see also Harlan Cumberland Coal Co*., 12 FMSHRC 134, 140-41 (Jan. 1990) (ALJ) (explaining that some violations are serious notwithstanding the likelihood of injury, such as a violation of an important safety standard, a violation demonstrating recidivism or defiance on the operator's part, or a violation that could combine with other conditions to set the stage for disaster).

C. Negligence and Unwarrantable Failure

Negligence is conduct that falls below the standard of care established under the Mine Act. Under the Secretary's regulations, an operator is held to a high standard of care and is required to be on the alert for conditions and practices that may cause injuries and to take necessary precautions to prevent or correct them. 30 C.F.R. § 100.3(d). The Secretary defines high negligence as having occurred in connection with a violation when "[t]he operator knew or

should have known of the violative *condition* or practice, and there were no mitigating circumstances." *Id.*; § 100.3, Table X. High negligence "suggests an aggravated lack of care that is more than ordinary negligence." *Topper Coal Co.,* 20 FMSHRC 344, 350 (Apr. 1998). The Commission generally assesses negligence by considering what actions a reasonably prudent person familiar with the mining industry, the relevant facts, and the protective purpose of the cited regulation would have taken under the circumstances. *Leeco, Inc*., 38 FMSHRC 1634, 1637 (July 2016); *see also Brody Mining, LLC*, 37 FMSHRC 1687, 1701-03 (Aug. 2015) (explaining that Commission ALJs "may evaluate negligence from the starting point of a traditional negligence analysis" rather than adhering to the Secretary's Part 100 definitions); *accord Mach Mining, LLC v. Sec'y of Labor*, 809 F.3d 1259, 1263-64 (D.C. Cir. 2016).

More serious consequences can be imposed under the Mine Act for violations that result from the operator's unwarrantable failure to comply with mandatory health or safety standards. The unwarrantable failure terminology is taken from § 104(d) of the Mine Act, 30 U.S.C. § 814(d), and refers to more serious conduct by an operator in connection with a violation. The Commission has determined that unwarrantable failure is aggravated conduct constituting more than ordinary negligence. *Emery Mining Corp.*, 9 FMSHRC 1997, 2001-04 (Dec. 1987). Unwarrantable failure is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference," or a "serious lack of reasonable care." *Id.* at 2003-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 193-94 (Feb. 1991); *Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d 133, 136 (7th Cir. 1995).

Whether conduct is "aggravated" in the context of unwarrantable failure is determined by looking at all the facts and circumstances of each case to see if any aggravating factors or mitigating circumstances exist. These factors often include (1) the extent of the violative condition, (2) the length of time the violative condition existed, (3) whether the violation posed a high degree of danger, (4) whether the violation was obvious, (5) the operator's knowledge of the existence of the violation, (6) the operator's efforts in abating the violative condition, and (7) whether the operator had been placed on notice prior to the issuance of the violation that greater efforts were necessary for compliance. *See CAM Mining, LLC*, 38 FMSHRC 1903, 1909 (Aug. 2016); *Wolf Run Mining Co.*, 35 FMSHRC 3512, 3520 (Dec. 2013); *IO Coal Co.*, 31 FMSHRC 1346, 1350-57 (Dec. 2009). Because supervisors are held to a high standard of care, another important factor supporting an unwarrantable failure determination is the involvement of a supervisor in the violation. *Lopke Quarries, Inc.*, 23 FMSHRC 705, 711 (July 2001).

The factors listed above must be viewed in the context of the factual circumstances of a particular violation, and it is not necessary to find that all factors are relevant or deserving of equal weight in order to determine that the violation is unwarrantable. *Wolf Run*, 35 FMSHRC at 3520-21; *E. Assoc'd Coal Corp.*, 32 FMSHRC 1189, 1193 (Oct. 2010); *IO Coal*, 31 FMSHRC at 1351. However, all factors that are relevant should be considered. *San Juan Coal Co.*, 29 FMSHRC 125, 129 (Mar. 2007).

IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Order No. 9101931 (Docket No. LAKE 2017-0178)

1. Finding of Facts

Order No. 9101931 was issued by MSHA Inspector Ryan Seitz on June 7, 2016 during an E01 inspection of the Francisco Underground Pit. Tr. 25-26. Upon arrival at the mine, Seitz reviewed the inspection tracking documents to determine the areas of the mine that still required inspection. Tr. 29. He then traveled to the 3rd South West Sub-Main Return Entry #8 ("return entry") with Matt Kamman, a mine employee escort, to begin the day's inspection. Tr. 28. Immediately prior to their arrival, Jim Robinson, the weekly examiner, began an examination of the same section. Throughout the inspection, Seitz and Kamman encountered Robinson as he examined the area concurrently. Tr. 30-31.

Immediately upon reaching the return entry, Seitz observed loose ribs and loose coal material on the ground in the number 8 entry. Tr. 32; Ex. S-3. No timbers or floor-to-roof support was present in the areas of concern. Seitz questioned Robinson on how he identified hazards and how they are abated and communicated to management. As Seitz noted in his inspection notes taken contemporaneously with the inspection, Robinson stated there were too many hazards for one person to fix and he (Robinson) had another set of large air courses that he must examine during the same shift. Ex. S-3. Seitz testified that as he continued his examination of the number 8 entry, he remarked to Kamman and Robinson, "I'm starting to see some areas here I don't really like." Tr. 32.

As Seitz and Kamman walked inby, they observed Robinson, three or four crosscuts ahead of them, prying down loose ribs and hanging red flags. Tr. 34. Seitz noted at hearing that no red flagging, timbers, or any other stabling mechanisms were in place prior to Robinson's work. Tr. 34-35. Seitz continued to observe sloughage, or coal material that comes down off the rib or ceiling, as he walked inby. The pathway measured 18 feet long and 6 feet wide. Tr. 35. Seitz rejoined Robinson at crosscut 80 and they continued together to crosscuts 89-90. Upon further discussion with Robinson, Seitz was informed that during the two years in which Robinson had been examining this area, the conditions observed by Seitz had existed. Robinson stated that it had always been "a problem area." Tr. 94. In fact, Robinson told Seitz that the conditions were the same in 2013 and 2014 when the area was actively mined. Tr. 39. Robinson further informed Seitz that he had sat down with John Devers, Peabody's General Manager, about 30 days prior and voiced his concerns to Devers about the conditions. Robinson said he also told Devers that an entire crew comprised of 30 to 40 miners armed with slate pry bars would spend an entire shift prying ribs down and it would not get them all. Robinson asked Devers, in fact, to take him off this examination route citing personal reasons but told Seitz the real reason was because he didn't want to be in the area or sign the examination record book. Robinson characterized Dever's response as minimal. Ex. S-3. Based upon his initial observations, Seitz informed Kamman and Robinson that he would be issuing a 104(a) citation because of the loose ribs. Robinson proceeded alone to continue his inspection. Tr. 33.

Upon continuing his inspection of the entryway, Seitz observed loose ribs and rib rash throughout the entire entry. He testified that most of the ribs in the area measured around 7.5 feet long, 4 feet high and 12 inches wide and gapped approximately 9 to 12 inches away from the wall. He observed rock dust within the gap behind these ribs, which indicated the conditions had been present for some period of time. Tr. 38. Additionally, Seitz stated that he did not observe any tire tracks from a scoop or a hose line for a trickle duster in the area. There were no bags of rock dust present for use in hand dusting and neither Kamman nor Robinson mentioned anything about dusting methods used. Tr. 37. All of these factors led Seitz to the conclusion that the conditions were not new and had existed for an unreasonably long period of time without corrective action taken. Tr.37-41. Due to the number of loose ribs present and the lack of corrective action taken, coupled with Robinson's comments concerning how long the conditions had existed, Seitz informed Kamman that he was elevating the citation to a 104(d) order.[4] Ex. S-3.

Matthew Kamman, a certified foreman, testified on behalf of Peabody. He contended that rib conditions change rapidly in a mine and the conditions observed by Seitz had occurred recently. Tr. 109, 126. Kamman stated that he worked in the area when it was actively mined and described that a mud seam ran through the ribs causing them to "flake off some" and explained that they would get worse as mining advanced. He stated that the ribs were scaled and extra bolts were added as needed. Tr. 108. He had not examined this cited air course recently. Tr. 109, 120. Kamman asserted that Seitz only found two loose ribs in the entire entry and otherwise found no violations. Tr. 111-14. He denied the comment contained in Seitz's notes that he said the ribs were "bad" when the area was actively mined in 2013 and 2014. Tr. 115, Ex. S-3, p. 22. Kamman confirmed that the black area left when a rib has been pried down will continue to appear black until the area has been rock dusted or a long period of time passes. Tr. 122. I find Kamman's denial of his comment to Seitz is not credible as Seitz recorded it in his notes contemporaneously with the event. I also find his minimization of the number of bad ribs found by Seitz to be unreliable as self-serving and contradicted by Seitz's very specific listing in his notes of the crosscuts affected and by the measurements he took. Ex. S-3.

Aaron Meador, a certified foreman, testified for Peabody. As an examiner of the cited entry, he stated that he would carry a pry bar with him and scale any loose ribs while he was making his examination. If a rib could not be addressed by him, he would hang a red danger flag. Tr. 129-30. He claimed there was a rock dust bore hole into which large quantities of dust would be dumped into the intake air course adjacent to the return causing dust to be vented through the return. Tr. 130-31. He claimed he would enter the specific location of any loose ribs he found in the examination book whether or not he pried them during his examination. However, he stated that at the time of this inspection it was not common practice to specifically identify the location where corrective action was taken during the pre-shift examination. It was only after being issued a citation by MSHA for not doing so that it became common practice. Tr. 133-34. Meador noted loose ribs recorded in numerous examination book entries and confirmed that the

[4] Section 104(d) of the Mine Act states in relevant part that when an inspector finds a violation that is of such a nature that it could significantly and substantially contribute to the cause and effect of a coal mine safety or health hazard, and that is caused by an unwarrantable failure of the operator to comply with the mandatory standard, he shall include such finding in any violation issued to the operator under this Act.

examination books were countersigned by management. Tr. 134-39, 144; Ex. S-4. I find Meador's testimony that he corrected all loose ribs during his examination to be contradicted by the sheer number of loose ribs found by Seitz and the fact that it took nine miners 24 hours to abate the order. Ex. S-1. It is also contradicted by the credible testimony of Seitz as confirmed by his inspection notes taken contemporaneously with the event.

John Devers, General Manager, testified that Robinson left Peabody in July 2016 and that he had never spoken to Devers about the rib conditions. Tr. 150. He maintained that Robinson and he never spoke of work – only personal things. Tr. 154. He also attributed the loose ribs to the mud seam and stated that it made the ribs less stable than elsewhere in the mine. Tr. 154. I find Devers' testimony to be unreliable. There is no objective reason why Seitz would record a conversation he had with Robinson on the day of the inspection in such detail had it not taken place. It is also corroborated by the fact that shortly after this event, Robinson left the employment of Peabody when Devers did not respond to his complaint about the condition of the ribs and his request to be relieved of his duties to examine this entryway.

2. The Violation

The narrative section of Order No. 9101931 states that the 3rd South West Sub-Main R/S Return Entry #8 from crosscuts 64 to 90 were found to have rib rash and multiple loose ribs on both rib lines exposing the weekly mine examiner to the hazard of being crushed by rib rolls and/or rib failure, in violation of 30 C.F.R. § 75.202(a). Ex. S-1.

The violation is assessed as high negligence, S&S, and an unwarrantable failure affecting one person and reasonably likely to result in permanently disabling injuries. The Secretary has proposed a specially assessed civil penalty of $40,400.00 as the cited standard is identified as a "Rule to Live By" standard and the most frequently cited as causing fatal accidents. Ex. S-5.

This regulation mandates: "The roof, face and ribs of areas where persons work or travel shall be supported or otherwise controlled to protect persons from hazards related to falls of the roof, face or ribs and coal or rock bursts." 30 C.F.R. § 75.202(a).

Respondent argues that the violative conditions found by Seitz occurred at some time after the last examination. Further, it asserts that a violation did not occur because it took reasonable efforts to control the loose roof and ribs in the return entry as established by its witnesses. I do not find Respondent's argument to be persuasive. While it is true that weekly examiners recorded that they had identified and pried down some loose ribs in this area, the credibility of this examination record is questionable because the examiners failed to specifically record the areas where loose ribs were located and pried down, as required. Tr. 44; Ex. S-4. Furthermore, Seitz contradicted the accuracy of the examination records based on his observations of the entry. He saw no evidence of recent pry-downs. Instead he observed dark gray rock dust on the floor, no evidence of rock dusting equipment tracks, or material for hand dusting. The gap identified by Seitz was obviously not recent as indicated by the color of the rib behind it. He was informed by Robinson that the conditions in this entry were so bad that a crew of 30 to 40 miners could not pry all the loose ribs in one shift. Indeed, Robinson had asked to be taken off the section because he no longer wanted to examine it. In addition, the extent of the

hazardous conditions contradicts Respondent's argument that examiners consistently pried down ribs in the weeks prior. While conditions can change rapidly, the existence of 35 loose ribs over the course of 4,000 feet, an overwhelming length, does not support Respondent's claims of reasonable efforts to control the ribs in this area. Tr. 46.

Additionally, relying on the premise that adequate measures were being taken to pry loose ribs during the examinations, Respondent argues that the presence of a loose roof or ribs alone does not establish a violation of the section. Respondent relies on *Jim Walter Resources, Inc*., (*JWR*), 30 FMSHRC 872, 879 (ALJ) (Aug. 2008); *Harlan Cumberland Coal Co*., 22 FMSHRC 672, 681 (ALJ) (May 2000); and *Energy West Mining Co*., 18 FMSHRC 1628, 1639 (ALJ) (Sept. 1996). Respondent's reliance on these cases is misplaced. While each of these decisions is an Administrative Law Judge's and thus have no precedential value, they are also clearly distinguishable on their facts. In each of these cases, a sudden rock fall or coal burst had occurred. In *JWR,* Judge Zielinski found the MSHA investigator issued no violations for unsupported roof and was of the opinion that *JWR* was following its roof control plan and a reasonably prudent person familiar with the mining industry and the protective purpose of the Act would not have concluded otherwise. Likewise, Judge Cetti found in the other two cases that the failure of the pillars was unpredictable and that the operator had fully complied with their roof control plan approved by MSHA. In the case of *Energy West,* the evidence was clear that the operator had been working in conjunction with MSHA to deal with the overburden on the pillars and had followed suggestions offered by MSHA. Judge Cetti found in both cases that a reasonable person familiar with the mining industry and the protective purposes of the Act would not have found the operator's actions to be unreasonable in light of the circumstances known at the time of the event.

I find in the instant case any reasonable person familiar with the mining industry would recognize that Peabody was not adequately addressing the loose rib problem which had been known to management for a prolonged period of time. They were not sufficiently pried down, there was no additional support through bolting or timbers and they were of such a number that, as Robinson stated, it would take more than a crew of 30 men over the course of an entire shift to begin to correct them all. While that was an exaggeration, it did in fact, require 9 miners 24 hours to pry down the ribs sufficiently to terminate this violation. Ex. S-1. I find that this violation occurred.

3. Gravity and S&S

The first prong of *Mathies* has been satisfied in my finding a violation occurred. Based upon the conditions described by Inspector Seitz, I find the second prong of *Mathies* has also been satisfied. The discrete safety hazard, a weekly examiner being crushed by rib rolls or a rib failure, was contributed to by the presence of 35 loose ribs over the course of 4,000 feet that had existed for a prolonged period of time without corrective action being taken. As even Respondent's witnesses confirmed, the condition of the ribs can change and worsen rapidly, which underscores the dangerousness of the hazard involved if corrective action is not timely, ongoing, and consistent. As Seitz stated, an examiner would be exposed to the hazards of a rib fall during each examination and he would not be walking past one loose rib for "one or two seconds," but instead traveling a large area "past a lot of ribs." Tr. 49. Because of this prolonged

exposure to loose ribs, Seitz found it reasonably likely the examiner "would be struck with a rib." Tr. 49.

The third and fourth prong of *Mathies*, the reasonable likelihood that the hazard contributed to will result in an injury and that the injury will be reasonably serious, are easily established by the inspector's common sense, as he stated being hit by a loose rib that measures as much as 29 feet long, 6 feet high, and 12 to 14 inches thick and weigh, at a minimum, approximately 10,000 pounds, would be at least permanently disabling. Tr. 50. Violation of this mandatory standard is known to be one of the most frequently cited for causing fatal accidents. Ex. S-5.

Respondent contends the violation is not S&S because it would be unlikely that the weekly examiner would be traveling the entry at the exact time and place that a rock or rib would roll, thereby causing injury. Resp. Br. 15. It further argues that an injury was not likely because the entry was only traveled once a week by one examiner who would correct the hazards as he found them during his pre-shift examination. Respondent relies on Administrative Law Judge decisions *Ohio County Coal Co*., 31 FMSHRC 1486, 1489 (ALJ) (Dec. 2009) and *Freedom Energy Mining Co*., 32 FMSHRC 1809, 1829 (ALJ) (Dec. 2010) for the proposition that this "simultaneous" occurrence of events is necessary to find this violation is S&S. However, these decisions are both Administrative Law Judge decisions and therefore do not express the position of the Commission, nor do they serve as legal precedent. Furthermore, this "confluence of factors" has been addressed by the Commission in cases involving explosions and fires in mines, not roof and rib falls. *See Paramount Coal Co., Virginia, LLC,* 37 FMSHRC 981 (May 2015); *Consolidation Coal Co.,* 35 FMSHRC 2326 (Aug. 2013). Those cases discussed the presence of all three elements necessary to cause a fire or explosion – potential ignition sources, fuel, and methane or coal dust. There is no requirement that the Secretary establish the likelihood of simultaneous events, as the Respondent states, for this type of violation to be S&S.

The Respondent cites to *Patriot Mining LLC*, 31 FMSHRC 1464, 1470 (ALJ) (Dec. 2009) in support of his second argument which is equally unpersuasive. Again, the decision does not carry precedential value and has been squarely addressed to the contrary by the Commission. In *Paramount*, the trial judge found that there was not a confluence of factors which would have resulted in an ignition of a belt fire because wooden baffles that were causing friction were immediately removed from service. The Commission, in its remand, stated, "the operative time frame for determining if a reasonable likelihood of injury exists includes both the time that a violative condition existed prior to the citation and the time that it would have existed if normal mining operations continued." *Paramount*, 37 FMSHRC at 985 (*quoting Rushton Mining Co.,* FMSHRC 1432, 1435 (1989)). The Commission has also stated that the argument that a condition would be corrected in a pre-shift examination "is at odds with the basic tenets of mine inspection requirements, in that all violations could be defended against as to whether they are S&S by maintaining that they would have been recognized in the next pre-shift examination." *Consolidation Coal Co.,* 35 FMSHRC 2326, 2337 (Aug 2013). Additionally, while Respondent maintains that only one miner traveled this entry once per week, it ignores the fact that in order to address the hazard it would and did require 29 miners over a 24 hour period to correct the hazard thereby increasing the exposure to the number of persons over a much broader time period if Peabody were to properly maintain the safety of the ribs.

I find that, assuming continued normal mining operations, the *Mathies* test has been met. I also find the gravity of this violation to be extremely serious affecting one miner, being the weekly examiner, and likely to result in at least permanently disabling injuries.

4. Negligence and Unwarrantable Failure

Seitz stated his rationale in assessing the negligence as high was that Robinson, a foreman, was acting as an agent for the operator while conducting his examination. When Seitz issued the verbal citation, Robinson had nothing to say in mitigation. In fact, Robinson stated that he had spoken with Devers 30 days earlier about the condition of the ribs and that he could not correct them during his examination because he had other air courses to examine and it would take dozens of miners to pry all the loose ribs down. Tr. 51-52, Ex. S-3. Kamman could not give Seitz any mitigating factors either when he was asked. Tr. 51. I find the conduct here exhibited an aggravated lack of care that is greater than ordinary negligence. The operator is required to be alert for hazardous conditions such as loose ribs that can cause injuries to miners and to take necessary precautions to prevent or correct them. As Seitz described, the loose and gapping ribs were throughout the entry and patently obvious to anyone. Management was aware of the problem which had existed sufficiently long to expose at least the weekly examiner to such danger. It neither took preventive measures in the form of timbers or barricades, nor did it take sufficient corrective measures as evidenced by the state in which they were found by Seitz. I find this violation is the result of high negligence.

Seitz designated the violation as an unwarrantable failure to comply with a mandatory standard, because the loose ribs were extensive in that they were "everywhere they looked" and they were hanging off the wall. Tr. 53. In his opinion, they had been that way longer than the previous weekly examination and there were no danger flags, barricades or timbers. The danger was that, while walking through this entry, ribs were hanging over a miner's head, on both sides of the passage, and these ribs could come down and the condition was very obvious. Tr. 53-4. He determined that the operator was aware of the condition because the notation of loose ribs had been in the examination book since April 19, 2016. The book is signed by the examiner, who is an agent of the operator, and countersigned by the superintendent. Tr. 54, 60, 144. Seitz stated that management was on heightened "negligence" for loose ribs and roof from prior violations. He explained that MSHA keeps a record in their office of mines with prior § 75.202(a) violations. The lead Authorized Representative determines when to put a mine on the list and informs the operator of it. On June 7, 2016, this mine was still on that list. Tr. 55-56.

At the hearing, Seitz reiterated that the loose ribs had existed, in their current form, for at least a week and possibly since April 19, 2016, when loose ribs were marked in the weekly examination book. He based this duration estimate on the existence of dark-gray rock dust on the ground and in the gaps between the loose ribs and the passage wall. Tr. 53. Respondent's examiner, Jim Robinson, conceded the area was known to have rib problems as the same conditions had existed in 2013 and 2014. Tr. 53. Seitz testified that "everywhere they looked . . . there were loose ribs." Tr. 53. In addition, he observed no attempt to abate the condition, prior to Robinson's simultaneous examination, through flagging, timbering, or prying. Tr. 58-61.

The Secretary argues the unwarrantable failure designation should be upheld based upon the inspector's assessment of the circumstances.

Respondent argues the violation did not result from aggravated conduct. Relying on *IO Coal*, in which the Commission held that whether the operator engaged in abatement prior to the subject inspection is a key consideration in an unwarrantable failure analysis, Respondent argues it took necessary steps to identify and pry the loose ribs during the preceding seven weeks. Tr. 43; Resp. Br. 18. In addition, Respondent argues the hazardous conditions were neither extensive nor lasted an extended period of time. Resp. Br. 20-22. Based upon my analysis below in addressing each of these factors, I uphold the unwarrantable failure designation.

(a) Extensiveness of Violation

The extensiveness of a violation can be analyzed in terms of the physical dimensions of the affected area, the number of persons endangered, the efforts required to abate the violation, or other similar factors. *Twentymile Coal Co.,* 36 FMSHRC 1533 (June 2014); *Peabody Coal Co.,* 14 FMSHRC 1258 (Aug. 1992); *E. Assoc'd Coal Corp.,* 32 FMSHRC 1189 (Oct. 2010). Other factors that may also be relevant to extensiveness include the number of persons affected by the violation and the measures required to abate it. The Commission has stated that the extensiveness inquiry "ultimately is a fact question concerning the material increase in the degree of risk to miners posed by the violation," and should account for the broad scope of the circumstances surrounding the violation. *E. Assoc'd Coal Corp.*, 32 FMSHR at 1196 (instructing ALJ to consider extensiveness of abatement measure needed to terminate the citation).

In this case, the condition was found throughout almost an entire entry; a total of 35 ribs were loose on both sides of the walkway for 50 crosscuts, or 4,000 feet. Tr. 53. To terminate the violation, it required 9 miners over the course of 24 hours to pry down the loose ribs. The condition was extensive in both physical dimensions and the amount of effort it took to abate it.

(b) Duration of Violative Condition

According to the mine's own records, the rib violations existed since at least April 19, 2016. This was seven weeks prior to Seitz's inspection. This significant duration meant that a mine examiner walked through this passage, past loose rib after loose rib, seven times. Tr. 59. Robinson and Kamman admitted similar conditions had existed as far back as 2013 and 2014, when the area was actively mined. Tr. 39, 108. Ex. S-3. While the current conditions likely did not date back to 2013 or 2014, they had, at the very least, existed for a week, according to Seitz's estimates based on the gray color of the rock dust and the absence of rock dusting equipment. While the exact length of time is difficult to determine, the Commission has stated that even imperfect evidence of duration should be taken into account by the judge. *Coal River Mining, LLC,* 32 FMSHRC 82, 93 (Feb. 2010). Because it was clearly established that the condition of loose ribs can worsen quickly, one week is sufficiently long to cause a serious injury.

(c) Degree of Danger Posed by Violation

Both the extent of the dangerous conditions, which increased the likelihood of a hazardous event, as well as the inability of the examiner to contact others in the case of that

event, contributed to the high degree of danger that a failed rib would strike or crush an examiner, rendering him permanently disabled or worse. This violation was extremely dangerous as evidenced by the fact that this standard is the most frequently cited as the cause of fatalities.

(d) Obviousness of Violation

The violation was very obvious.

From the outset of the inspection, Seitz immediately noticed the area looked "a little rough" as he observed loose ribs. He even remarked to Kamman and Robinson, "Hey, I'm starting to see some areas here I really don't like." Tr. 32. These were not hidden dangers, rather "everywhere they looked . . . there were loose ribs." Tr. 53. The gaps formed between the sloughing material and the passage wall was not insignificant. Seitz observed the material was sloughing away from the wall by 9 to 12 inches. He could easily observe rock dust in these gaps. Tr. 38.

(e) Operator's Knowledge of Existence of Violation

An operator's knowledge may be actual or constructive. Knowledge of the predicate circumstances is sufficient to establish constructive knowledge. *Coal River Mining, LLC*, 32 FMSHRC 82 (Feb. 2010).

As stated above, the obviousness of the violation, the frequency with which it was recorded in the examination books, and that fact that the operator was put on notice that greater efforts at compliance were necessary to address the problem, make it clear that the operator knew of the long-standing existence of the violation. I make this finding even discounting the fact that Robinson addressed the hazards with Devers prior to this subject inspection.

(f) Operator's Efforts at Abating Violative Condition

The focus of this element is the efforts, if any, made by the operator prior to the issuance of the order. Seitz found no evidence Respondent attempted to abate the dangerous conditions prior to his inspection. I find this assessment to be credible. Seitz asked both Robinson and Kamman what had been done to remedy this problem. Neither gave an adequate answer. Seitz did not observe any flagging, aside from the flags placed by Robinson on the day of the inspection, nor did he observe any timbers or freshly-pried sloughage (again, aside from that created by Robinson during the course of the simultaneous examination). It is evident that Respondent knew of the dangerous conditions and took no action to abate the conditions prior to Seitz's inspection.

(g) Operator's Notice that Greater Compliance Efforts Were Necessary

An operator's history of past similar violations or other specific warnings from MSHA is relevant to inform the operator of the interpretation of a standard or when it can be charged with a violation. To demonstrate notice of the need for greater compliance for unwarrantable failure purposes, the operator's history of violations, discussions with inspectors, and other forms of specific warnings by MSHA, as well as evidence of record including shift book reports

evidencing notice to management of a recurring safety problem in need of correction, is relevant. *IO Coal*, 31 FMSHRC at 1353; *Lion Mining Co.,* 18 FMSHRC 695 (May 1996); *Peabody Coal Co.,* 14 FMSHRC 1258 (Aug. 1992).

According to the inspection notes, Respondent was cited 22 times for violations of 75.202(a) since February 2, 2015. Exs. S-3, S-6. In addition, Seitz explained that the mine was put on heightened notice for greater compliance and management was made aware of this when it was added to the record kept at the MSHA office. Tr. 55-56. Furthermore, both Respondent and the Secretary introduced multiple examination reports showing prying of loose ribs and other actions such as bolting were ongoing requirements. Exs. R-2, R-3, R-5; Ex. S-4, 1, 3, 5-7, 9-11, 13-15, 17-19, 21-27, 30. Witnesses for Peabody confirmed that this area was known for having loose ribs that changed and worsened rapidly. The examination books, which are countersigned by the superintendent, clearly demonstrate that the operator should have been keenly aware by the ongoing nature of the hazard that greater efforts at compliance were necessary. Yet no additional support was present in the entry.

(h) Weighing the Factors

Obviousness and the degree of danger posed by a violation alone can support an unwarrantable failure finding. *Manalapan Mining Co*., 35 FMSHRC 289 (Feb. 2013); *Windsor Coal Co.,* 21 FMSHRC 997 (Sept. 1999). I have already found that the rib condition existed throughout the number 8 entry and that roof and rib falls are known throughout the industry to be the leading cause of mine fatalities. In light of this, that Peabody had done nothing more to support the ribs than expect the weekly examiner to pry them down while covering thousands of feet of entries during his examination is tantamount to subjecting him to a game of Russian Roulette. These two elements are sufficient to show the complete disregard Peabody exhibited for the safety of its miners. In this case, there is also ample evidence to satisfy each of the other factors within the unwarrantable failure analysis set forth by the Commission. The existence of 35 loose ribs over the course of 4,000 feet demonstrate an extensive violation. The hazardous conditions had been present for at least one week, but had definitely existed, in some form, for at least seven weeks. Respondent knew these conditions existed, as they had been recorded in the weekly examination record, and Respondent knew greater efforts were necessary for full compliance. For these reasons, I find these factors support a finding of reckless disregard for safety and higher than average negligence.

B. Order No. 9101933 (Docket No. LAKE 2016-0421)

1. Finding of Facts

After making his inspection of the number 8 entry, as detailed in the above Order, Seitz went to the surface to review the examination book for the period between April 19 and May 31, 2016. Tr. 43; Ex. S-4. Upon reviewing the records, he discovered examiners had recorded the existence of loose ribs in the area and that these loose ribs had been "pried down." Tr. 43. The examination book had been countersigned by several supervisors including Superintendent Eric Carter. Ex. S-3. He questioned Robinson as to why the precise number and locations of the ribs were not documented as required and Robinson's response was that "he would run out of room

in the book" if he did so. Tr. 43. Aaron Meador confirmed that it was not until the operator received a violation for inadequate examinations that they started listing specific locations for hazards found and he never thought it was necessary to do so if the hazard had been corrected. He said this was because no one would have to come later to correct it so he didn't think such precision was necessary. Tr. 133. However, as I have found in the previous order, the conditions were not being corrected during the examinations or thereafter. As Seitz testified, there was no visible evidence that such prying had taken place. There were also no timbers, barricades, or other means of support in the area.

2. The Violation

The narrative section of this order issued by Inspector Seitz states that an inadequate weekly examination was conducted on the 3rd South West Sub-Main R/S Return air course. It cites the same conditions of the ribs as cited in the previous order and goes on to document that the record book "lists hazards as loose ribs only, and pried ribs down as the action taken." Ex. S-2. The order is assessed as reasonably likely to result in permanently disabling injury to one person, S&S, high negligence, and an unwarrantable failure to comply with the mandatory standard. The Secretary has proposed a penalty of $5,054.00. Ex. S-2.

The cited mandatory standard requires:

> 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: . . . (2) In at least one entry of each return air course, in its entirety, so that the entire air course is traveled.

30 C.F.R. § 75.364(b)(2).

In his post-hearing brief, the Secretary argues Respondent violated 30 C.F.R. § 75.364(b)(2) in two distinct ways. First, a violation occurred when Respondent's weekly examiners recorded that they had pried down loose ribs in the return entry, despite the fact that Inspector Seitz observed no newly-pried materials to corroborate that claim. Sec'y Br. 14. Second, Respondent violated § 75.364(b)(2) when its weekly examiners recorded the existence of loose ribs and their actions of prying down those ribs, but did not list the exact locations of the ribs or the actions taken, despite the requirement for specificity. Sec'y Br. 15.

Respondent argues the weekly examinations, both the one conducted by Mr. Robinson on June 7, 2016, and those previous, were adequate and thus no violation of § 75.364(b)(2) occurred. Respondent summarizes the steps taken by Mr. Robinson on June 7, 2016, including checking, flagging, and prying ribs, as needed. Tr. 73, 111; Resp. Br. 12. In addition, Respondent argues that prior weekly examinations were accomplished in a similar fashion. Resp. Br. 12.[5]

[5] Respondent also argues that the written order is invalid as it does not provide the required specificity as to the date and time of the particular examination that was inadequate. This order was issued orally during the examination by Seitz who was accompanied by a

(continued…)

I do not find Respondent's arguments to be persuasive. While some notations were made in the book concerning loose ribs and prying them down, Robinson and Meador confirmed conditions were omitted or not specified due to common practice of the mine and the sheer number of hazards they would have had to document. Ex. S-4. Seitz was quite clear in explaining that even hazards that no longer exist, i.e., those which have been abated, must be recorded with particularity. Tr. 45.

In a recent unpublished opinion issued by the United States Court of Appeals for the District of Columbia, the court addressed the recordkeeping requirement by mine examiners for hazardous conditions and corrective actions taken in a situation where the examiner recorded in the book "slope needs cleaned – work in progress." *Mach Mining, LLC. v. FMSHRC,* No. 18-1048, Sept. Term, 2018 (DC Cir. 2019). The operator argued that this was sufficient to record the nature and location of the hazardous condition. The Court of Appeals upheld the judge's determination that it was not sufficient. It concluded that the location must be sufficiently recorded so that those who read it will know where and how to address the problem. *Mach Mining, LLC.,* No. 18-1048, Sept. Term, 2018 (DC Cir. 2019).

The Commission, in its review of the trial judge's decision in *Mach*, categorically rejected Mach's contention that the language of the standard does not require any degree of specificity. *Mach Mining II,* 40 FMSHRC 1 (Jan. 2018). The Commission held that there were multiple locations over a distance of 105 feet where accumulations were in contact with the belt. The inspector had testified that the notations in the book were deficient because the slope belt needed cleaning every shift. The same notation appeared in the examination book over the course of dozens of examinations. The Commission stated, "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. 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." *Mach Mining II*, 40 FMSHRC at 12 (*citing Safety Standards for Underground Coal Mine Ventilation,* 61 Fed. Reg. 9764, 9803 (Mar. 11, 1996)). The Commission found the vague language in Mach's examination book frustrated the purpose and further did not enable miners to know of dangerous conditions before they went underground. *Mach Mining II*, 40 FMSHRC at13. The language in the recordkeeping regulation involved in *Mach* is essentially identical to that contained in the regulation cited here. That is, "a record of hazardous conditions and violations . . . found during each examination and their locations, and corrective action taken" are to be recorded in the examination book. 30 C.F.R. § 75.364(h).

The purpose of both mandatory standards, § § 75.363(b) and 75.364(h), is identical – to help identify recurrent conditions, assess the effectiveness of corrective action taken, and to

[5] (…continued)
representative of management. The reason for the violation was explained to him at the time the violation was found. The Commission has consistently held a written violation is sufficient if the operator is adequately advised of the violating conditions and the operator was sufficiently notified of them in order to abate them. Additionally there was no prejudice to the operator in their preparing for trial as pretrial discovery was robust. *See Jim Walters Resources,* 1 FMSHRC 1827 (Nov. 1979); *Twentymile Coal Co.,* 26 FMSHRC 666 (Aug. 2004).

protect miners before going underground. Although Seitz's Order is not charged as a violation of the recordkeeping section of § 75.364, if the record is inadequate, then the entire examination is for naught and frustrates the purpose of identifying ongoing problems, correcting them, and protecting the health and safety of the miners.

The facts in *Mach* are also analogous to the instant case. The hazards were numerous and widespread over the course of a 4,000-foot-long entry. The record books indicated, as did the witnesses from Peabody, that this area was known to have recurrent problems with the ribs. To abate the violation, nine miners spent 24 hours cleaning the area. Had the examination been adequate and the specific locations and corrective actions been recorded, it should have been readily apparent that the measures taken were deficient and more support was needed. It also forced the weekly examiners to go underground not knowing exactly where the hazards would be located and exposing them to an unreasonable danger.

I find the Secretary has met his burden of proving this violation.

3. Gravity and S&S

Inspector Seitz characterized this as an S&S violation essentially for the same reasons as the previous Order. Tr.57. The weekly examiner would go through the area by himself exposed to large ribs either coming down off the top or sloughing down which would be reasonably likely to cause an injury. Any injury would be serious in nature and permanently disabling. Since the examiners did not have trackers on them, he would be unable to contact anyone for help. Tr. 57-58. Respondent disputes the S&S finding and makes the same argument against such a finding as it made concerning the S&S finding for Order No. 9101931. Because the argument is duplicative, I incorporate my earlier analysis, as applied to Order No. 9101931, here.[6]

I find that this violation meets the four elements of the *Mathies* test and therefore I uphold the Secretary's characterization of the violation as S&S. Respondent violated § 75.364(b)(2), a mandatory safety standard, when it failed to adequately conduct a weekly examination of the return entry. This created a "measure of danger to safety" because it increased the likelihood that hazardous conditions within the return entry, such as loose ribs, would go unresolved. *Mathies*, 6 FMSHRC at 3-4. The Commission has found that the failure to conduct an adequate pre-shift examination satisfies the third prong of the *Mathies* test, because such a failure "exposed its miners to the underlying hazardous conditions." *Dominion Coal Corp*., 35 FMSHRC 3557, 3600 (Dec. 2013). Here, an inadequate weekly examination exposed miners to a reasonable likelihood of an injury sustained by a rib failure and such injury would be serious.

I find that, assuming continued normal mining operations, the *Mathies* test has been met. I also find the gravity of this violation to be extremely serious affecting one miner, being the weekly examiner, and likely to result in at least permanently disabling injuries.

[6] As stated above, the argument that a condition would be corrected in a pre-shift examination "is at odds with the basic tenets of mine inspection requirements, in that all violations could be defended against as to whether they are S&S by maintaining that they would have been recognized in the next pre-shift examination." *Consolidation Coal Co*., 35 FMSHRC 2326, 2337 (Aug 2013).

4. Negligence and Unwarrantable Failure

Seitz testified that he marked this violation as high negligence and an unwarrantable failure for the same reasons as the previous order. Peabody contests the negligence and unwarrantable failure designation based on the same arguments raised and addressed in the previous Order. I find they are not persuasive for the same reasons set forth in my analysis above.

I uphold the high negligence designation for the reasons set forth in the previous Order. I also find the unwarrantable failure designation to be supported for the same reasons set forth above and reiterated below.

(a) Extensiveness of Violation

The extensiveness was demonstrated by the fact that there was no specificity in the examination book to determine how many or where the ribs were that needed correction. In fact Seitz found far more loose and sloughing ribs, and in many more locations, than was indicated in the examination record. In fact, he found loose and sloughing ribs on both sides of the entry throughout the 4,000-foot length of it with no flagging, barricading, timbering, or prying having taken place. The violation was also extensive in the sense that it had been the historical practice at the mine not to indicate the location or corrective actions taken in the examination book until a violation for failing to do so was issued. The statements of both Robinson and Meador confirmed this.

(b) Duration of Violative Condition

Seitz reviewed the examination book back as far as April 19, 2016, in determining that the record was not being properly completed. Tr. 44, 59. The weekly examiners failed to adequately record the results of their weekly examinations for at least seven weeks. However, as Robinson told Seitz, he never put all the information in the book because he would run out of room. Meador confirmed that at the time of this inspection, they had not been in the practice of recording that information in the examination book. It was not until they were cited for not doing so that the practice changed. It is unclear just how far back the practice went but it is abundantly clear that it was far too long considering the danger posed to the examiner making his weekly examination. It would additionally pose the same danger to miners had Respondent assigned the appropriate number of persons needed to maintain the ribs in satisfactory condition.

(c) Degree of Danger Posed by Violation

The degree of danger posed by the inadequate, even misleading, record of the weekly examination was great. As discussed, despite the fact that examiners claimed to have pried down loose coal material during prior weekly examinations, Seitz witnessed no evidence to corroborate this claim. Tr. 53. Therefore, the inadequate weekly examinations created a situation where a miner would go underground without knowledge of where loose ribs were located, thus exposing him to grave danger. It did, however, enable management to ignore the fact that this was a serious ongoing problem which required greater corrective action to protect its miners. This rib

failure could have catastrophic effects, including the striking, crushing, or pinning of a miner. Tr. 49.

(d) Obviousness of Violation

A trained weekly examiner of a mining operation would have known the requirement to list the specific locations of hazards and the actions taken to abate them. The two-word notations, "loose ribs" and "pried down," lacked any specificity sufficient to alert other examiners, miners, or mine management of the location of these hazards. This would have been obvious to any informed reader of the examination book.

(e) Operator's Knowledge of Existence of Violation

Testimony from both Seitz and Peabody's witnesses confirmed that once the weekly examiner signed the examination book, it was countersigned by the Superintendent of the mine. Tr. 54-55, 60, 141, 144. Based upon the extensiveness and obviousness of the rib condition compared to the vague and very few notations in the book, I find the operator had at least constructive knowledge of this violation.

(f) Operator's Efforts at Abating Violative Condition

While the examiner noted that "loose ribs" were "pried down" in preceding examinations, Seitz found no evidence that loose material had been pried down in the passage. Tr. 48. No visible evidence, in the book or the passage, demonstrated an effort to abate the violation. Tr. 53. There was also no evidence presented that the operator took any steps to instruct or train the examiners to properly complete the examination books until they were cited for the behavior.

(g) Operator's Notice that Greater Compliance Efforts Were Necessary

Respondent was aware of the need for greater compliance efforts in conducting weekly examinations because it had been cited 15 times for violating § 75.364(b) since June 29, 2015. Ex. S-3. Seitz stated that the mine was on heightened negligence for this condition and it was communicated to the operator. Tr. 61

(h) Weighing the Factors

There is ample evidence to satisfy each of the factors within the unwarrantable failure analysis set forth by the Commission. It had obviously been the practice of the examiners to omit from the record book the specific location and action taken of hazards found. Whether it was because the conditions were so extensive that the examiner would run out of room in the book or because it would have revealed to the MSHA investigator, who reviews the mine books during each quarterly inspection, how extensive and unabated the conditions were is immaterial. As the Commission has stated, the specificity required in the examination book is to protect miners from entering an area without warning of the potentially deadly hazards that may exist there. It also serves to identify for the operator ongoing problems that would require more

extensive remedial action. The book was countersigned by the Superintendent of the mine which means such behavior was at least condoned by management making the violation that much more egregious. I find the danger posed by this violation alone supports a finding of an unwarrantable failure to comply with the mandatory standard.

C. Order No. 9101766 (Docket No. LAKE 2017-0178)

1. Finding of Facts

MSHA inspector Nicholas Vandergriff issued this order on September 20, 2016, during his quarterly inspection of the mine. Tr. 163. Vandergriff started his inspection by reviewing the mine's files including roof control and ventilation plans to check for deficiencies. He also reviewed a copy he brought from the heightened negligence book retained at MSHA. This mine had been on the list for accumulations since July 2015. Tr.157, 217. He was then escorted underground by Randy Hammond, a weekly examiner and member of the mine's Compliance Assistance Safety team. Tr. 163. Vandergriff began his underground inspection at the power center of the 4th Southeast (SE) belt line, which runs coal to the outside of the mine. Tr. 163, 166. Almost immediately upon his arrival underground, the belt went down. Tr. 167. Hammond contacted Jason Fink, the head maintenance chief, who attempted to diagnose the problem with the belt. Tr. 167.

While Fink worked on the belt, Vandergriff went to observe the head drive and saw two miners who were assigned to go from belt drive to belt drive cleaning by shoveling loose coal, dusting the drive, and spraying them as needed. Tr. 168, 171. This concerned Vandergriff because he had reviewed the examination book prior to going underground and the miners were not addressing the conditions observed by the examiner and were engaged in cleanup work in an area that had been listed in the examination book as having been completed on September 19, 2016 Tr. 168-71; Ex. S-12, 34.

Traveling inby within the first break or two, Vandergriff observed loose coal on the intake side of the belt. The accumulations measured anywhere from two to four inches deep and two to four-and-a-half feet wide. Tr. 173. After observing these conditions for another three to four crosscuts, or about 200 to 250 feet, Vandergriff informed Hammond he was going to issue a 104(a) citation. Hammond did not respond. Tr. 174. After walking four more crosscuts, Hammond said, "This is going to get bad. I have to go make a phone call." Tr. 174. He did not elaborate. At that point, Hammond left. The belt had been switched on and off three or four times prior to Hammond's remark and was currently off. Vandergriff observed piles of coal along the entire length they had walked so far. Tr. 174-75. He began photographing the conditions. Tr. 174-75; Ex. S-11. At trial, referring to his photographs, he pointed out an "abnormal" amount of accumulations several crosscuts long on the intake side of the belt and a misaligned roller above a pile of coal. Tr. 175-78; Ex. S-11. Vandergriff pointed to one photograph where in one location on the intake side of the belt, a portion of the belt was not properly aligned with the top roller which would cause the belt to sway back and forth when in motion. Tr. 179-80; Ex. S-11, 7. Photograph 10, Vandergriff testified, showed the top belt shoved towards the haul road side of the entry. He explained this misalignment happens when coal is dumped onto a full belt which causes it to be deposited onto the bottom belt and then thrown onto the ground. Tr. 192.

Referring to Photograph 6, he testified that it depicts where the belt was running inside the top roller rather than underneath them causing the belt to overhang the roller by as much as 10 inches. Tr. 195-98. He additionally observed areas where the belt was resting on the metal structure and had made gouges from one-half to one inch deep. Tr. 199. During the time Vandergriff was taking photographs, Hammond repeatedly met up with him and then walked back to the haul road to call in to get people to start shoveling. Tr. 180-81.

Vandergriff was approached by MSHA Compliance Assistance Program (CAP) personnel Danny Mann and Kris Robinson. At this time, Vandergriff told Hammond he was issuing a 104(d) order. Tr. 183. Robinson requested that Vandergriff not issue the order, because they would ensure the spillage was cleared. After a short conversation with Mann, Vandergriff reiterated to Robinson and Hammond that he was going to issue a (d)(2) order. Hammond left with no response. Vandergriff walked down to the head drive and the belt was locked and tagged out. Tr. 185.

Vandergriff continued his inspection walking inby the belt drive. Six or seven miners were shoveling the accumulations. Tr. 185. He recognized an examiner, Nathan Kamman, and asked him how long the belt had been in this condition. Kamman answered that he had not examined the belt in some time, but when he had, it had always been as Vandergriff observed and he, Kamman, and management knew about it. Tr. 185-86.

Vandergriff stated that he determined the condition had existed since September 6, 2016. He explained that there had been an A and a B belt at one time but the motors on the B belt went down so the B belt drive was removed and the A and B belts were spliced together. When they did so, they removed the rollers but not the tails on the B belt and just moved it over and connected them together. While the A belt was straight, the B belt had a slight angle, so when the two were spliced together the change was "enough to throw off an entire belt line" in his opinion. Tr. 186-87. This caused the accumulations that he observed on the ground. Kamman confirmed that the situation had been like that since they removed the B belt. Tr. 187.

As he continued up the belt line, Vandergriff continued to take photographs, make notes, and take measurements of the accumulations. After 25 or 30 breaks, Hammand would walk back in at each crosscut, ask what conditions were found, and go back to the haul road and call for additional people. Tr. 188. Vandergriff stated that he found coal, float coal dust, and belt pressings anywhere from 2 to 10 inches deep. Tr. 188. At crosscut 119, he spoke to Don Moeller, another examiner, who stated he knew about the (d)(2) orders and told him the cited conditions had existed for a long time. Tr. 189. Moeller stated that management knew about the issues, but did not specifically identify any member of management. Tr. 190. By this time, two hours had elapsed since Vandergriff had placed the closure tag on the belt, which had effectively shut down the mine. Tr. 189-190. He observed nearly 20 to 25 people shoveling the accumulations in the worst part, which was located 30 breaks away from where the belts were spliced together. Tr. 191.

2. The Violation

In the narrative section of Order No. 9101766, it states that accumulations on the 4th SE belt line in the form of loose coal, float coal dust, and belt pressings were found in numerous specified locations from the 2nd Main South tail to the head drive measuring varying widths and depths primarily on the intake side. The violation is charged as reasonably likely to result in a fatality, affecting 30 miners, S&S, and an unwarrantable failure to comply with a mandatory standard. The Secretary proposes a civil penalty of $69,417.00. Ex. S-7.

The cited mandatory standard provides: "Coal dust, including float coal dust deposited on rock-dusted surfaces, loose coal, and other combustible materials, shall be cleaned up and not be permitted to accumulate in active workings, or on diesel-powered and electric equipment therein." 30 C.F.R. § 75.400. The purpose of the standard is to prevent the "confluence of factors" which can cause a fire and propagate an explosion in a mine. *McCoy Elkhorn Coal, Corp.,* 36 FMSHRC 1987, 1992 (Aug. 2014).

The Secretary maintains that Respondent violated § 75.400 because it allowed coal material to accumulate along a "vast majority" of the 4th SE belt line and failed to properly abate those conditions in an effective and timely manner. Sec'y Br. 40. Allowing the coal, coal dust, and belt pressings to accumulate in an environment where the belt was rubbing on the metal structure would in the course of continued normal mining operations pose the hazard of a fire or ignition.

Peabody contests the violation on three grounds. First, that Vandergriff did not actually take measurements of the accumulations. Second, that what Vandergriff cited was actually spillage rather than accumulations. Third, that it was not likely that the material was combustible.

Hammond stated that he did not see Vandergriff take the measurements listed in the narrative section of the order. However, he confirmed that he was continually darting back and forth between the belt line and the haul road to call out for shovelers to address the conditions found by Vandergriff. He maintained that he went out and back in the same crosscut each time purporting to say that Vandergriff was never out of his sight. Tr. 328. While Hammond was at the haul road, which was frequent, Vandergriff did not stop his inspection on the opposite side of the belt. It is entirely plausible that Hammond did not observe a great deal of what Vandergriff was doing during his frequent absences. And, in fact, Hammond testified that he didn't "recall" seeing Vandergriff take measurements which is quite different from saying he did not do so. Tr. 328. When asked whether he trusted Vandergriff, Hammond testified that he found him to be competent and trustworthy and he believed the measurements he cited. Tr. 368. Hammond also confirmed, as Vandergriff had testified, that the coal was one half of an inch away from the belt at crosscuts 13 to 17. Tr. 352. I find Peabody's first argument to be baseless.

As to its second point of contention, that the coal represented "spillage" rather than an accumulation, I find the implied significance of the distinction between the two unsupported by case law. In support of its argument, Peabody cites to *Old Ben Coal Co.,* 1 FMSHRC 1954 (Dec. 1979) and *Utah Power & Light Co. v. Sec'y of Labor,* 951 F.2d 292 (10th Cir. 1991). However,

these cases do not support the Respondent's theory of spillage versus accumulations. In addressing whether a condition was an accumulation or spillage, the Court of Appeals stated, "FMSHRC has expressly rejected the argument that 'accumulations of combustible materials may be tolerated for a reasonable time.'" *Black Beauty Coal Co. v. FMSHRC*, 703 F.3d 553 (DC Cir. 2012). The court went further to state that § 75.400 "was directed at preventing accumulations in the first instance, not at cleaning up the materials within a reasonable period of time after they have accumulated." *Black Beauty*, 703 F.3d. at 2 (*citing Old Ben Coal Co. (Old Ben 1)*, 1 FMSHRC 1954 (1979)). Citing *Utah Power & Light Co.,* the court recognized that the test for whether an accumulation exists is if "a reasonably prudent person familiar with the mining industry and the protective purpose of the standard, would have recognized the hazardous condition that the regulation seeks to prevent." *Black Beauty Coal Co.*, 703 F.3d at 558 (*citing Utah Power & Light Co*., 951 F.2d 292 (10th Cir. 1991)). I find Vandergriff's testimony that the amount of material he observed was both extensive in length, sufficiently deep to be abnormal, and posed a potential for a fire or explosion credible. *See McCoy Elkhorn Coal Co*., 36 FMSHRC 1987, 1993-94 (Aug. 2014) (finding accumulations were extensive where spillage was more extensive than normal). I further find, based upon his description, measurements, and photographs of the conditions, he found that a reasonably prudent person familiar with the mining industry would recognize the hazardous condition that the regulation seeks to prevent. The material found by Vandergriff was not spillage, as Respondent defines it, and there is no tolerance for it to exist without appropriate corrective action underway, which there was not.

With regard to its last argument, the fact that some of the coal may have been wet, mixed with mud, or dusted making it non-combustible is not persuasive. The Commission has long recognized that wet coal can dry out quickly and provide the fuel necessary for a fire or explosion. *See Consolidation Coal Co*., 35 FMSHRC 2326 (Aug. 2013); *see also Continent Res. Inc*., 16 FMSHRC 1226 (June 1994). Again, the photographs taken by Vandergriff, his notes taken simultaneously with the inspection, and his measurements clearly disprove the assertion that the material was mostly wet, muddy material. This is especially true in the area where the coal was a mere half of an inch from the belt.

The Secretary has met his burden of proving this violation.

3. S&S Designation and Gravity

I find that this violation meets the four elements of the *Mathies* test and therefore I uphold the Secretary's characterization of the violation as S&S. The first factor is satisfied by my finding of the violation of a mandatory safety standard.

The second element is also satisfied because the discrete hazard posed by the accumulations was reasonably likely to cause harm. The testimony established that accumulations were a mere one half of an inch below the belt at points and the belt had gouged into the metal structure by as much as an inch, which could be an ignition source. Assuming continued normal mining operations and the amount of coal being dumped off the belt, it would take a very short period of time before the accumulations were sufficiently deep to make contact with the belt providing fuel to propagate a fire or explosion. The accumulations would be likely to ignite and such an ignition would be likely to result in injury.

Respondent contends that the material would have been corrected during the next examination. I have already rejected the argument that this was merely a spill. The validity of the argument that the condition would be corrected during the next examination has also been addressed in section A. 2. of this decision's discussion of *Paramount Coal Co*. under Order No. 9101931. The condition was far too extensive for correction to be made during an examination. It required numerous miners a considerable amount of time to rectify the situation.

Respondent argues that there was not a confluence of factors to make an ignition possible as there were no ignition sources present. It alleges that Vandergriff's testimony regarding the belt rubbing in the structure was essentially fabricated. Resp. Br. 49. I find Vandergriff was a credible witness. He exhibited excellent recall of the facts without having to reference his notes. That this particular fact was not in his notes is not a concern to me. His testimony as a whole was specific, detailed, and corroborated by photographs and in some instances by witnesses for Peabody. As described in some detail above, he had a photograph of a section of the belt that extended over the rollers by a significant margin. The misalignment of the belt rubbing against the rollers alone could serve as an ignition source. A belt rubbing in coal can also be an ignition source and with continued normal mining operations, it would take very little time for the accumulations to contact the belt.

The third *Mathies* factor is also satisfied. The Fourth and Seventh Circuits' application of this factor requires the assumption that the hazard occurred and looks to whether an injury would be serious. *Knox Creek Coal Corp. v. Sec'y of Labor*, 811 F.3d 148,162 (4th Cir. 2016); *Peabody Midwest Mining, LLC v. FMSHRC*, 762 F. 3d 611, 616 (7th Cir. 2014).[7] Due to the extensive nature of the accumulation, an ignition would be highly likely to result in a fatality. This entry also serves as a haul road, meaning that equipment passes through it. Tr. 202. Additionally, belt rollers and head drive motors located on the belt are considered pieces of equipment. *See Buck Creek,* 52 F.3d at 135 (affirming S&S designation where the frictional heat from a roller turning in coal dust could easily cause a fire, despite no evidence that the roller was hot or defective). Tom Burnett testified that on September 16, 2016, his team changed a bad roller which he confirmed can become a fire hazard. Tr. 452-55; Ex. S-12, 27. While there was no evidence produced that this mine is gassy or methane was present, it does not negate the likelihood that rollers running in coal creates an ignition hazard. Tr. 454-55.

The fourth factor has also been met. As Vandergriff testified, the beltline is also an escapeway. It is the primary escapeway for Unit 3 at crosscut 52 and a secondary one for the other two units. Should there be a fire on Unit 3 inby crosscut 52, with the air directed outby, the fire could travel through their primary escapeway preventing escape. Tr. 203. If an explosion were to occur, it would be propagated outby and any miners located outby the explosion could be burned, overcome by smoke, or disoriented and unable to escape. Tr. 202.

I find this violation was properly designated as S&S. Vandergriff explained that the unit averaged 16 to 18 miners in Unit 3 and there were commonly mechanics, shovelers, and others working on the haul road at any one time. There could be as many as 30 persons affected. Tr. 203. I find the gravity to be extremely serious as the hazard could have caused fatal injuries to at least 20 miners.

[7] This case was heard in Southern Indiana within the 7th Circuit.

4. Negligence and Unwarrantable Failure

a. Negligence

Vandergriff determined that the violation was due to reckless disregard when he issued the order. It was subsequently modified to high negligence. He stated that high negligence was appropriate due to the conditions he saw and because no one was able to offer any mitigating evidence. Tr. 204.

The Commission considers the actions a reasonably prudent person familiar with the mining industry would have taken under the circumstances to comply with the protective purpose of the mandatory standard. *See U.S. Steel Corp.,* 6 FMSHRC at 1910.

The Respondent argues that high negligence is not supported by the evidence, however, it offers no explanation as to why in its brief. It addresses only the unwarrantable failure factors.

Witnesses for Peabody testified that they were aware of the problem with the belt spilling coal. Ryan Sandefur, Peabody's safety manager, testified that he was the belt coordinator at the time of the inspection. Tr. 258. At one time, there were two belts, 4th SE A and 4th SE B, serving the three working units. Units 1 and 2 dumped onto the B belt and Unit 3 dumped onto the A belt at crosscut 50. Tr. 287. At some point around September 6, 2016, two or three reducers failed on the B belt. Each reducer costs $25,000.00 and would require at least one shift of down time to install them. Tr. 288. Due to the time and expense, it was determined that the two belts could be joined into one without affecting the ability of the belt to function. Additional structure was added to bridge the gap between the two belts and belts were spliced together. The newly spliced belt measured 7,000 feet in length and worked well until September 13, 2016, when it started to spill coal mostly at the head of the belt. Tr. 262-70, 285. Sandefur began to investigate the cause of the spills over the next several days and assigned a belt mechanic, Travis Kyffin, to spend extra time on the belt to figure out what the cause was. Tr. 271-75. He also assigned workers to spray the belt, level the structure between the head and the 3A dump area where most of the spillage was occurring. Tr. 277. On September 19, 2016, he told his leadman that the two of them were going to come in the following day to figure out what was going on even if they "had to live down there for the rest of the week." Tr. 280. Before that plan could be put into effect, however, Vandergriff showed up the next morning to conduct his inspection of the belt line. Tr.282.

In contrast to Sandefur's testimony, when Vandergriff asked examiner Nathan Kamman how long the belt had been in this condition, Kamman answered that he had not examined the belt in some time, but when he had, it had always been like that and he had called it out. Tr. 185. Additionally, Sandefur stated that the spills were located at the head of the belt and that is where the work was concentrated. Tr. 270. Vandergriff testified that when he arrived at the head, miners were moving from belt head to belt head shoveling. However, he found the accumulations were also at the following locations:

> 4th SE head drive to XC 8 6" to 1" in depth by 3' in width, road side XC 6-11 1" to 5" in depth by 3 1/2 feet in width, intake side XC 8-12 1" to 2 1/2' in depth by 4' wide, intake side XC 13-18 1" to 2 1/2' in depth by 4' width, intake side XC 21-

> 24 1" to 4" in depth by 3 1/2' in width, intake side XC 25-31 1/2" to 6" in depth by 3 1/2' in width, under belt/intake side XC 32-34 1" to 4" in depth by 2 1/2' in width, under belt/intake side XC 36-40 1" to 6" in depth by 2 1/2' in width, under belt/intake side XC 42-46 1" to 3" in depth by 3 1/2' in width, under belt/intake side XC 48-51 1" to 5" in depth by 4' in width, under belt/intake side XC 51-52 1" to 3" in depth by 3 1/2' in width, under belt/intake side XC 52-60 1" to 3" in depth by 3 1/2' in width, under belt/intake side XC 63-69 1" to 3" in depth by 3 1/2' in depth, under belt XC 71-73 1" to 3" in depth by 3' in width, under belt XC 78-82 1" to 3" in depth by 3' in width, under belt/intake side XC 86-89 1" to 3" in depth by 4' in width, under belt XC 90-93 1" to 4" in depth by 3' in width, all belt line XC 95-101 1" by 6" in depth by 10' wide, all belt line XC 104-114 1" to 3" in depth by 16' in width, under belt XC 116-119 float dust to 3" in depth.

Ex. S-7.

Shortly before arriving at the mine, Vandergriff was contacted by another examiner who had asked to speak with him. The miner met with him briefly and informed him that the 4th SE belt line was a disaster and no one was taking care of it. Vandergriff was also informed that the books were being signed off indicating the work was being done when in fact it had not been and upper management had been informed of it. Ex. S-10. While I may not give these statements full faith on their own, they corroborate the conditions Vandergriff observed for himself. They also are corroborated by the statements made to Seitz by Robinson that the hazardous conditions at Peabody were not sufficiently corrected. Both he and Meador stated that identified hazards were not accurately reflected in the examination books and management was well aware of the practice.

The testimony from Respondent's witnesses do not overcome or in any way mitigate the gross lack of care for miners' safety exhibited by Peabody. High negligence is appropriate.

b. Unwarrantable Failure

The Secretary requests Vandergriff's unwarrantable failure designation be upheld, citing the extensiveness and obviousness of the accumulations posing a high risk of danger. Sec'y Br. 45.

The Respondent asserts that the Secretary has not established any of the unwarrantable factors. It posits that Peabody took numerous steps to control and remedy the spillage; the condition did not exist for an extended period of time; it was not extensive; mine management had no knowledge of the cited conditions; and that the Secretary has disclaimed that the heightened notice due to past violations was used in support of the unwarrantable failure assessment. Resp.'s Br. 52-57.

After considering the following factors, I uphold the unwarrantable failure designation.

(a) Extensiveness of Violation

The accumulations of coal extended along the 4th SE belt line for a mile and a half as detailed in the narrative section of the Order. Tr. 166; Ex. S-7. Their depth ranged from two to six inches, while their width ranged from four to four and a half feet wide. Tr. 173; Ex. S-7. The windrow of coal, which was measured to be one half of an inch from the belt in one area, was 1,600 feet long. Tr. 349-50. This was an extensive accumulation of coal material. While Respondent has argued that Vandergraff did not take measurements, Hammond agreed at trial that Vandergriff is indeed a competent and trustworthy person and he believed the measurements he found. Tr. 368.

Other factors that may also be relevant to extensiveness include the number of persons affected by the violation and the measures required to abate it. The Commission has stated that the extensiveness inquiry "ultimately is a fact question concerning the material increase in the degree of risk to miners posed by the violation," and should account for the broad scope of the circumstances surrounding the violation. *E. Assoc'd Coal Corp*., 32 FMSHR at 1196 (instructing ALJ to consider extensiveness of abatement measure needed to terminate the citation). Vandergriff credibly testified that were a fire to start inby crosscut 52, the entire Unit 3 could be trapped. With return air traveling outby, a propagation could make the entire entry, which served as a secondary escapeway, impassable. Nathan Courtney testified that it required at least six unit miners, three shovelers, and several other miners at least one day to abate the violation. Tr. 469. Vandergriff characterized the amount of accumulations as "abnormal." *See McCoy Elkhorn Coal Co.,* 36 FMSHRC 1987, 1993-94 (Aug. 14) (finding accumulations were extensive where spillage was more extensive than normal). He stated that, while he did not terminate the Order, he was aware that the entire mine had stopped production. He stated he thought it would have taken 70 to 80 people to shovel it. Tr. 247.

I find the violation was extensive based upon all of these factors.

(b) Duration of Violative Condition

While Peabody witnesses testified that the condition had only existed since September 13, 2016, Vandergriff found evidence in the examination book that it had existed since the September 6 or 7, and that the notations that it was cleaned every shift were not believable. Tr. 205. From his experience, the number of shovelers they had on staff at the time would not have been able to clean every shift. Tr. 206. Both Kamman and Moeller told Vandergriff that the conditions had existed for a long time. Tr. 186, 189. Because coal can accumulate quickly, it was already confirmed to be within one half of an inch from the belt, and there was evidence of the belt rubbing the structure, the existence of uncorrected accumulations for two weeks is sufficiently long to cause an ignition.

(c) Degree of Danger Posed by Violation

The operator's conduct exposed miners to the hazards of a fire or explosion along the 7,000-foot-long belt line. This could have caused miners to be burned, disoriented, or trapped,

thus preventing their escape. A mine fire or explosion is one of the single most dangerous of hazards in mining and has led to catastrophic results.

The degree of danger posed by the accumulations was extremely high.

(d) Obviousness of Violation

The violation was blatantly obvious to the most unsophisticated of observers. Coal had accumulated along approximately a mile and a half of the belt line and measured as much as four feet wide and two and one half feet deep. Tr. 173. Hammond testified that one windrow ran from Crosscut 6 to Crosscut 30 or 31, a distance of 16,00 feet. Tr. 349-50.

(e) Operator's Knowledge of Existence of Violation

Knowledge of a violation is established where the operator knew or reasonably should have known of the violation. *Coal River Mining, LLC*, 32 FMSHRC 82, 95 (Feb. 2010). The knowledge or negligence of an agent may be imputed to the operator. *Excel Mining, LLC*, 37 FMSHRC 459, 467-68 (Mar. 2015); *Martin Marietta Aggregates*, 22 FMSHRC 633 (May 2000).

Sandefur testified that several days after the belts were spliced together, they were aware that the belt was dumping coal. It was an ongoing problem of which management was aware. Multiple agents of Respondent admitted to Vandergriff during the inspection that they knew the hazardous conditions had existed for a long time. Both Kamman and Moeller stated they personally knew about the belt problem and the resultant accumulations. General Manager Eric Carter stated to Vandergriff that he had been approached by an examiner asking for help in training miners to shovel and that he had no excuse for the conditions. Tr. 207. The miner who contacted Vandergriff prior to the examination stated that the information had been brought to management's attention and they continued to sign off on the examinations knowing the work had not been done. The unabated conditions were clearly known to management, yet the superintendent signed off on the examination books indicating corrective actions had been taken despite his knowledge that the hazard persisted.

The extensiveness and obviousness of the hazard alone would put any reasonable person on notice of the violation. Here, I find the operator had actual knowledge of the violation.

(f) Operator's Efforts at Abating Violative Condition

While some effort was taken to clear the accumulations of coal material along the belt line, these efforts were a mere fraction of that required to satisfactorily abate the conditions. As has been repeatedly stated, the coal accumulations lasted for nearly a mile and a half along the belt line. Tr. 285. Only two miners were cleaning the head drives and only one other miner was shoveling in the area of crosscuts 14 to 17. Tr. 207. Hammond observed no miners shoveling the 1,600-foot windrow of coal. Tr. 354. Vandergriff disputed the claim that the accumulations were cleared during every shift, as recorded in the examination book. He testified, "I do not believe [the accumulations] were cleared every shift like it states in the book. From my experience and the amount of shovelers that they had on staff at the time, there is no way they could have

cleared it every single time." Tr. 205-06. Even the General Manager, Eric Carter, admitted the need to train more shovelers lest his examiners kill themselves. Tr. 207.

Vandergriff stated that while he did not terminate the Order, he was aware that the entire mine had stopped production. He thought it would have taken 70 to 80 people to clean it in order to abate the condition. Tr. 247.

I do not find Sandefur and his workers' efforts to determine the cause of the coal dumping off the belt to be abatement efforts. Their work was directed towards keeping the belt running so that production could continue rather than protecting the miners as evidenced by the fact that so much of the affected area was left untouched by cleanup efforts before Vandergriff's Order was issued.

I find no meaningful effort at abatement was made.

(g) Operator's Notice that Greater Compliance Efforts were Necessary

An operator's history of past similar violations or other specific warnings from MSHA is relevant to the unwarrantable failure analysis to the extent the past violations and warnings placed the operator on notice, before the citation was issued, that greater efforts were necessary for compliance with the cited safety standard. *IO Coal*, 31 FMSHRC at 1353. Respondent was cited for violations of § 75.400 178 times in two years at this mine. Such a high frequency of violations provided Respondent notice of a need for greater compliance efforts when it came to accumulation prevention and clean up. Additionally, Vandergriff testified that the mine was put on the heightened awareness list by MSHA for violations of accumulations throughout the mine since July 2015 and management was so informed. Tr.157, 217.

Respondent cites Vandergriff's testimony that the past enforcement actions did not play a part in issuing an unwarrantable failure. Resp's Br. 57. However, the Commission has said that an **Administrative Law Judge** must consider all relevant record evidence not limited to specific warnings from MSHA, **including shift record books**, to determine whether an operator is on notice of recurring safety problem in needs of correction. *Jim Walter Res*., 19 FMSHRC 480, 485 (Mar. 1997) (emphasis added). This case is instructive for two reasons. First, it underscores the fact that it is the judge who determines the issue of whether past enforcement actions put the operator on notice. Second, it highlights the fact that other forms of notice are sufficient. Vandergriff testified that the records books indicated problems along the belt line for some time, although he did not believe the corrective work listed had been done as evidenced by the extensiveness of the accumulations.

I find that MSHA had sufficiently put Peabody on notice of the need for greater compliance efforts through the heightened awareness designation issued in 2015, the number of prior violations of this standard, and the repeated entries in the examination book indicating an ongoing problem.

(h) Weighing the Factors

There is ample evidence to satisfy each of the factors to satisfy the unwarrantable failure analysis set forth by the Commission. This was an extraordinary amount of accumulated coal. Mine management knew the belt line was dumping coal at an alarming rate. They had known this for some time. In the event of continued normal mining operations, the chance of an ignition caused by the belt rubbing the structure and the ever-present possibility of the failure of a roller was great. For these reasons, I find this violation was the result of an unwarranted failure to comply with the mandatory standard.

D. Order No. 9101767 (Docket No. LAKE 2017-0382)

1. Findings of Fact

As Vandergriff testified, he reviewed the on-shift/pre-shift examination book for the 4th SE belt line prior to going underground. Tr. 168; Ex. S-12. Specifically, he reviewed the entries for the day before and the day of the inspection. Tr. 168-70; Ex. S-12, 33- 34. The Conditions Observed listed in the book for September 19, 2016, indicated only: "Broom 30 to 40, 47-56, Spill Head at 21." Tr. 170; Ex. S-12, 33-34. Under Actions Taken, the book indicates those areas had been cleaned. Tr. 170, Ex. S-12, 33. As stated above, when Vandergriff went underground, he saw miners shoveling at the head. Tr. 171. The miners told Vandergriff that they were going from head to head cleaning and Vandergriff described the work they were doing as "substantial." Tr. 171. This concerned him because this work had been recorded in the examination book as having been completed on September 19, 2016. Tr. 171. In comparing the conditions recorded in the examination book with the accumulations he observed and photographed underground, Vandergriff stated that he found and recorded 218% more accumulations than what the examiners had found and recorded from the previous day. Tr. 208; Ex. S-12, 33. Vandergriff confirmed that he had found 83 crosscuts with accumulations while three examiners had found 38. Tr. 244-45. Vandergriff was under the misapprehension at the time he made the inspection that one examiner had made the belt. At trial, he acknowledged that it had been three and stated, "if three examiners, three experienced, certified examiners, cannot find 83 [accumulation locations] – even half of what a federal man finds, then they're not doing their job." Tr. 246. As a result of his findings, Vandergriff issued the Order for an inadequate examination in violation of a mandatory standard.

2. The Violation

The narrative Condition or Practice section of Order No. 9101767 alleges in part: "The operator failed to examine for hazardous conditions and violations of the mandatory health and safety standards. Accumulations on the 4th SE belt line in the form of loose coal, float coal dust, and belt pressings were observed from the 2nd Main South tail to XC #119." Ex. S-8.

Each of the crosscuts at which accumulations were found were listed in the order, as well as the measurements he made of each. The violation was assessed as reasonably likely to result in fatal injury to 30 persons, S&S, high negligence, and an unwarrantable failure in violation of 30 C.F.R. § 75.362(b). Ex. S-8. The Secretary has proposed a civil penalty of $44,546.00.

This regulation mandates:

> During each shift that coal is produced, a certified person shall examine for hazardous conditions and violations of the mandatory health or safety standards referenced in paragraph (a)(3) of this section along each belt conveyor haulageway where a belt conveyor is operated. This examination may be conducted at the same time as the preshift examination of belt conveyors and belt conveyor haulageways, if the examination is conducted within 3 hours before the oncoming shift.

30 C.F.R. § 75.362(b).

Peabody contests the issuance of this Order, arguing that the Secretary has not proven that the conditions found by Vandergriff existed at the time the pre-shift examination was done. Peabody maintains that production continued after the examination was done and again argues that what was found was the result of a "spill" that would have been cleaned during the shift. This seems to be a recurrent excuse for the operator and, as discussed at length above, I reject these arguments as unpersuasive for the same reasons as previously stated. I also take into consideration my findings that the accumulations were not recent, they had existed for some time, they represented a condition in the mine that was long standing, they were too extensive to represent a spill that had occurred just before the inspector arrived and they were of such magnitude that it required a total shutdown in production to abate the condition. I find the violation has been proven.

3. S&S Designation and Gravity

Respondent contests the S&S designation for the same reasons as the previous Order. I therefore find them unfounded for the same reasons as set forth above.

I find that this violation meets the four elements of the *Mathies* test and therefore I uphold the Secretary's characterization of the violation as S&S. The first factor is satisfied by my finding of the violation of a mandatory safety standard.

The second element is satisfied because the inadequate pre-shift examination contributed to the dangers of continued accumulations, as well as the ineffective clearing of those accumulations. Both of these dangers contributed to the discrete safety hazard of a fire or ignition of accumulated coal.

The third element is satisfied because, in the event of the hazard, that is, a fire or ignition, an injury was reasonably likely. Due to the extent of the coal, it was likely a fire would quickly spread through this escapeway, burning those in the passage, as well as causing disorientation, confusion, and entrapment preventing evacuation.

Finally, the injuries sustained from the reasonably likely event of a fire would be extremely serious and likely fatal. Belt fires are probably the single-most feared occurrence in a mine and have resulted in catastrophic events.

In conclusion, considering all the facts presented by Vandergriff and other witnesses, I find the violation satisfies the *Mathies* test and was properly assessed as significant and substantial. I also find the gravity of this violation to be very serious and likely to cause fatal injuries to as many as 30 miners.

4. Negligence and Unwarrantable Failure

This Order was designated as high negligence and an unwarrantable failure by Vandergriff for the same reasons as the previous Order. Respondent contests both assessments for the same reasons as the previous order as well. Based upon the same findings of fact and analysis of law above, I find that high negligence is supported by a preponderance of the evidence. I also find the violation was an unwarrantable failure as stated above and as summarized below.

The hazardous condition was of sufficient duration to pose a substantial threat of an explosion or fire. Examiners from Peabody confirmed the conditions had existed at least since September 6 or 7, 2016. They were extensive as they ran the course of 1 and a half mile of belt line and measured up to 4 feet wide and as much as 4 inches deep – just one half of an inch below the bottom of the belt in one area. As such, they were patently obvious and highly dangerous as they were present in the primary escapeway for Unit 3 and secondary for the rest of the units and could have prevented escape in the event of a fire or explosion propagated by the coal. Peabody's examiners and members of management stated they were aware of the conditions and were signing off the examination book which did not accurately reflect either the extent of the hazard or that the conditions had not been corrected. The mine was on heightened negligence for the hazards and had been cited numerous time for similar violations. The efforts at abatement were nil.

I find the danger posed by the violation in subjecting miners to unknown, uncorrected hazardous underground conditions, as well as the operator's knowledge of these condition to be particularly persuasive factors in finding this violation is an unwarrantable failure.

E. Order No. 9101768 (Docket No. LAKE 2017-0178)

1. The Violation

This Order was issued based upon the same findings as stated above in discussion of Order 9101767. Vandergriff stated that he found the pre-shift report dated September 19, 2016 reported correct actions taken for the 4th SE belt line included "broomed 30 to 40, 47 to 51, cleaned head number 8, 21 to 15, and 120 to 122." Tr. 211; Ex. S-9. However, only 6 of the 30 crosscuts listed in the pre-shift report had actually been cleaned. Twenty-four remained untouched and he found miners shoveling in those areas on September 20, 2016, that were listed on the previous day as having been completed. Tr. 211. He explained that, if no actions are taken to abate a condition listed in a pre-shift report, the corresponding abatement action cannot be listed in the report if it has not been completed. Instead, the condition should be recorded once again in the next examination report until it is properly abated. Tr. 247-48.

The standard violated is cited as 30 C.F.R. § 75.360(g). Ex. S-9. It is assessed as reasonably likely to result in fatal injuries to 30 persons, S&S, high negligence, and an unwarrantable failure. The Secretary proposes a civil penalty of $44,546.00.

This recordkeeping regulation mandates in pertinent part:

> A record of the results of each preshift examination, including a record of hazardous conditions and violations of the nine mandatory health or safety standards and their locations found by the examiner during each examination shall be made on the surface before any persons, other than certified persons conducting examinations required by this subpart, enter any underground area of the mine. The record shall be made by the certified person who made the examination or by a person designated by the operator. If the record is made by someone other than the examiner, the examiner shall verify the record by initials and date by or at the end of the shift for which the examination was made. A record shall also be made by a certified person of the action taken to correct hazardous conditions and violations of mandatory health or safety standards found during the preshift examination. All preshift and corrective action records shall be countersigned by the mine foreman or equivalent mine official by the end of the mine foreman's or equivalent mine official's next regularly scheduled working shift.

30 C.F.R. § 75.360(g).

The Respondent again contests the violation, gravity, negligence, S&S, and unwarrantable failure designations with the same arguments as those posed in first Order above. Repetition of them is unnecessary and they are rejected for the same reasons as stated in Order No. 9101766. I find the violation did occur.

2. S&S Designation and Gravity

I have found the violation occurred. I also find the failure to maintain an accurate recording of the hazards found and corrective action taken in the examination book contributes to the discrete safety hazard of a miner being exposed to a fire or explosion from the accumulation of coal. Tr. 212. I also find under continued normal mining operations the rapidity with which accumulations can amass and dry out while in contact with the belt, rollers or metal structure can lead to an ignition making an injury reasonably likely. It is likely a fire would quickly propagate through the belt line which serves as an escapeway that would reasonably result in confusion, disorientation, and possible entrapment of miners leading to fatalities to as many as 30 miners. This violation is very serious and I find it to be S&S.

3. Negligence and Unwarrantable Failure

The hazardous conditions, including those not recorded by the examiners, lasted anywhere from two days to one week or even to all of the way back to September 6 or 7, 2016. Such a lengthy period of insufficient recordkeeping could have catastrophic effects, such as the

inability of mine personnel to abate hazards. Out of 30 crosscuts identified by an examiner as sufficiently broomed, only 6 of those crosscuts were actually properly broomed, meaning it was extensive. The extensiveness and obviousness of coal along the 4th SE belt line could not have been ignored by management. The inaccuracy of the record book would be obvious to those in management who countersigned the book when compared to the conditions readily observable underground. The danger posed by misleading a miner into believing a hazardous condition had been corrected is that he would face potentially deadly conditions underground without warning. There is no evidence the operator took any measures to abate the situation. In fact, management was condoning such practice.

While there is evidence of only two prior violations of this standard in the two years prior to this violation, such lack of clear notice of greater efforts at compliance is not critical to my analysis of an unwarrantable failure here. As the Commission has stated, it is not necessary to find all factors are relevant to determine that a violation is unwarrantable. *Wolf Run*, 35 FMSHRC at 3520.

V. PENALTY

The Commission has reiterated in *Mize Granite Quarries, Inc.*, 34 FMSHRC 1760, 1763-64 (Aug. 2012):

> Section 110(i) of the Mine Act grants the Commission the authority to assess all civil penalties provided under the Act. 30 U.S.C. § 820(i). It further directs that the Commission, in determining penalty amounts, shall consider:
>
> The operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

30 U.S.C. § 820(i).

The Commission and its ALJs are not bound by the penalties proposed by the Secretary, nor are they governed by MSHA's Part 100 regulations, although substantial deviations from the proposed penalties must be explained using the § 110(i) criteria. *See Am. Coal Co.*, 38 FMSHRC 1987, 1992-93 (Aug. 2016); *Sellersburg Stone Co.*, 5 FMSHRC 287, 293 (Mar. 1983). In addition to considering the 110(i) criteria, the judge must provide a sufficient factual basis upon which the Commission can perform its review function. *See Martin Co. Coal Corp.*, 28 FMSHRC 247, 266 (May 2006).

The Secretary has proposed a Special Assessment (SA) for Order No. 9101931 issued by Inspector Seitz. At trial the Secretary offered no additional evidence in support of his proposed enhanced penalty. As discussed by the Commission, the Special Assessment Narrative Findings (SANF) forms are general in nature and provide no specific reasons for the SA. However, the

Secretary does have the burden before the Commission and its judges of providing evidence sufficient in the Judge's discretionary opinion to support the assessment. "When a violation is specially assessed that obligation may be considerable." *See American Coal Co.,* 38 FMSHRC 1987, 1993 (2016). The Commission underscored the fact that the assessment of penalties is a matter addressed *de novo* by the judge based upon the evidence presented to comport with her discretionary opinion. I have considered the gravity, negligence and seriousness of the § 75.200 violation. I have explained my unwarrantable failure findings and considered that fact that there was no injury or imminent danger involved. The mine was not ordered to shut down to abate the violation, negligence was high yet not reckless, there were 29 prior violations in two years at the mine which is not excessive and I find no particularly aggravating factors involved. I also consider the fact that the closely related order issued for an inadequate examination based upon the same conditions was not given an enhancement in proposed penalty and the operator was given a 10% Good Faith reduction in the calculation of the proposed penalty. Based upon these considerations, I find the SA is not warranted and I make an entirely independent assessment of the appropriate penalties for all violations herein as set forth below.

A. Size of Operator; Ability to Continue in Business; Violation History

The mine is large and the parties have stipulated that the proposed penalties will not affect the operator's ability to continue in business. Joint Ex. 1.

B. Good Faith

The Secretary credited Peabody with good faith in abating all violations at issue in this case except Order No. 910931. Good faith is also reflected in the portion of each citation that describes the actions taken to abate the condition and in the testimony regarding the operator's abatement efforts.

C. Negligence, Gravity and Unwarrantable Failure

The gravity of each violation and Peabody's negligence with respect to the violations are discussed at length within the body of my decision above. Specific findings as to each factor for unwarrantable failure of each violation are discussed within the body of my decision above.

D. Conclusion

After considering the six statutory penalty criteria, I assess the following penalties for the five violations at issue in this case:

Docket No. LAKE 2017-0178, Order No. 9101931: $6,000.00
Docket No. LAKE 2017-0178, Order No. 9101766: $69,400.00
Docket No. LAKE 2017-0178, Order No. 9101768: $45,000.00
Docket No. LAKE 2017-0382, Order No. 9101767: $45,000.00
Docket No. LAKE 2016-0421, Order No. 9101933: $5,100.00

ORDER

Peabody Midwest Mining, LLC is hereby **ORDERED** to pay a total penalty of $170,500.00 for the five violations at issue in this docket within thirty (30) days of the date of this Decision and Order.[8]

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

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

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
1331 PENNSYLVANIA AVENUE, NW, SUITE 520N
WASHINGTON, DC 20004

February 19, 2019

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), on behalf of JASON WYLIE, Petitioner, v. ALLEGHENY MINERAL CORPORATION, Respondent.	DISCRIMINATION PROCEEDING Docket No. PENN 2018-0158-DM MSHA No. NE MD 2018-01 Mine Name: Bison Mine Mine ID: 36-10107

DECISION
and
REDACTION ORDER

Appearances: Jason Wylie, pro se, Bridgeville, Pennsylvania;
Oscar Hampton III, Regional Solicitor, Andrea Appel, Deputy of the Regional Solicitor, Matthew Epstein, Esq., Office of the Solicitor, Philadelphia, Pennsylvania for the Secretary of Labor;
Patrick Dennison, Esq., Jackson Kelly, PLLC, Pittsburgh, Pennsylvania for Respondent.

Before: Judge Feldman

This case is before me based on a discrimination complaint filed pursuant to section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, as amended, 30 U.S.C. § 815(c)(2) (the "Act"), by the Secretary of Labor ("the Secretary") on behalf of Jason Wylie against the Allegheny Mineral Corporation ("Allegheny"). Before me is a Settlement and General Release Agreement between Wylie and Allegheny that resolves all matters at issue with respect to Wylie's compensatory relief. This proceeding is limited to the issue of Wylie's entitlement to compensatory relief. Both Wylie and the Secretary remain as parties in this case until disposition of this matter through settlement or adjudication.[1] Due to the extraordinary circumstances of this case in which the Secretary continues to object to the propriety of Wylie's decision to settle, it is necessary to provide the procedural history in this matter.

The captioned discrimination proceeding in Docket No. PENN 2018-0158-DM was initially assigned to Judge Paez. Order of Assignment, unpublished Order (April 5, 2018). During Judge Paez's consideration of this matter, on or about August 16, 2018, Judge Paez was

[1] Commission Rule 4(a) states, in pertinent part, "[i]n a proceeding instituted by the Secretary under section 105(c)(2) of the Act . . . the complainant on whose behalf the Secretary has filed the complaint is a party . . . ." 29 C.F.R. § 2700.4(a).

informed by the Secretary that the discrimination case brought by the Secretary on Wylie's behalf had settled. Second Amended Notice of Hearing, unpublished Order at 1 (Oct. 3, 2018) (ALJ Paez). However, Judge Paez was subsequently informed that the Secretary had withdrawn his settlement offer. *Id*. Judge Paez summarized his understanding of the rationale for the withdrawal by noting, "[a]lthough the case [had] settled in all other respects," the Secretary subsequently withdrew his consent to the settlement agreement because "the Secretary object[ed] to a confidentiality agreement between Wylie and Allegheny Mineral Corporation that would keep confidential Wylie's back-pay settlement amount." *Id*. (footnote omitted).

Shortly after the Secretary advised Judge Paez that the tentative settlement agreement resolving the issue of Wylie's compensatory relief had been withdrawn, Wylie communicated to the Commission his continuing desire to settle. Specifically, in an email dated September 28, 2018, Wylie advised the Commission:

> This settlement proceedings [*sic*] is getting way out of control now. I agreed to a[n] amount [of compensatory relief] and now feel like it has stalled out to nothing. I have tried to move on but [it is getting] ridiculous. When I agreed to settle I was and am ready to move on but have yet to get anywhere as far as finalizing or receiving my settlement. I don't want to go to court and I just want to move on. *It has been long enough and for the* [*sic*] *MSHA to fight the court and without my settlement is absurd*. Thank you for reading my email I just want my thoughts on the matter known.

Allegheny's Resp. to Sec'y's Mot. to Recons., Ex. C at 1, (Nov. 5, 2018) (emphasis added).

This matter was reassigned to me from Judge Paez on October 11, 2018, after Judge Paez contemporaneously recused himself from further deliberations. Order Placing Documents Under Seal and Notice of Recusal, unpublished Order (Oct. 11, 2018) (ALJ Paez); Order of Reassignment to Judge Feldman, unpublished Order (Oct. 11, 2018).

Given Wylie's clearly expressed desire to settle, the captioned discrimination proceeding in Docket No. PENN 2018-0158-DM was severed from the Secretary's civil penalty proceeding in the newly created Docket No. PENN 2018-0275. Severance Order 40 FMSHRC ___ Slip. op. at 4 (Oct. 23, 2018). The Severance Order noted that the captioned discrimination proceeding in Docket No. PENN 2018-0158-DM was solely limited to issues concerning the merits of Wylie's discrimination complaint and his claim for relief. *Id*.

The Secretary challenged the procedural basis for severance of the compensatory relief and civil penalty issues in a Motion for Reconsideration filed on October 26, 2018. *See* Sec'y's Mot. to Recons. Severance Order. The Secretary's Motion to Reconsider the October 23, 2018, Severance Order was denied on November 8, 2018. Order Denying the Sec'y's Mot. for Recons., 40 FMSHRC, ___ Slip op. at 3. The Secretary's motion was denied because severance was consistent with the Commission's Rules, the Federal Rules of Civil Procedure, and relevant Commission case law. *Id*. at 2-3. Specifically, Commission Rule 1(b) provides, in pertinent part: "on any procedural question not regulated by the Act . . . the Commission and its Judges shall be

guided so far as practicable by the Federal Rules of Civil Procedure . . . .” 29 C.F.R. § 2700.1(b). Rule 42 of the Federal Rules of Civil Procedure authorizes a judge to issue orders avoiding unnecessary delay or prejudice, or such orders that expedite and/or economize proceedings. Fed. R. Civ. P. 42(a)(3), 42(b).

With respect to case law, the Commission eschews prejudicing a complainant as a consequence of actions taken by the Secretary in a 105(c)(2) proceeding. *See Sec'y of Labor on behalf of Hale v. 4-A Coal Co.*, 8 FMSHRC 905, 908 (June 1986). Severance enables Wylie to expeditiously receive the identical compensatory relief that was tentatively accepted but subsequently withdrawn by the Secretary in August, 2018. Moreover, it is inexplicable that the impediment to Wylie's timely receipt of compensatory relief has been based on the Secretary's adamant refusal to accept confidentiality of settlement terms as a quid pro quo for settlement despite the Secretary's history of routine acquiescence to confidentiality of settlement terms that resolved 105(c)(2) proceedings. *See*, *e.g.*, *Secretary of Labor o/b/o Pedro Iglesias v. Titan Florida*, *LLC*, 39 FMSHRC 1678 (Aug. 2017) (ALJ); *Secretary of Labor o/b/o Jerry M. Caudill v. Leeco, Inc.*, 20 FMSHRC 532 (May 1998) (ALJ); *Secretary of Labor o/b/o Frank Scott v. Leeco, Inc.*, 18 FMSHRC 648 (April 1996) (ALJ); *Secretary of Labor o/b/o Danny Shepherd v. Adena Fuels, Inc.*, 15 FMSHRC 1438 (July 1993) (ALJ).

Finally, severance is consistent with the Commission's decision in *Sec'y of Labor o/b/o Clemmie Callahan v. Hubb Corp.*, 20 FMSHRC 832 (Aug. 1998) ("*Callahan*"). In *Callahan* the Commission distinguished a discrimination complainant's interest in resolving his complaint in a 105(c)(2) proceeding from the Secretary's interest in establishing a violation of section 105(c) in a pertinent civil penalty proceeding. *See Callahan*, 20 FMSHRC at 837-39. In other words, Wylie's settlement with Allegheny would not preclude the Secretary from prosecuting his civil penalty case. However, consistent with *Callahan*, Wylie does not need the Secretary's approval to settle his discrimination claim. *Id*. Moreover, as a party in a 105(c)(2) proceeding, Wylie has an unfettered right to settle his discrimination case.

In support of his opposition to the severance, the Secretary asserts, contrary to Wylie's September 28, 2018, email representations to the Commission, that Wylie "has embraced [the] desire to serve the broader public purpose of deterring future discrimination and does not want his to be the test case allowing the routine confidential resolution [of] discrimination cases." Sec'y's Mot. to Recons. Severance Order at 5 (Oct. 26, 2018). The Secretary's portrayal of Wylie as a trailblazing miner who is committed to subordinating his receipt of significant compensatory relief to his purported "desire to serve the broader public purpose of deterring future discrimination" strains credulity. This is particularly so in view of the frustration expressed by Wylie in his September 28, 2018, email regarding the 'absurdity' of MSHA (the Secretary) interfering with his desire to settle.

In view of the questionable statements the Secretary has attributed to Wylie, it became clear that a telephone conference with Wylie, as well as with all attorneys of record, was necessary to ascertain Wylie's wishes. *See* Order Scheduling Prehr'g Tel. Conf., 41 FMSHRC ___ Slip op. (Jan. 9, 2018). Consequently, a recorded conference call was conducted on

January 22, 2019, to hear directly from Wylie whether he wished to accept the settlement terms proposed by Allegheny, or, whether he wished to pursue his discrimination claim at an evidentiary hearing.[2]

During the January 22, 2019, telephone conference, Wylie readily and without hesitation indicated he wished to agree to the settlement terms, including that the settlement terms remain confidential. Tr. 7-9. Wylie stated, "[a]t first the terms were fine" but he did not understand the "confidentiality thing." Tr. 7. Consistent with his September 28, 2018, email, Wylie expressed his regret that "[i]t dragged on. I felt like I was pushed into a corner, but it is what it is. I'm going to be happy that we can all walk away from this as soon as possible, sir." Tr. 11.

To place the divergent interests of Wylie and the Secretary in perspective, it is necessary to reconcile Wylie's September 29, 2018, affidavit submitted to the Commission by the Secretary from Wylie's repeated unequivocal statements made directly to the Commission concerning his interest in settlement. The Secretary acknowledges that he does not represent Wylie in this proceeding. Tr. 14. Nevertheless, Wylie's affidavit was submitted as an exhibit to the Secretary's opposition to the settlement motion for the purpose of demonstrating Wylie's strong opposition to confidentiality. Sec'y's Opp'n to Settlement Mot., Ex. A (Nov. 29, 2018). The affidavit is instructive for several reasons. For example, paragraph eight of the affidavit avers:

> I understand and agree *with the concerns of the Secretary* that any resolution of this matter without public inclusion of the amount of back wages due makes it harder for miners to assert their rights in future Mine Act discrimination cases by decreasing awareness of successful enforcement actions.

Sec'y's Opp'n to Settlement Mot., Ex. A at 4 (Nov. 29, 2018) (emphasis added).

Paragraph eight is revealing in two respects. First, it is apparent that the Secretary has been the driving force behind the demand for public disclosure, as the Secretary's interest in public disclosure preceded Wylie's. Second, the Secretary's reliance on paragraph eight to evidence Wylie's overriding concern for public disclosure is an apparent attempt to mask the Secretary's self-serving interest in this unfortunate situation.[3]

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[2] Transcript references to the January 22, 2019, telephone conference will be cited as "Tr." followed by the page number.

[3] As discussed herein, I am concerned about the Secretary's efforts to act in Wylie's best interests. For example, obviously administering the oath encourages truthfulness that is essential to the judicial process. Yet the Secretary objected to the fact that Wylie's statements during the telephone conference would be given under oath based on the disconcerting claim that the swearing-in process is intimidating. Tr. 5. In fact, it is clear that Wylie did not feel intimidated, as he appeared to be relieved that he had the opportunity to "speak freely" during the conference call. Tr. 6, 7.

The Secretary also relies on paragraph seven of Wylie's affidavit that states that Wylie "understand[s] that [he] ha[s] the right to settle [his] claim for back wages regardless of whether the Secretary wishes to do so." *Id*. at 3. However, the extent of Wylie's understanding in this regard is suspect as there is no evidence that Wylie was aware that confidentiality terms have historically been agreed to by the Secretary in 105(c)(2) proceedings.

In attempting to insulate himself from Wylie's expressed frustrations regarding feeling "pushed into a corner" and Wylie's desire to extricate himself from his dilemma "as soon as possible," the Secretary provides a self-serving explanation that seeks to blame the Commission for Wylie's predicament:

> [T]he most important thing that's occurred thus far is the statement by Mr. Wylie that he said he was pushed in the corner. There is absolutely no basis either in the current case law that has been promulgated by the Commission or any statutory promulgation by the United States Congress nor in the rules that allows a court sua sponte to impose a settlement on a complainant who is not represented. The Callahan case involves a complainant that was represented from the beginning of that litigation. Mr. Wylie does not have a lawyer as the court indicated in his initial comments to Mr. Wylie expressing the concern about Mr. Wylie being intimidated, and Mr. Wylie actually stating that he was somewhat intimidated by this process. The court has used its authority, I believe, inappropriately to get a settlement to force Mr. Wylie into a settlement.

Tr. 14.

The objections proffered on behalf of the Secretary during the telephone conference are noted. Suffice it to say, there is nothing in the procedural history of this matter to support the Secretary's claim that "the court has used its authority . . . to force Mr. Wylie into a settlement." *Id*. On the contrary, it is significant that, but for the issue of confidentiality, the Secretary previously agreed to identical settlement terms with respect to Wylie's compensatory relief as early as August 2018. Second Amended Notice of Hearing, unpublished Order at 1 (Oct. 3, 2018) (ALJ Paez). It is regrettable that Wylie has yet to receive his compensatory relief during this approximate six month intervening period. Finally, I am not aware of, nor has the Secretary cited, any case law that supports the proposition that the Commission disfavors confidentiality of settlement terms in discrimination cases brought pursuant to section 105(c) of the Act.

It is the initial November 6, 2017, Complaint Wylie filed with MSHA that serves as the predicate for this discrimination proceeding. Compl., Ex. A (Feb 23, 2018). As previously noted, as a party, Wylie has the right to settle his discrimination complaint. To hold otherwise would be inconsistent with the Commission's holding in *Callahan*. Placing the procedural history in this proceeding in perspective will be helpful in the event that the Secretary continues to believe that severing these matters is unjustified, or, that he is otherwise aggrieved by the approval of the subject settlement terms between Wylie and Allegheny.

ORDER

Consistent with Wylie's eagerness to accept the settlement terms, including confidentiality, expressed during the telephone conference, less than 24 hours after the telephone conference, Wylie provided the Commission with a signed copy of his Settlement and General Release Agreement with Allegheny on January 23, 2019. During the Conference call, counsel for Allegheny agreed that the performance of the terms of the settlement with respect to Wylie's compensatory relief would be completed within 30 days of the date of this Decision. Tr. 9.

The subject settlement terms resolve all matters in issue with respect to Wylie's relief. Consequently, **IT IS ORDERED** that the Settlement and General Release Agreement between Allegheny and Wylie **IS APPROVED** and that Allegheny provide Wylie with the compensatory relief provided for in the settlement agreement within 30 days of the date of this Decision.

IT IS FURTHER ORDERED that upon confirmation of Wylie's timely receipt of his compensatory relief, the subject discrimination proceeding in Docket No. PENN 2018-0158-DM **SHALL BE DISMISSED**.

IT IS FURTHER ORDERED that unredacted copies of the settlement terms and the January 22, 2019, telephone conference transcript shall be placed under seal.

IT IS FURTHER ORDERED that a redacted copy of the January 22, 2019, telephone conference transcript deleting all references to the amount of Wylie's compensatory relief will not be sealed.[4]

Nothing herein shall preclude the Secretary from pursuing the civil penalty case in Docket No. PENN 2018-0275. In this regard, the Secretary has requested a hearing in the civil penalty mater in Docket No. PENN 2018-0275. The date and location of the hearing will be specified in a subsequent order.

/s/ Jerold Feldman
Jerold Feldman
Administrative Law Judge

[4] To preserve the pending issue of confidentiality, the parties were initially advised that the transcript of the telephone conference would be placed under seal. Order Scheduling Prehr'g Tel. Conf., 41 FMSHRC ___ Slip op. at 2 (Jan 9, 2019). However, the parties were subsequently advised that a redacted copy that deletes all references to the amount of the agreed upon compensatory relief sufficiently preserves the issue of confidentiality, and thus would not be placed under seal. Tr. 3.

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/nm

ADMINISTRATIVE LAW JUDGE ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
1331 PENNSYLVANIA AVENUE, NW, SUITE 520N
WASHINGTON, DC 20004

January 9, 2019

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), on behalf of JASON WYLIE, Complainant, v. ALLEGHENY MINERAL CORPORATION, Respondent.	DISCRIMINATION PROCEEDING Docket No. PENN 2018-0158-DM MSHA No. NE MD 2018-01 Mine: Bison Mine Mine ID: 36-10107
SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner, v. ALLEGHENY MINERAL CORPORATION, Respondent.	CIVIL PENALTY PROCEEDING Docket No. PENN 2018-0275 Mine: Bison Mine Mine ID: 36-10107

ORDER SCHEDULING PREHEARING TELEPHONE CONFERENCE

Before: Judge Feldman

The captioned matters were severed in an Order that established and severed newly created Docket No. PENN 2018-0275 concerning the Secretary's civil penalty proceeding from Docket No. PENN 2018-0158-DM that is limited to issues concerning the merits of Wylie's discrimination complaint and his claim for relief. Severance Order, 40 FMSHRC ___, Slip op. at 4, (Oct. 23, 2018). These matters were severed as a consequence of the Secretary's withdrawal from the parties' verbal settlement agreement that would have resolved the issues of both the compensatory relief to be awarded to Wylie and the amount of the civil penalty to be paid in this matter. *Id*. at 2. Currently before me is Allegheny's Motion to Approve Settlement with Wylie that apparently concerns the identical settlement terms with respect to compensatory relief that were informally accepted but subsequently rejected by the Secretary. Allegheny's Agreement and Mot. to Approve Settlement at 3-4 (Nov. 21, 2018).

The record contains conflicting statements concerning whether Wylie has agreed to settle. In an email transmitted on September 28, 2018, Wylie unequivocally advised the Commission that he agreed to the settlement terms with regard to his monetary relief, and, that he was not interested in participating in a hearing. *See* Order Denying Sec'y's Mot. for Recon., 40 FMSHRC ___, Slip op. at 2 (Nov. 8, 2018). Nevertheless, the Secretary now asserts that Wylie has rejected the settlement because, "[Wylie] has embraced [the] desire to serve the broader public purpose of deterring future discrimination and does not want his to be the test case allowing the routine confidential resolution [of] discrimination cases." Sec'y's Mot. to Recons. Severance Order at 5 (Oct 26, 2018). However, issues concerning deterrence go beyond the scope of the discrimination proceeding in Docket No. PENN 2018-0158-DM, which is limited to the issue of Wylie's entitlement to monetary relief.

Commission Rule 4(a) provides, in pertinent part:

> In a proceeding instituted by the Secretary under section 105(c)(2) of the Act, 30 U.S.C. [§] 815(c)(2), the complainant on whose behalf the Secretary has filed the complaint is a party . . . .

29 C.F.R. § 2700.4(a); *Sec'y of Labor v. Mountain Top Trucking Co.*, 18 FMSHRC 487, 488 (April 1996).

As a party, Wylie does not require the Secretary's approval for his agreement to settle the issue of his monetary relief. Consequently, a telephone conference with Wylie, opposing counsel for Allegheny, and the Secretary will be scheduled so I can hear directly from Wylie whether he accepts the settlement terms with respect to the amount of his compensatory relief, or, whether Wylie chooses to pursue his claim of alleged discrimination through an evidentiary hearing. The telephone conference will be limited solely to the motion to approve settlement between Allegheny and Wylie in Docket No. PENN 2018-0158-DM. The telephone conference will not address the issues concerning deterrence-related sanctions that are the subject of Docket No. PENN 2018-0275.

The telephone conference will be recorded and transcribed. To preserve the pending nature of Allegheny's request for confidentiality, the transcript of the telephone conference will be placed under seal.

ORDER

Consequently, consistent with the above, **IT IS ORDERED** that the captioned parties participate in a conference call scheduled for 2:00 p.m. on Tuesday, January 22, 2019. The parties will receive an email containing the information required to participate in the conference call.

Any procedural questions concerning the matters discussed herein should be directed to my Law Clerk, Noah Meyer, at nmeyer@fmshrc.gov or (202) 233-4010.

/s/ Jerold Feldman
Jerold Feldman
Administrative Law Judge

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January 18, 2019

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), ON BEHALF OF DELBERT LEIMBACH, Applicant v. HUBER CARBONATES, LLC Respondent	DISCRIMINATION PROCEEDING Docket No. LAKE 2019-0106-DM No. NC-MD-19-01 Mine: Quincy Plant Mine ID: 11-02627

ORDER DENYING RESPONDENT'S MOTION TO DISMISS OR IN THE ALTERNATIVE MOTION TO STAY, RECUSE, AND REINVESTIGATE

Before: Judge William B. Moran

Before the Court is Respondent Huber Carbonates, LLC's Motion to Dismiss or in the Alternative Motion to Stay, Recuse, and Reinvestigate. ("Motion"). The Secretary filed an Opposition to the Motion ("Opposition"). For the reasons which follow, the Court denies the Motion to Dismiss and also denies the Alternative Motion because the Court does not have the authority to order a stay, recusal or reinvestigation in connection with an Application for Temporary Reinstatement.

Huber's Motion seeks an order "dismissing the Secretary's Application for Temporary Reinstatement or, in the alternative, an Order staying the Secretary's Application for Temporary Reinstatement until such time as the Mine Safety and Health Administration ("MSHA") has recused the individuals involved in investigating Delbert Leimbach's ("Leimbach") Section 105(c) discrimination complaint and completing a new investigation into the merits of Leimbach's allegations by MSHA representatives who have not seen the email correspondence described in this motion."[1] Motion at 1.

[1] On December 26, 2018, following a hearing held on December 19, 2018, the Court issued an Order, granting the Secretary's Application for the Temporary Reinstatement of Delbert Leimbach, finding that the Application was not frivolously brought. Subsequently, on January 8, 2019, the parties filed a joint motion seeking to amend that Order granting temporary reinstatement to economically reinstate Leimbach as of December 26, 2018. The Court GRANTED the joint motion on January 11, 2019.

Background

The heart of the controversy precipitating the Motion may be concisely stated. On August 8, 2018, outside counsel for Huber sent what it contends was an attorney-client privileged and confidential email to Huber. The email was addressed to Huber's in-house counsel and members of management. According to Huber's Counsel, the email contained legal advice about a separate temporary reinstatement proceeding (Docket Number LAKE 2018-0343), before a different administrative law judge, and involving a different employee, although it also included legal advice regarding Leimbach. Motion at 2. Subsequently, according to the Motion, a Huber management member sent the email to another Huber employee, an EH&S [Environmental Health and Safety] Coordinator. That EH&S employee then forwarded the email to Leimbach, an act Huber characterizes as inappropriate and without authorization. *Id.* at 3. Leimbach then, again according to the Motion, forwarded the email to an MSHA special investigator and Leimbach filed a section 105(c) discrimination complaint under the Mine Act. The text of Leimbach's complaint asserted that his firing was based on forwarding the email to MSHA.

Huber's Counsel endeavored to have the email returned and asserted that an attorney for the Secretary acknowledged in September 2018 "that the email 'contained exchanges between management and counsel that meet the requirements of attorney-client communications.'" *Id.* at 4. Huber also asserts that the email also contains attorney work product, and as such, that is also privileged. *Id.* Later in September Huber fired Leimbach, asserting that the action was taken for violating company policies including sharing the email created by Huber's Counsel. Subsequently, the Secretary's Counsel and Huber's Counsel attempted to reach an accord about the disposition of the email but they were unable to come to an agreement.

The impact of the email was not limited to the Leimbach complaint. As noted, it was also connected with another discrimination complaint brought by a different individual, whose complaint was investigated by a different special investigator for MSHA and which case was before a different administrative law judge, in Docket No. LAKE 2018-0387-DM. In that separate discrimination proceeding, Huber's Counsel filed a motion similar in intent to the Motion currently before this Court. The administrative law judge assigned to that case dealt with the attorney-client privilege assertion by referring the question to another administrative law judge. That "referral judge" concluded that the email was subject to the attorney-client privilege being claimed. Motion at 5, Exhibit 2.

The Motion then turns to the Application for Leimbach's temporary reinstatement. Respondent observes that the four corners of Leimbach's complaint speak only to his actions regarding sharing the email with MSHA. As the Court noted in its Order of temporary reinstatement, the basis of a discrimination complaint is not limited to words in the complaint but includes MSHA's interview of the individual making the complaint. Order Granting Temporary Reinstatement at 4, *citing Hatfield v. Colquest Energy*, 13 FMSHRC 544 (Apr. 1991). The reason for this inclusion is plain – a person filing a discrimination complaint is not necessarily savvy about expressing all the possible bases for the complaint and therefore the MSHA interview and investigation are deemed to be part of the charging document.

Respondent's Contentions/Arguments

Huber begins its argument by noting that the requirements for a complaint include "a short and plain statement of the facts, setting forth the alleged discharge, discrimination or interference, and a statement of the relief requested." Motion at 6, *citing* 29 C.F.R. § 2700.42. Huber also contends that "the doctrine of collateral estoppel applies to 'preclude the relitigation in a subsequent suit of any issues actually litigated and determined in the prior suit.'" *Id.* (internal citations omitted). Focusing on the latter point, Huber asserts that Leimbach's Application for Temporary Reinstatement must be dismissed, because it is based on the email claimed to be within the attorney-client privilege, which Leimbach was not entitled to possess, and because the administrative law judge in that other discrimination case, which matter did not involve Leimbach, determined that the email was within the attorney-client privilege. *Id.*

From this, Huber contends that any use of the email is unwarranted and, since it cannot form the basis of any discrimination complaint filed by Leimbach, his Application and Complaint should be dismissed. Huber then stakes out its alternative requested relief if the Application is not dismissed. The alternative is that the Application be stayed until MSHA both recuses the individuals involved in investigating Leimbach's Section 105(c) discrimination complaint and undertakes and completes a new investigation into the merits of Leimbach's allegations, performed by new MSHA representatives, with those individuals being untainted by knowledge of the information in the Huber email. *Id.* at 7.

The Secretary's Opposition to Huber's Motion

At the outset the Secretary, in his Opposition, contends that Huber's Motion fails "to provide any reason to delay any temporary reinstatement hearing." Opposition at 1. As the temporary reinstatement hearing occurred before the Court had an opportunity to review the Secretary's Opposition and the Court, as noted above, granted the application, reinstating Leimbach, that aspect is now moot and the Court treats the Motion as a motion to reconsider whether the application was frivolously brought. Since the Court's determination of frivolity was not based on the email issue at all, but rather on separate and independent grounds of discrimination, the determination of reinstatement stands.

The Secretary also contends that "[t]his Court should also deny Huber's motion because the Court is not bound by Judge Rae's decision,[2] and because collateral estoppel does not apply in this case." *Id.* Instead, the Secretary asserts that Huber's filing is simply a *motion in limine* seeking to exclude potential evidence. Granting such a motion, excluding the email, "would be manifestly unfair to [the] Complainant." *Id.*

[2] The Secretary notes, and it is not disputed, that there are two separate discrimination cases involving different complainants and that those matters are before different administrative law judges. What the cases have in common is the question of the August 8, 2018 email between Huber and its legal counsel. They are: *Secretary on behalf of Justin Hickman v. Huber Carbonates, LLC*, Docket No. LAKE 2018-0387, which is before Judge Rae and *Secretary on behalf of Delbert Leimbach v. Huber Carbonates, LLC*, Docket No. LAKE 2019-0106, before this Court.

The Secretary acknowledges that Leimbach's temporary reinstatement application was based, *in part*, on information he learned through an August 8, 2018 email "between respondent, respondent's counsel, and a non-management level employee." *Id.* at 3. However, the Court takes note that the temporary reinstatement application was not based solely upon the August 8, 2018 email. In fact, at the temporary reinstatement proceeding, the Court's subsequent determination that the application was not frivolously brought was based entirely on information *apart* from that email. *See*, this Court's Order Granting Temporary Reinstatement, December 26, 2018, at 3 n.1.

Importantly, the Secretary announced that his decision to proceed with evidence apart from the August 8, 2018 email at the temporary reinstatement proceeding, did not constitute a concession that the email is not relevant nor that it would be improper to consider the email in a discrimination case on the merits. Opposition at 3.

In the argument section of the Secretary's Opposition, the Secretary asserts that Huber "seeks to dismiss the entire Leimbach TR Application because it disagrees with *one* of the Secretary's theories of the case." *Id.* at 4. (emphasis in original). In this regard the Opposition notes that the Secretary's Leimbach TR Application, [ ] was accompanied by an affidavit from Special Investigator David Schwab, [and that it] sets forth multiple instances of protected activities, including Mr. Leimbach's communications with MSHA and his safety-related complaints made directly to Huber." *Id.* at 5. The Secretary also challenges Huber's reliance on 29 C.F.R. § 2700.42, and Administrative Law Judge Miller's decision in *Secretary o/b/o Eric Greathouse et al v. Monongalia County Coal Co. et al*., 37 FMSHRC 2892 (Dec. 2015) (ALJ)("*Greathouse*"), because "[t]he pleading and evidentiary standards are different for temporary reinstatement proceedings than they are for merits proceedings."[3] Opposition at 5-6. The Court agrees. *Greathouse* was not a temporary reinstatement proceeding.

The Secretary also addresses whether the Court is bound by the decision of Judge Rae regarding the August 8, 2018 email and whether collateral estoppel applies, arguing that neither so limits this Court. Noting that the determination of an administrative law judge is not binding on another judge, the Secretary points to 29 C.F.R. part 2700.69(d) and *Big Ridge, Inc. v. FMSHRC*, 715 F.3d 631, 640 (7th Cir. 2013), which expressly address the subject of precedence. As to the collateral estoppel assertion, the Secretary argues that the email issue cannot be described as having been "determined," because Judge Rae's decision is not final and there is no

[3] The Secretary similarly dismisses Huber's contentions that Leimbach inappropriately retained the August 8, 2018 email, that he admitted sharing the email with others, and that he was fired for violating several company policies and breaching his confidentiality agreement, because those contentions are not evidence, but rather arguments by Huber's Counsel. Further, at the temporary reinstatement stage, the Secretary argues that it is outside the judge's duty to resolve conflicts in testimony or to entertain the operator's rebuttal or affirmative defenses. Such proceeding is only to determine whether the application has been frivolously brought. Opposition at 6-7.

established identity of issue.[4] Beyond those issues, in the temporary application case before her, as Judge Rae temporarily reinstated Mr. Hickman *a month before Huber's motion for declaratory judgment*, the email determination could not be deemed as necessary to her temporary reinstatement decision. Opposition at 8-9.

Last, the Secretary contends that "Huber's demand for this Court to 'stay, recuse, and reinvestigate' this matter must be rejected because the requested remedies are outside the scope of Commission authority to grant." *Id.* at 9. In this regard, the Secretary asserts that the Commission is without authority to issue "a declaratory order granting such relief."[5] *Id.*

Discussion

After receiving the Motion and the Opposition, the Court held a conference call with the parties, *procedurally* addressing the logistics of addressing the Motion and whether its order on the Motion could include a ruling on whether the email is within the attorney-client privilege claim and, if so, whether it was waived in any event. The Court was initially inclined to address those issues in this Order, but as a result of the conference call, it reconsidered that approach and directs that those issues now be addressed by a separate motion.[6]

Nevertheless, speaking to the Motion at hand in a limited fashion, Huber asserts that the emails in issue constitute attorney-client privileged communications and they also contain attorney work product, which is also privileged. It is true that, in a distinct Mine Act discrimination case, involving a different miner, and before a different administrative law judge, the same Huber emails were determined to be within the attorney-client privilege. Huber's Counsel seeks the same outcome regarding those emails in this case.

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[4] There are problems with collateral estoppel claim in that it may be questioned whether the two cases involve the same parties, but perhaps more significantly, whether there has been a final adjudication on the merits. The latter seems not to have occurred. Further, the issue of waiver of the attorney-client claim has clearly not been determined in that other matter. *Compare with Sec. v. Southwest Quarry and Materials,* 2003 WL 145588 at *2-3 (Jan. 2003) (ALJ).

[5] On the issue of declaratory orders, among other authority cited, the Secretary states that "declaratory orders are 'noncoercive declarations of rights rather than orders imposing penalties or liabilities' … [and that] [t]he only difference between declaratory orders or judgments and other orders and judgments is presence or absence of the element of coercion." Opposition at 10, *citing Administrative Declaratory Orders*, 13 Stan. L. Rev. 307, 307 (1961); Kenneth Culp Davis, *Administrative Law Treatise* § 4.10 at 268 (1958). The Secretary comments that "this constraint is appropriate to ensure the agency is limited to adjudicating only the specific types of claims it is authorized to hear, rather than functioning more like a court of general jurisdiction." *Id.*

[6] Thus the Secretary and Huber will have a separate opportunity to *flesh out* the email issues. "To flesh out something is to give it substance, or to make it fuller or more nearly complete. …To *flush out* something is to cause it to leave a hiding place." *Flesh Out*, Merriam-Webster's Collegiate Dictionary (11th ed. 2003).

As described above, Huber asserts that, as it prevailed in the distinct discrimination matter before a different judge, collateral estoppel controls the attorney-client contention in this case as well. From that premise, it contends that since Leimbach's complaint rests on that privileged material and it may not be considered, his complaint and consequently the application must fail.

Huber's Motion must fail because the Secretary's Application for Leimbach did not in fact rest solely upon the email, nor did the Court's December 26, 2019 Order Granting Temporary Reinstatement rely at all upon the email material. In addition, the Court agrees with the arguments advanced by the Secretary of Labor that collateral estoppel is not applicable to this matter. Accordingly, Huber's Motion to Dismiss is **DENIED**.

As to Huber's alternative motion to stay, recuse and reinvestigate Leimbach's discrimination complaint anew, with no part of such reinvestigation involving the Huber emails and that it be performed by individuals who have not been exposed to those emails, that is also **DENIED**. Motion at 7-8. In making this argument, Huber simply repeats the points it made in seeking its Motion to Dismiss. Key in the Court's denial of Huber's alternative motion is no prior decision by the Commission is cited to show that the Court has the authority to order reinvestigation by the Secretary. When presented with an Application for Temporary Reinstatement, the Court is faced with a single issue – whether the Application was frivolously brought. In its December 26, 2018 Order granting the temporary reinstatement application for Delbert Leimbach, the Court, relying only on testimony and exhibits apart from the challenged emails, found that the application was not frivolous. [7]

The Court, now in possession of the Huber email, which was provided by Respondent's Counsel, at the Court's direction, for its *in camera* review, awaits further arguments on the issues of whether the email is within the attorney-client privilege claim and, if so, whether it was waived in any event. The parties are advised that the Court is receptive to a conference call, if there are questions regarding how to proceed on those issues.

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

[7] Huber's Motion refers to its motion seeking declaratory relief in the *Hickman* matter before Judge Rae, but the Motion here does not seek such relief. Although declaratory relief may be available before the Commission in some instances, Huber has neither asserted, nor articulated, the basis for such relief here. *See, e.g.*, *North American Drillers, LLC,* 34 FMSHRC 352, 356 (Feb. 2012).

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February 6, 2019

MICHAEL DEUSO, Petitioner v. SHELBURNE LIMESTONE CORP., Respondent	DISCRIMINATION PROCEEDING Docket No. YORK 2019-0015-DM Mine: SLC Swanton Div. Mine ID: 43-00030

ORDER TO COMPLAINANT TO SHOW CAUSE

This case is before me on a pro se Complaint of Discrimination pursuant to Section 105(c)(3) of the Federal Mine Safety and Health Act of 1977 ("Mine Act") filed on December 12, 2018 with the Commission. Respondent filed a Motion to Dismiss on January 8, 2019. The case was assigned to the undersigned on January 24, 2019.

Complainant's claim of discrimination stems from an incident alleged to have occurred at the Respondent's main office on April 21, 2017. On May 22, 2017, Complainant e-mailed the Mine Health and Safety Administration's (MSHA) Albany Field Office supervisor recounting the alleged incident. At that time, Complainant did not raise any issue of protected activity under the Mine Act, but did assert that he was terminated because of his age, and that a physical altercation with Respondent's representatives occurred after he was terminated by the Respondent. Less than four hours later, MSHA's supervisor responded to Complainant's e-mail by asserting that he "was sorry to hear about this very unfortunate incident," that MSHA lacked jurisdiction over an incident that occurred at Respondent's main office, and that "there is nothing that MSHA can do to assist in the matter." The MSHA supervisor's reply email further stated that Respondent's "main office would fall under VOSHA [Vermont OSHA] jurisdiction and they should be made aware of the incident," that age discrimination is a violation of the Age Discrimination in Employment Act (ADEA), and "[i]f you seek legal counsel on this matter, they should be well versed in the laws that have been violated."

Complainant subsequently sought redress of his alleged improper termination claim with the Office of Administrative Hearings at the Department of Labor for the State of Vermont. Complainant's claim has been active in the Vermont administrative adjudication system and the state courts[1] through at least October 30, 2018.

[1] *Deuso v. Vermont Department of Labor*, No. 2017-425, 2018 WL 2100366 (Vt. May 4, 2018) (unpub. mem.) (reversed and remanded for further proceedings).

On December 12, 2018, almost 19 months after his e-mail conversation with MSHA, the Complainant filed a discrimination claim with the Commission alleging he was discharged for activity protected under the Mine Act. Complainant alleged, in pertinent part, his "belief that for the past couple of years the owners were looking for ways to force me to quit because I was a highly paid employee and by making my job unbearable that they would push me out the door." Complainant further avers, for the first time, that on the week of April 17, 2017, the owners came to the mine and "made adjustments on the primary and secondary feeders and the system [was] running at 100 percent capacity using the conveyor belt amp meters as guides[.] [I]t had rained and the stone was flowing faster through the feeder pans and the belt amps were starting to run past the amp setting that they had the feeders set at so I tweaked the setting on the stone crusher to maintain the belt amperage." Complainant further alleges that after the owners came out of a meeting, one of them asked why he had adjusted the feeder knob. Complainant explained, and was told by the owner to "set the dial on 100 percent no matter what happened." Complainant then turned the dial back to 100 percent and gave the owner a brochure of a belt speed sensor and asked him to install it on the conveyor belt. The owner left with the brochure. Complainant alleges that a couple of days later, he was called down to the main office to be fired for touching the feeder dial.

On January 8, 2019, Respondent filed a Motion to Dismiss arguing that Complainant filed a Section 105(c)(1) complaint with MSHA on May 22, 2017, that MSHA denied the complaint that same day, and that Complainant did not timely file a Section 105(c)(3) complaint within 30 days of MSHA's denial. In addition, Respondent argues that the acts complained of took place at the Respondent's main office, which is not under MSHA jurisdiction, and age discrimination is not covered by the Mine Act. Finally, Respondent relies on and attaches Vermont administrative decisions finding that Complainant was terminated for insubordination and failure to obey a direct order.[2]

Section 105(c)(1) of the Mine Act provides, in pertinent part, that:

> No person shall discharge or in any manner discriminate against . . . or otherwise interfere with the exercise of the statutory rights of any miner . . . in any coal or other mine subject to this Act because such miner . . . has filed or made a complaint under or related to this Act, including a complaint notifying the operator or the operator's agent . . . of an alleged danger or safety or health violation in a coal or other mine, or because such miner . . . instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in any such proceeding, or because of the exercise by such miner . . . on behalf of himself or others of any statutory right afforded by this Act.

Section 105(c)(2) of the Mine Act provides, in pertinent part, that:

> 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

[2] *See* note 2, *supra*.

> complaint to the respondent and shall cause such investigation to be made as he deems appropriate. . . .

Section 105(c)(3) of the Mine Act provides, in pertinent part, that:

> Within 90 days of the receipt of a complaint filed under paragraph (2), the Secretary shall notify, in writing, the miner . . . of his determination whether a violation has occurred. If the Secretary, upon investigation, determines that the provisions of this subsection have not been violated, 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 paragraph (1) . . . .

Under Section 105(c)(3) of the Mine Act, assuming arguendo that MSHA's e-mail communication on May 22, 2017 is considered a determination after investigation that no violation of the Mine Act occurred, Complainant had 30 days to file his 105(c)(3) action with the Commission. As noted, Complainant filed with the Commission almost 19 months later. The Commission has held however, that a claim may be considered despite untimely filing due to "justifiable circumstances, including ignorance, mistake, inadvertence and excusable neglect." *Perry v. Phelps Dodge Morenci, Inc.,* 18 FMSHRC 1918, 1921-22 (Nov. 1996). There is no evidence in the record that the Secretary's May 22, 2017 determination that the Mine Act had not been violated was based upon any investigation of the conveyor belt incident raised for the first time in the Complainant's filing with the Commission. *Cf. Hatfield v. Colquist Energy, Inc.*, 13 FMSHRC 544 (Apr. 1991).

In light of the foregoing, the Complainant is directed to **SHOW CAUSE** why his claim should not be dismissed as untimely filed, or dismissed because the matters contained in his Commission filing were not investigated by the Secretary such that the statutory prerequisites for a complaint pursuant to Section 105(c)(3) have not been satisfied.

Complainant is directed to respond within two weeks of receipt of this order. Respondent will have two weeks from the filing of Complainant's response to submit a reply to Complaint's response.

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

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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February 13, 2019

GABRIEL SILVA, Complainant, v. ROCKWELL MINING, LLC, BLACKHAWK MINING, LLC, BLACK OAK MINING, LLC, Respondents.	DISCRIMINATION PROCEEDING Docket No. WEVA 2018-0565-D MSHA No. HOPE-DC-2018-02 Mine: Black Oak Mine Mine ID: 46-09152

ORDER DENYING RESPONDENTS' MOTION FOR SUMMARY DECISION

Before: Judge Feldman

The captioned discrimination proceeding is before me based on a discrimination complaint filed pursuant to section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, as amended, 30 U.S.C. § 815(c)(3) (the "Act"), by Gabriel Silva against Rockwell Mining, LLC, Blackhawk Mining, LLC, and Black Oak Mining, LLC (collectively, "Respondents"). The record reflects that Silva was employed at all relevant times as a utility man by Black Oak Mine, LLC ("Black Oak") at its facility located in Wharton, West Virginia. Compl. at 1. Silva alleges, in essence, that his three day suspension that followed his refusal to mix a Quikrete dry sealant because of his concern regarding the adequacy of the inhalation protection provided to him by Black Oak violates the antidiscrimination provisions of section 105(c)(1) of the Act.[1] Compl. at 2-4. On December 7, 2018, the Respondents filed a Motion for Summary Decision ("Respondents' Motion") seeking the dismissal of Silva's complaint. Silva filed an opposition to the Respondents' Motion on December 19, 2018 ("Complainant's Opposition"). The United Mine Workers of America ("UMWA") represents Silva in this matter. *Id*. at 4.

I. Background

Silva asserts that he refused to mix water with powdered dry sealant because of his concern that the product is a lung irritant. Compl. at 2-3. Silva alleges that his refusal was due to his concern that the inhalation protection provided by the paper Moldex 2300N95 respirator, supplied by Black Oak, was inadequate. *Id*. at 3. Silva further alleges that his request for a 3M filtered respirator that contained a rubber seal, that he believed would provide better inhalation protection, was denied by Black Oak. Compl. Opp., Ex. A at 2-3. In contrast, Black Oak alleges

[1] Section 105(c)(1) provides in pertinent part, "No person shall discharge or in any manner discriminate against [a miner] . . . because such miner . . . made a safety complaint related to this Act." 30 U.S.C § 815(c)(1).

that the inhalation protection provided by the paper Moldex 2300N95 respirator was sufficient because it was the respirator recommended by Quikrete, the manufacturer of the powdered sealant. Resp't Mot. at 1-2.

II. Analysis

a. Prima Facie Case

Section 105(c)(1) of the Act prohibits a mine operator from discriminating against a miner because the miner has engaged in safety-related protected activity. 30 U.S.C. §815(c)(1). To establish a prima facie case under section 105(c)(1) of the Act, it must be shown, by a preponderance of the evidence, that the complainant engaged in safety-related protected activity, and, that the claimant was the victim of adverse action that was motivated, at least in part, by that activity. *Jeffrey Pappas v. Calportland Co. and Riverside Cement Co.,* 40 FMSHRC 664, 668 (May 2018) (citing *Turner v. Nat'l Cement Coal Co. of California*, 33 FMSHRC 1059, 1064-67 (May 2011); *Sec'y of Labor on behalf of Pasula v. Consolidation Coal Co*., 2 FMSHRC 2786, 2799 (Oct. 1980); *Sec'y of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 817-18 (Apr. 1981).

b. Protected Work Refusal

The Commission has addressed the evidentiary criteria for determining whether a work refusal is protected activity as contemplated by section 105(c)(1) of the Act:

> The Mine Act grants miners the right to complain of a safety or health danger or violation, but does not expressly state that miners have the right to refuse to work under such circumstances. Nevertheless, the Commission and the courts have recognized the right to refuse to work in the face of such perceived danger. *See Price*, 12 FMSHRC at 1514; *Cooley*, 6 FMSHRC at 520. In order to be protected, work refusals must be based upon the miner's "good faith, reasonable belief in a hazardous condition." *Robinette*, 3 FMSHRC at 812; accord *Gilbert v. FMSHRC*, 866 F.2d 1433, 1439 (D.C. Cir. 1989). A good faith belief "simply means honest belief that a hazard exists." *Robinette*, 3 FMSHRC at 810. Consistent with the requirement that the complainant establish a good faith, reasonable belief in a hazard, "a miner refusing work should ordinarily communicate, or at least attempt to communicate, to some representative of the operator his belief in the safety or health hazard at issue." *Secretary of Labor on behalf of Dunmire v. Northern Coal Co.*, 4 FMSHRC 126, 133 (Feb. 1982).
>
> Once it is determined that a miner has expressed a good faith, reasonable concern about safety, the analysis shifts to an evaluation of whether the operator addressed the miner's concern

> "in a way that his fears reasonably should have been quelled." *Gilbert*, 866 F.2d at 1441; *see also Secretary of Labor on behalf of Bush v. Union Carbide Co.*, 5 FMSHRC 993, 998-99 (June 1983); *Thurman v. Queen Anne Coal Co.*, 10 FMSHRC 131, 135 (Feb. 1988), aff'd mem., 866 F.2d 431 (6th Cir. 1989). A miner's continuing refusal to work may be deemed unreasonable after an operator has taken reasonable steps to dissipate fears or ensure the safety of the challenged task or condition. *See Bush*, 5 FMSHRC at 998-99.

Bryce Dolan v. F & E Erection Co., 22 FMSHRC 171, 177 (Feb. 2000).

c. Summary Decision

Commission Procedural Rule 67(b), which tracks the provisions of summary judgment Rule 56(a) of the Federal Rules of Civil Procedure, provides:

> 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); *see* Fed. R. Civ. P. 56(a).

The Commission has cautioned against the broad approval of motions for summary decision, noting that, "[s]ummary decision is an extraordinary procedure. If used improperly it denies litigants their right to be heard." *Missouri Gravel Co.*, 3 FMSRC 2470, 2471 (Nov. 1981) (footnote omitted). The Respondents, as the parties moving for summary decision, bear the burden of demonstrating there are no genuine disputes as to material facts. *See Kenamerican Res., Inc*., 38 FMSHRC 1943, 1946 (Aug. 2016) (citing *Celotex Corp v. Catrett*, 477 U.S. 317, 323 (1986); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970)). If the Respondents satisfy their burden, the focus shifts to whether Silva, as the non-movant party, has established a genuine dispute as to material fact. *Id*. (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986); *Scott v. Harris*, 550 U.S. 372, 380 (2007); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-587 (1986)). The inferences to be drawn from the underlying facts allegedly supporting the motion must be viewed in the light most favorable to the party opposing the motion. *Id*. (citing U.S. v. Diebold, Inc., 369 U.S. 654, 655 (1962)).

Disposition of the Respondents' Motion for Summary Decision requires identification of several outstanding issues of material fact that must be viewed in the light most favorable to Silva. Namely: (1) whether Silva's work refusal was based on a reasonable good faith belief that the respiratory protection provided by Black Oak did not adequately protect him from the potentially toxic inhalation hazard posed by the mixing of the powdered dry sealant; (2) whether Silva adequately communicated his inhalation concerns to Black Oak; and (3) whether Black Oak responded to Silva in a manner that should have adequately quelled Silva's fears. Given

unresolved nature of these outstanding questions of material fact, the Respondents' Motion for Summary Decision must be denied.

d. Proper Parties in this Matter

The record reflects that Blackhawk Mining, LLC, is the parent company of Rockwell Mining, LLC, and Black Oak Mining, LLC. Compl. Opp., Ex. C at 1. The Respondents assert, in essence, that Blackhawk Mining, LLC, and/or Rockwell Mining, LLC, are not proper parties as they do not operate the Black Oak Mine, and are not Silva's employer. Resp't Mot. at 2, n. 1. I construe the Respondents' assertion as a motion to strike Black Hawk Mining, LLC, and/or Rockwell Mining, LLC, as Respondents in this proceeding. The proper inquiry in a discrimination proceeding is whether a named respondent has the ability to make a complaining miner whole. *See Sec'y of Labor o/b/o Shemwell v. Armstrong Coal Co., Inc.*, et al., 34 FMSHRC 894, 898-99 (April 2012) (ALJ) (Noting that the "legislative history of the Mine Act reflects Congress' concern that effective relief must be afforded to victims of discrimination."). It is doubtful that Black Oak Mining, LLC, is incapable of providing the relief sought by Silva, namely the reimbursement of lost pay as a consequence of Silva's three day suspension. However, the issue of whether Black Oak Mining, LLC, should be the sole Respondent in this proceeding shall be held in abeyance to afford the parties an opportunity to address this issue in their post-hearing briefs.

ORDER

In view of the above, **IT IS ORDERED** that the Respondents' Motion for Summary Decision **IS DENIED** and that this matter shall be scheduled for hearing. The hearing date and location will be specified in a subsequent order.

IT IS FURTHER ORDERED that the Motion to Strike Black Hawk Mining, LLC, and/or Rockwell Mining, LLC, at this early phase of this proceeding **IS DENIED**.

/s/ Jerold Feldman
Jerold Feldman
Administrative Law Judge

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/nm

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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February 25, 2019

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) on behalf of JAMES DEE TERRY Complainant v. PROSPECT MINING & DEVELOPMENT CO., LLC, Respondent	TEMPORARY REINSTATEMENT PROCEEDING Docket No. SE 2019-0071-D MSHA Case No. BARB-CD-2019-1 Mine: Carbon Hill Mine Mine ID: 01-03389

ORDER GRANTING TEMPORARY REINSTATEMENT

Before: Judge McCarthy

This matter is before me on the Secretary of Labor's Application for Temporary Reinstatement filed on behalf of miner James Dee Terry pursuant to Section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801, et seq., as amended ("Mine Act"), and 29 C.F.R. § 2700.45. The Secretary seeks an order temporarily reinstating Terry to his former position with Prospect Mining & Development Co., LLC, pending the investigation and disposition of a Complaint of Discrimination under Section 105(c) of the Act.

I. Statement of the Case

Terry was a miner within the meaning of the Mine Act for Prospect Mining & Development beginning in December 2016 when Prospect Mining acquired Terry's previous employer. Terry was employed as Manager of Special Projects and Safety Compliance from approximately the summer 2017 until September 2018. The Secretary of Labor, on behalf of Terry, alleged that on August 29, 2018, Terry filed a safety complaint with the Mine Safety & Health Administration ("MSHA") regarding conditions at the mine, pursuant to which MSHA conducted an inspection. The Secretary alleges that on September 10, 2018, Terry was reassigned to a position taking inventory of equipment at the Mine and the duties of his previous position were assigned to other employees. The Secretary further alleges that in early November 2018, Terry communicated additional safety concerns to Respondent.

On November 28, 2018, Terry's employment was terminated by the Respondent. Terry filed a discrimination complaint with MSHA on December 3, 2018. On January 23, 2019, after an investigation conducted by MSHA special investigator Freddie N. Fugate, the Secretary filed an application ("Application") for temporary reinstatement with the Commission. The Secretary requested in its Application that the Commission issue an order "directing the Respondent to

reinstate James Dee Terry to the position he held immediately prior to the reduction in his job duties on or about September 10, 2018, or to a similar position at the same rate of pay, with the same benefits, and with the same or equivalent duties assigned to him." Application at 3.

On February 1, 2019, Respondent filed a formal request for a hearing on the temporary reinstatement matter. On February 5, 2019, a conference call was held to set a hearing date for this matter. The hearing was scheduled for February 11, 2019. However, Respondent withdrew its request for a hearing on February 8, 2019. In the same document as the withdrawal of the request for a hearing, Respondent moved for issuance of an order economically reinstating Terry in lieu of physical reinstatement. See Withdrawal of Request for Hearing and Motion for Temporary Economic Reinstatement ("Motion"). In the Motion, the Respondent alleged that Terry's job responsibilities "evolved over time given his inability to work with others and continued, unsatisfactory job performance." Motion at ¶ 5. The Respondent further claimed that "Terry exhibited an abrasive attitude to all individuals with whom he worked, including employees, contractors, and MSHA personnel," and that "[s]ince his discharge, Prospect Mining has received threats made by contract miners towards Terry if he were to return to the mine property." *Id*. Respondent also alleged that Terry refused to return filing cabinets, furniture, and a personal computer that all belonged to Respondent, and that Respondent "has also uncovered some troubling activity Terry was engaged in during his employment related to the administration of certain workers' compensation claims." Motion at ¶ 6. Respondent added in a footnote that it was "ready to support these statements with affidavits if necessary or requested by the Court." Motion at ¶ 6 n.1.

During a February 8, 2019 conference call with the parties to discuss Respondent's Motion, Terry indicated that he objected to Respondent's motion and wished to be temporarily reinstated to his former position at Carbon Hill Mine, pending disposition of his discrimination complaint. Terry also indicated that he would submit his own reply ("Reply") to the allegations contained in Respondent's Motion.

On February 12, 2019, the Secretary, the Respondent, and Terry conferred to discuss a possible settlement agreement to temporarily economically reinstate Terry. The following day, the Secretary represented to the undersigned that the parties had reached an agreement in principle as to economic reinstatement. In the early evening on Thursday, February 14, 2019, however, the Secretary informed the undersigned that "[i]n discussing the terms of the potential agreement today, it has become clear that the parties do not have an agreement." During a conference call on the morning of Friday, February 15, 2019, Respondent confirmed that although the parties had failed to reach agreement on the specific terms of temporary economic reinstatement, Respondent's withdrawal of a hearing request was unconditional.

On February 15, 2019, Terry, on his own behalf, filed his Reply to Respondent's Motion. In his Reply, Terry stated that he did not receive notice about the change to his job title, any dissatisfaction with his job performance, or complaints by others about him or his work. Reply at ¶ 3-5. Terry also asserted that he "did not administer any workers' compensation claims for Prospect Mining," only removed items from the Carbon Hill Mine that belonged to him, and that the only threat Terry received was from Prospect Mining CEO Robert Schneid threatening to break his legs should Terry return to the property. Reply at ¶ 6-10. Terry requested that the

undersigned either order temporary physical reinstatement, or in the alternative, order temporary economic reinstatement with "the unconditional right to obtain other employment." Reply at ¶ 13.

On February 15, 2019, after Terry filed his Reply, Respondent filed a supplemental evidentiary submission ("Supplement") in support of its motion for temporary economic reinstatement. The Supplement included four exhibits. The first, a declaration from CEO Robert Schneid, stated that Terry was removed from his original position due to "his confrontational attitude toward parties working on the project and his inability to get tasks completed on time and on schedule." Supplement Exhibit A, Declaration of Robert Schneid, at ¶ 8. Schneid also asserted that Respondent was unable to provide training records for certain employees to MSHA because Terry, who had previously been in charge of maintaining training records, could not produce them for Respondent. *Id.* at ¶ 15. The second exhibit was a description of the key responsibilities of Terry's prior position as Manager of Special Projects and Safety Compliance. The third exhibit was an e-mail communication sent on August 15, 2018 between GMS Mine Repair and Maintenance ("GMS") in which GMS employees expressed concern regarding Terry's attitude towards GMS. The final exhibit was a communication dated November 7, 2018 between Schneid and Terry regarding Terry's job responsibilities as of September/October 2018.

On February 19, 2019, Terry filed a second reply ("Second Reply") with the Commission disputing the Supplement. Specifically, Terry alleged that he made safety complaints directly to CEO Robert Schneid in August and November. Second Reply at ¶ 1-2. Terry submitted exhibits that he alleges prove that Schneid was aware of safety violations committed by GMS[1] and the Respondent. Second Reply, Exhibits A-B. Terry reproduced an e-mail communication with MSHA from December 12, 2018, after his termination, where he denied withholding training records from Respondent. Second Reply, Exhibit D. Finally, Terry reiterated his request to be temporarily physically reinstated or temporarily economically reinstated with an unconditional right to seek alternative employment.

On February 19, 2019, after Terry submitted his Second Reply, the Secretary submitted his own response. The Secretary declined to take a position on the content of the Operator and Terry's filings while the Secretary's investigation remained pending, but instead the Secretary argued that I lack the authority under the Mine Act and the Commission's Procedural Rules to grant the Respondent's motion for temporary economic reinstatement over Terry's objections.

II. Legal Principles and Analysis

Section 105(c)(2) of the Mine Act provides that, as to claims of discrimination, "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." Commission Procedural Rule 45(d) states that "[t]he scope of a hearing for temporary reinstatement is limited to a determination as to whether the miner's complaint was frivolously brought."

[1] Based on the e-mail communications provided in Exhibit C of the Supplement and Exhibit A of Terry's Second Reply, it appears that GMS and Z&J are independent contractors, and not subsidiaries of Prospect Mining and Development Co., LLC.

The elements of a discrimination claim provide a useful framework to assess whether an allegation is frivolous. *Secretary of Labor on behalf of Williamson v. CAM Mining, LLC*, 31 FMSHRC 1085, 1088 (Oct. 2009). To establish a prima facie case of discrimination under section 105(c) of the Act, a complainant must establish (1) that he or she engaged in protected activity and (2) that the adverse action complained of was motivated in any part by that activity. *Secretary of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786 (Oct. 1980), *rev'd on other grounds*, 663 F.2d 1211 (3d Cir. 1981); *Secretary of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803 (Apr. 1981).

For a temporary reinstatement proceeding, the Secretary need not prove a causal nexus exists between the protected activity and the adverse action; the Secretary need only demonstrate that there is a non-frivolous issue as to the causal nexus. As explained by Judge Manning, a Commission judge should determine the issue of causal nexus was not frivolously brought if "evidence was presented to show that the adverse actions could have been motivated at least in part by the protected activity." *Secretary of Labor on behalf of Bradley v. Climax Molybdenum Co.*, 34 FMSHRC 2808, 2821 (Oct. 2012) (ALJ). The Commission has recognized that direct evidence of motivation is rarely encountered and often, the only available evidence is indirect. *See, e.g., Secretary of Labor on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2510 (Nov. 1981)., *rev'd on other grounds*, 709 F.2d 86 (D.C. Cir. 1983). The Commission has identified the following indicia of discriminatory intent to establish a nexus between the protected activity and the alleged discrimination: (1) hostility or animus toward the protected activity, (2) knowledge of the protected activity, and (3) coincidence in time between the protected activity and adverse action. *Id*.

The Secretary has sufficiently demonstrated that the Application was not frivolously brought as to the issue of protected activity. The Secretary's Application states that Terry made safety complaints on two separate occasions. The first was made on or about August 29, 2019. Application at ¶ 6. The second complaint was made in early November 2018 directly to the Respondent. Application at ¶ 9. Making a safety complaint to MSHA or an operator is indisputably protected activity. 30 U.S.C. § 815(c)(1) ("[n]o person shall discharge or in any other manner discriminate against…because such miner…has filed or made a complaint under or relating to this Act, including a complaint notifying the operator or the operator's agent…of an alleged danger or safety or health violation").

The Secretary has sufficiently demonstrated that the Application was not frivolously brought as to the issue of adverse action. The Secretary's Application states that on September 10, 2018, Terry's work responsibilities were reassigned to other individuals and Terry was given another job. Application at ¶ 7. Reassignment to a different position can be considered an adverse action. *Moses v. Whitley Development Corp.*, 4 FMSHRC 1475, 1478 (Aug. 1982). On or about November 16, 2018, Terry was denied continued use of a certain company truck that he had previously used. Application at ¶ 9. An operator's revocation of certain benefits related to the performance of job duties can be considered an adverse action if "materially adverse to a reasonable employee." *Secretary of Labor on behalf of Pendley v. Highland Mining Company*, 34 FMSHRC 1919 (Aug. 2012), *citing Burlington Northern & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 57 (2006). On November 28, 2018, Terry's employment was terminated. Application

at ¶ 9. It cannot be gainsaid that termination is also an adverse action per the plain meaning of Section 105(c)(1) when motivated by protected activity. *Moses*, 4 FMSHRC at 1479-80.

I further find that the Secretary's Application alleging discriminatory reassignment, loss of benefits, and discharge establishes a sufficient nexus between the protected activity and the adverse action such that it was not frivolously brought. Terry complained directly to Schneid regarding "training violations" at the Carbon Hill Prep Plant owned by Respondent, to which MSHA issued citations to Respondent, GMS, and Z&J. Second Reply at ¶ 2. This, if true, would be sufficient to show Respondent was aware that Terry engaged in protected activity by making a safety complaint. Terry was reassigned to another position less than two weeks after Terry made this safety complaint to MSHA. Application at ¶ 6. After communicating additional safety concerns to Prospect Mining in November 2018, Terry lost the continued use of a company truck, and was terminated less than a month later. Application at ¶ 9. I therefore find that the Secretary has shown that the adverse action could have been motivated at least in part by the protected activity, and therefore the Application is not frivolously brought.

The Respondent elected not to dispute any of the allegations described above at a hearing. As the Respondent has elected not to contest whether the Secretary's application on behalf of Terry was frivolously brought, the only question remaining for me to decide at this stage of the proceedings is the manner of temporary reinstatement. As previously discussed, the Respondent seeks an order granting temporary economic reinstatement, but Terry objects to the terms of Respondent's apparent offer.

My legal authority to order economic reinstatement in lieu of physical reinstatement over the objection of a party is tenuous, absent agreement of the parties. As a default rule, Commission judges have ordered the physical reinstatement of the complainant to his or her former position at the mine, and the parties may subsequently negotiate terms of economic reinstatement in lieu of the complainant's actual return to mine site.[2] Although the Commission has yet to squarely address the question of whether a judge can unilaterally order economic reinstatement, the Commission held in *North Fork Coal Corporation*, 33 FMSHRC 589 (Mar. 2011), *rev'd on other grounds*, 691 F.3d 735 (6th Cir. 2012) that a judge lacks the authority to unilaterally modify the terms of an existing economic reinstatement agreement. Specifically, the Commission noted "[u]nlike back pay awards, Commission judges do not decide the terms of economic reinstatement agreements." *Id*. at 593. Multiple Commission judges have interpreted *North Fork Coal* to severely limit the ability of a judge to order economic reinstatement without a clear agreement between the parties. In *Secretary of Labor on behalf of Riordan v. Knox Creek Coal Corporation*, 36 FMSHRC 1050 (Apr. 2014) (ALJ), Judge Moran rejected a motion by the respondent to order temporary economic reinstatement with a provision offsetting the respondent's payments to the complainant for services rendered elsewhere. He reasoned that "[u]ntil the parties reach an agreement on the terms of any economic reinstatement, the Court's involvement is foreclosed." *Id.* at 1053. Judge Simonton reached a similar conclusion in *Secretary of Labor on behalf of Garcia v. Veris Gold U.S.A.*, 36 FMSHRC 1883 (July 2014) (ALJ) ("*Veris Gold I*"). Judge Gill also rejected the argument that a Commission judge could issue an order granting temporary economic reinstatement without a previous agreement between

[2] *See, e.g.*, *Sec'y of Labor on behalf of York v. BR&D Enterprises, Inc.*, 23 FMSHRC 386 (Apr. 2001).

the parties. *Secretary of Labor on behalf of Wilder v. Private Investigation & Counter Intelligence Services, Inc.*, 33 FMSHRC 2031, 2032 (Apr. 2011) (ALJ) ("the parties have no right to require or impose on each other, nor does the Court have authority to impose, economic reinstatement terms that have not been negotiated and agreed to.") (internal citations omitted).

Commission judges, however, have not entirely foreclosed the possibility of ordering temporary economic reinstatement without an agreement between all parties after particular facts have been established. For example, on reconsideration of his decision in *Veris Gold I*, Judge Simonton opined that an order granting temporary economic reinstatement might be permissible "when presented with a clear showing of extreme circumstances that would render temporary physical reinstatement an objectively meaningless remedy." *Secretary of Labor on behalf of Garcia v. Veris Gold U.S.A.*, 36 FMSHRC 2365, 2368-69 (Aug. 2014) (ALJ) ("*Veris Gold II*"). In reaching this conclusion, Judge Simonton considered Judge Melick's decision in *Secretary of Labor on behalf of Pruitt v. Grand Eagle Mining, Inc.*, 33 FMSHRC 1738 (July 2011) (ALJ). In that case, Judge Melick ordered temporary economic reinstatement over the objection of the complainant where the complainant "represent[ed] a safety hazard to himself and others and present[ed] a potential financial liability to Grand Eagle if he were to be returned to his former job through temporary reinstatement." *Id*. at 1738-39. Judge Melick found particularly persuasive uncontroverted evidence presented at a temporary reinstatement hearing that the complainant damaged a $30,000.00 piece of equipment while on the job just three months prior to his discharge, and violated a mandatory safety standard by working at least 20 feet above ground without fall protection. *Id*.

After careful consideration of the foregoing cases and temporary reinstatement principles, although decisions by other Commission Judges are not binding on me pursuant to Commission Procedural Rule 69(d), I find the reasoning of the Commission in *North Fork Coal* and the reasoning of Judges Moran, Gill, and Simonton to be persuasive on the issue before me. In the absence of an agreement between the Secretary, on behalf of Terry, and the Respondent, my order granting temporary economic reinstatement would by definition impose terms on which the parties could not reach agreement. Respondent's counsel has made it clear that any right to obtain other employment in a temporary economic reinstatement agreement is conditioned on the work "not occur[ing] at Prospect Mining's mine sites or directly relat[ing] to Prospect's mining activities." E-mail from Respondent's attorney to this tribunal (Feb. 19, 2019, 10:09 EST). In his Reply, Terry says that he would accept temporary economic reinstatement only with "the unconditional right to obtain other employment." Reply at ¶ 13. Therefore, the parties do not agree on the terms of economic reinstatement, and I cannot by adjudicative fiat form a complete economic reinstatement agreement for the parties. Doing so would be contrary to the plain meaning of *North Fork Coal*, which by implication contemplates temporary economic reinstatement as an alternative remedy created solely by agreement between the parties.

Respondent argues that the alleged facts submitted in paragraphs five and six of its Motion justify ordering temporary economic reinstatement over Terry's objection. Specifically, the Respondent alleged that Terry "exhibited an abrasive attitude to all individuals with whom he worked, including employees, contractors, and MSHA personnel." Motion at ¶ 5. The Respondent further alleged that Terry removed property, including "filing cabinets, furniture, and a personal computer on which he performed company business" and failed to provide the

Respondent with an inventory of the items he removed. Motion at ¶ 6. Finally, the Respondent alleged that it had uncovered some "troubling activity" involving the administration of certain workers' compensation claims it argues Terry handled. *Id*. All of these allegations, the Respondent concludes, are sufficient to justify ordering temporary economic reinstatement over Terry's objection.

In advancing its arguments, Respondent relies on Judge Melick's decision in *Pruitt*. Given the posture of this case, however, I decline to adopt Judge Melick's approach in *Pruitt* for several reasons. First, I do not read Section 105(c)(2) to grant Commission judges broad authority to craft temporary reinstatement agreements. I conclude that the broad remedies contemplated by Section 105(c)(2) of the Mine Act as cited by Judge Melick apply only to discrimination proceedings. The Mine Act states in relevant part that "if the Secretary finds that such complaint was not frivolously brought, the Commission, on an expedited basis upon application of the Secretary, shall order the immediate reinstatement of the miner pending final order on the complaint." The Mine Act then proceeds to describe the process for adjudicating a discrimination complaint on the merits before reaching the "to take such affirmative action to abate the violation as the Commission deems appropriate" language cited by Judge Melick. From this, I conclude that the plain language of the Mine Act does not empower Commission Judges to issue remedies beyond reinstatement without an agreement between the parties. I agree with Judge Simonton's analysis of Section 105(c)(2) in *Veris Gold II*, where he noted that the language quoted by Judge Melick "applies only after the Commission has provided an 'opportunity for a hearing,' found that a 'person commit[ed] a violation of this subsection' and issued an order 'based upon findings of fact.'" *Veris Gold II*, 36 FMSHRC at 2368. Although the Respondent was provided an opportunity for a hearing on the issue of temporary reinstatement, Respondent withdrew its request unconditionally. I cannot find at this stage of the proceedings that the Respondent has or has not violated Section 105(c), nor can I issue findings of fact with regard to Terry's alleged misconduct. Accordingly, I conclude that my authority to order temporary economic reinstatement is considerably more limited than Judge Melick expressed in *Pruitt*.

Second, unlike the operator in *Pruitt*, the Respondent does not cite any mandatory health or safety standard that Terry violated, or that Respondent would be liable for, should Terry return to work. That there may be hard feelings between Terry and management, or between Terry and other miners, is by itself insufficient to override Terry's statutory right to be reinstated to his position while his claim of discrimination is adjudicated on the merits, particularly where Terry himself wishes to return to work. While it may be true that maintaining a hostile work environment can give rise to a claim of discrimination under Section 105(c) of the Mine Act,[3] the hostile work environment must interfere with the exercise of activities protected by the Mine

[3] *See, e.g.*, *Sec'y of Labor on behalf of Bowling v. Mountain Top Trucking Co.*, 21 FMSHRC 265 (Mar. 1999), citing *Sec'y of Labor on behalf of Nantz v. Nally & Hamilton Enters., Inc*., 16 FMSHRC 2208, 2210 (Nov. 1994).

Act,[4] and any such allegation of a hostile work environment in this case must be weighed against the fact that it was the Respondent who initially sought temporary economic reinstatement, and that it was Terry, through the Secretary, who insisted on physical reinstatement after awareness of Respondent's allegations.

Third, the facts that Judge Melick relied on in *Pruitt* to justify unilaterally ordering temporary economic reinstatement were undisputed by the parties. *Pruitt*, 33 FMSHRC at 1738-39. In this case, Terry disputes all of the allegations that Respondent sets forth in paragraph six of its Motion. Additionally, Terry filed a Second Reply subsequent to Respondent's Supplement in which he reiterated his factual disagreement with Respondent regarding the circumstances of his termination. The undersigned is foreclosed from making credibility determinations in evaluating the Secretary's application for temporary reinstatement.[5] Even if the Respondent could establish an affirmative defense in the underlying discrimination proceeding based on the information provided in the Motion and Supplement,[6] a determination without hearing at this stage of the proceedings that Respondent's allegations are sufficient to justify temporary economic reinstatement over Terry's objections would necessarily require me to credit the Respondent's version of events over Terry's version. Therefore, I find that the facts that Judge Melick relied upon in *Pruitt* are not sufficiently analogous to the mere allegations present in this case to justify imposing temporary economic reinstatement, absent agreement of the parties.

III. Order

For the foregoing reasons, Respondent Prospect Mining & Development Co., LLC is **ORDERED** to immediately reinstate James Dee Terry to the position he held immediately prior to the reduction in his job duties on or about September 10, 2018, or to a substantially equivalent position at the same rate of pay, with the same benefits, and with the same or equivalent duties assigned to him.[7] Should the parties subsequently come to a complete and full agreement on the terms of economic reinstatement, the parties may jointly file a motion to modify this Order to economically reinstate Terry in lieu of actual, physical reinstatement.

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[4] *See, e.g.*, *Delisio v. Mathies Coal Co.*, 12 FMSHRC 2535, 2544 (Dec. 1990) ("the Commission does not sit as a super grievance board to judge the industrial merits, fairness, reasonableness, or wisdom of an operator's employment policies except insofar as those policies may conflict with rights granted under section 105(c) of the Mine Act.") (internal citations omitted).

[5] *Williamson*, 31 FMSHRC at 1089.

[6] Commission judges have the authority to make credibility determinations and factual findings in underlying discrimination proceedings that they lack in temporary reinstatement proceedings.

[7] As the change in job responsibilities is one of the non-frivolous adverse actions established by the Secretary's Application, reinstatement to the position previously held by Terry prior to the change in responsibilities is more consistent with the Mine Act's intent to place the miner in as close a position as possible prior to the alleged discrimination while the Secretary completes his investigation. *See, e.g. Bradley*, 34 FMSHRC at 2825.

This Order of Temporary Reinstatement is not open-ended. It will end upon final order on the underlying discrimination complaint as set forth in Section 105(c)(2) of the Act. 30 U.S.C. § 815(c)(2). Therefore, the Secretary must promptly determine whether or not he will file a complaint with the Commission under Section 105(c)(2) of the Act and so advise Terry, the Respondent, and this administrative tribunal.

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

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