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Review was denied in the following cases during the month of July 2015:

Secretary of Labor v. Northern Illinois Service Company, Docket No. LAKE 2013-616-M, et al (Judge Barbour, June 5, 2015)

Secretary of Labor v. Pocahontas Coal Company, LLC, Docket No. WEVA 2014-395-R (Judge Miller, June 18, 2015)

There were no cases in which review was granted during the month of July 2015.

COMMISSION DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

July 23, 2015

MILL BRANCH COAL CORPORATION

v.

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION

Docket Nos. VA 2012-435-R
VA 2012-436-R
VA 2012-439-R
VA 2012-440-R

BEFORE: Cohen, Nakamura, and Althen, Commissioners¹

DECISION

BY THE COMMISSION:

In these contest proceedings, arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) (“Mine Act” or “Act”), the Department of Labor’s Mine Safety and Health Administration (“MSHA”) issued a citation and multiple orders, including an imminent danger order, to Mill Branch Coal Corporation after observing deteriorating conditions in the operator’s Low Splint A Mine. A Commission Administrative Law Judge upheld the imminent danger order and a citation alleging a significant and substantial (“S&S”)² violation of an escapeway standard.³ 34 FMSHRC 2090, 2137 (Aug. 2012) (ALJ). He also upheld two

¹ Chairman Jordan and Commissioner Young assumed office after this case had been considered at a Commission meeting. A new Commissioner possesses legal authority to participate in pending cases, but such participation is discretionary. *Mid-Continent Res., Inc.*, 16 FMSHRC 1218, 1218 n.2 (June 1994). In the interest of efficient decision-making, Chairman Jordan and Commissioner Young have elected not to participate in this matter.

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

³ That standard, 30 C.F.R. § 75.380, provides in relevant part:

- (d) Each escapeway shall be –
 - (1) Maintained in a safe condition to always assure passage of anyone, including disabled persons[.]

orders alleging S&S violations of standards mandating weekly safety examinations.⁴ *Id.* The Judge concluded, however, that the weekly examination violations had not resulted from an unwarrantable failure to comply with the standards.⁵ *Id.*

Mill Branch and the Secretary of Labor filed cross-petitions for discretionary review, which we granted. For the reasons set forth below, we affirm the Judge's decision: (1) upholding the imminent danger order; (2) concluding that the violation of the escapeway standard was S&S; and (3) holding that the operator violated the weekly examination standards. As to the examination violations, we remand the Judge's S&S determinations for further findings and analysis and vacate the Judge's unwarrantable failure determinations and remand for findings and analysis consistent with this decision.

I.

Factual and Procedural Background

The Low Splint A Mine is an underground coal mine located in Wise, Virginia, which exists at a middle level between two other mines. The Taggart seam, which lies approximately 250 feet below the Low Splint A Mine, is mined out, and the mine formerly in that seam is now closed. The mining of the Taggart seam created pressures in the Low Splint A Mine, including the creation of "floor heave."⁶

Mining was performed in the Low Splint A Mine in the following sequence: development of the Southeast Mains, A Left and B Left sections; retreat mining of the B Left section; development of the B Right and the 5 West sections; and retreat mining of the 5 West

⁴ The standard, 30 C.F.R. § 75.364(b), provides in relevant part:

At least every 7 days, an examination for hazardous conditions . . . shall be made by a certified person . . . at the following locations:

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

⁵ The unwarrantable failure terminology is taken from section 104(d)(1) of the Mine Act, which establishes more severe sanctions for any violation that is caused by "an unwarrantable failure of [an] operator to comply with . . . mandatory health or safety standards." 30 U.S.C. § 814(d)(1).

⁶ Floor "heave" is defined as a "rising of the floor of a mine caused by its being too soft to resist the weight on the pillars." *See* Am. Geological Institute, Dictionary of Mining, Mineral, and Related Terms 258 (2d ed. 1997).

and B Right sections. On May 21, 2012, the only producing section in the mine was the B Right section, where retreat mining was being conducted using a continuous miner.⁷

On May 22, 2012, MSHA Inspector Christopher Cain, accompanied by his supervisor, Gary Hall, visited the mine in order to conduct a monthly retreat-mining review, a six-month evaluation of the roof control plan, and a regular underground inspection. Inspector Cain had driven by the mine the day before and had seen coal coming out of the mine on the stacker belt, so he knew that production had been occurring. He had previously inspected the mine in January 2012, when another MSHA inspector had asked him to consult on floor heaval along the Southeast Mains, and a citation had been issued alleging a failure to maintain the roof and ribs along the No. 5 belt.

Inspector Cain stated that when he arrived, Randy Hensley, who had been acting as superintendent at the mine since earlier that month, informed him that they were no longer mining and that they were pulling equipment from the B Right area because the belt could no longer run. 34 FMSHRC at 2094; 5 Tr. 28-29; 6 Tr. 6.⁸ Hensley explained that the floor heaval under the belt had required the belt to be raised to the point that it was too close to the roof to run. 5 Tr. 29, 40-41, 165, 218. Cain checked the weekly examination book, which did not describe the conditions described by Hensley.

Cain, Hall, and Hensley travelled toward the face via the No. 3 entry, which was the secondary escapeway (also referred to as the “return entry” or “alternate escapeway”), through the Southeast Mains panel. The secondary escapeway served as the travelway for men and equipment from the No. 5 belt drive to the working face. Inspector Cain observed that the floor heaving that he had previously seen in January was worse, and that the ribs had deteriorated more.

In the A Left panel, they got out of the mantrip and continued on foot. Conditions worsened, as documented by photographs, and included floor heaval, heaved floor material scooped and dumped into crosscuts and entries, bent and tilted 100-ton jacks, knocked-out jacks, and spalling ribs. Some of the jacks had been recently set, as demonstrated by the lack of rock dust on them. Some jacks had been knocked out and not reset.

When Cain and Hall traveled through the B Right area, they observed seven miners working underground to remove mining equipment, including one mechanic who was removing the canopy from a shuttle car. They also observed a “cutter,” or crack, where the roof met the ribs, indicating deterioration, and they directed that area to be dangered-off. 5 Tr. 170-71.

⁷ A mine map is attached to this decision as Attachment A.

⁸ The hearing in this case occurred over two days (June 5, 2012 and June 6, 2012), and each day has its own transcript that begins on page 1. The transcript for June 5 will be referred to as “5 Tr.,” and the transcript for June 6 will be referred to as “6 Tr.”

Inspector Cain asked Hensley if they could use the mantrip to travel through the primary escapeway (sometimes referred to as the “intake escapeway”). Cain stated that Hensley replied that the mantrip would not make it through the primary escapeway due to the heaving bottom. 5 Tr. 68-69; S. Ex. F1 at p. 4. As the inspectors walked through the primary escapeway, they observed conditions similar to those they observed in the secondary escapeway, which they also documented with photographs. Both inspectors noted that, unlike the secondary escapeway, there was no evidence that the operator had attempted to scoop the heaving floor. In addition, there was a roof fall which required the primary escapeway to be re-routed.

After traveling past the roof fall in the primary escapeway, Cain and Hall could not find a door that would open between the primary and secondary escapeways. Inspector Cain stated that for 1400 feet they could not find a door that would open and allow access into and out of the intake escapeway. In addition, he stated that the door positioned just outby the seven drive, where he had seen miners working, would not open. The doors would not open because of the pressure exerted on them by the floor heaval.

Before returning to the surface, Cain issued a verbal imminent danger order for the Southeast Mains and the A Left and B Right areas of the mine due to the excessive pressure in the area. Once on the surface, Inspector Cain issued one citation and several additional orders.

Following the inspection by Cain and Hall on May 22, there were other visits to the mine to inspect conditions. On the night of May 22, Daniel McGlothlin, the safety manager for Alpha Natural Resources, and General Manager John Richardson went into the mine to look at conditions and to mark the location of the remaining equipment. On May 23, Mill Branch personnel accompanied state mine inspectors through the area. On May 24, accompanied by some of the operator’s personnel, Cain and Hall inspected the mine with Mike Gauna, a mine engineer from MSHA’s Office of Technical Support. On June 1, MSHA went underground again because the Judge granted a motion permitting the operator’s technical experts to observe the conditions, and the Judge ordered MSHA representatives to accompany them.

Mill Branch contested the citation and orders, and an expedited hearing was conducted on: (1) the imminent danger order (Order No. 8178569); (2) Citation No. 8178570, alleging that the operator failed to adequately maintain the primary escapeway in violation of section 75.380(d)(1) and that the violation was S&S and caused by unwarrantable failure; and (3) Order Nos. 8178573 and 8178574, alleging that Mill Branch failed to inspect and record in the weekly examination books the hazards present in the intake and return escapeways in violation of sections 75.364(b)(1) and (b)(2), and that the violations were S&S and caused by unwarrantable failures.

After the hearing, the Judge affirmed imminent danger Order No. 8178569 and the S&S primary escapeway violation alleged in Citation No. 8178570. The Judge concluded that the inspector did not abuse his discretion in issuing the imminent danger order given: (1) the conditions that comprised an S&S violation of section 75.380(d) and (2) evidence that there might be a massive failure of the structural integrity of the mine. He found, however, that the violation of section 75.380(d) had not resulted from unwarrantable failure. The Judge further concluded that the operator violated sections 75.364(b)(1) and (b)(2) because there were

numerous observable hazards in the escapeways that the weekly examiner essentially failed to recognize, record, or report. The Judge adopted the Secretary's rationale expressed in his post-hearing brief that the violations were S&S, but concluded that they were not unwarrantable because there was some question regarding the length of time that the conditions were known to the operator and the weekly examiner had not recorded the hazards because they were already known to the operator.

Mill Branch filed a petition for discretionary review with the Commission, challenging the Judge's determinations upholding the imminent danger order, that the violation of section 75.380(d)(1) was S&S, that it had violated sections 75.364(b)(1) and (b)(2), and that those violations were S&S. The Secretary challenged the Judge's determination that the violations of sections 75.364(b)(1) and (b)(2) had not resulted from unwarrantable failures.⁹ The Commission granted both petitions and heard oral argument.

II.

Disposition

A. Order No. 8178569 – The Imminent Danger Order

Mill Branch argues that the Judge erred in affirming the imminent danger order because the Judge failed to properly consider the imminence of the danger associated with the conditions present, and that there was no objective evidence that a collapse or an emergency situation would occur in a short time. The operator asserts that Cain's and Hall's concerns about the conditions were belied by the repeated investigations permitted in the area after issuance of the order. In addition, it contends that the Judge erred in his imminent danger analysis by improperly assuming the occurrence of an emergency requiring the use of the primary escapeway.

Section 107(a) of the Mine Act provides in relevant part that if an MSHA inspector "finds that an imminent danger exists, [the inspector] shall . . . issue an order requiring the operator of such mine to cause all persons . . . to be withdrawn from" the relevant area until the danger no longer exists. 30 U.S.C. § 817(a). Section 3(j) of the Act defines an "imminent danger" as a condition "which could reasonably be expected to cause death or serious physical harm before such condition or practice can be abated." 30 U.S.C. § 802(j). The Commission has held that "there must be some degree of imminence to support a section 107(a) order." *Utah Power and Light Co.*, 13 FMSHRC 1617, 1621 (Oct. 1991) ("*UP&L*").¹⁰

⁹ The Secretary did not challenge the Judge's determination that the violation of section 75.380(d) had not resulted from an unwarrantable failure. Oral Arg. Tr. at 35-36.

¹⁰ In *UP&L*, the Commission additionally stated that "[t]o support a finding of imminent danger, the inspector must find that the hazardous condition has a reasonable potential to cause death or serious injury *within a short period of time.*" 13 FMSHRC at 1622 (emphasis added). We clarify that, while it may be necessary in some cases for the condition or practice to be reasonably expected to cause death or serious injury within a short time in order to show

(continued...)

The Commission has also recognized that “[t]he concept of imminent danger is not limited to hazards that pose an immediate danger.” *Connolly-Pacific Co.*, 36 FMSHRC 1549,

¹⁰ (...continued)

imminence, such a showing is not necessary in all cases. Rather, the Mine Act requires that an imminent danger be one that “could reasonably be expected to cause death or serious physical harm before [a] condition or practice can be abated.” See *Connolly-Pacific Co.*, 36 FMSHRC 1549, 1555 (June 2014) (citing 30 U.S.C. § 820(j)) (added emphasis omitted) (upholding an imminent danger order despite the absence of evidence demonstrating that the cited danger had a reasonable potential to cause death or serious injury in a short time).

Commissioner Cohen believes that the foregoing analysis is not sufficient to resolve the tension between our case law and the language of the Mine Act. In fact, the *UP&L* Commission’s statement that the injury must have the potential to occur “within a short period of time” was a departure from earlier Commission and U.S. Court of Appeals holdings that “refused to limit the concept of imminent danger to hazards that pose an immediate danger.” *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2163 (Nov. 1989) (citing *Freeman Coal Mining Co. v. Interior Bd. of Mine Op. App.*, 504 F.2d 741 (7th Cir. 1974); *Eastern Assoc. Coal Corp. v. Interior Bd. of Mine Op. App.*, 491 F.2d 277, 278 (4th Cir. 1974); *Old Ben Coal Corp. v. Interior Bd. of Mine Op. App.*, 523 F.2d 25, 33 (7th Cir. 1975)). The court decisions issued prior to enactment of the Mine Act in 1977 are relevant because the definition of “imminent danger” was created in the Federal Coal Mine Health and Safety Act of 1969, and was not changed when Congress enacted the Mine Act in 1977. *Cypress Empire Corp.*, 12 FMSHRC 911, 918 (May 1990).

Now confronted with reconciling these two seemingly competing interpretations, Commissioner Cohen finds it appropriate to turn to the statutory language of the Mine Act for assistance. Section 3(j) of the Mine Act defines “imminent danger” as “the existence of any condition or practice . . . which could reasonably be expected to cause death or serious physical harm *before such condition or practice can be abated.*” 30 U.S.C. § 820(j) (emphasis added). Upon reflection, it appears to Commissioner Cohen that, in interpreting the language of section 3(j), the *UP&L* Commission assumed that all hazardous conditions or practices which necessitate the immediate removal of miners can be abated “within a short period of time.” (Without such an assumption, there would be an obvious conflict between the quoted language of *UP&L* and section 3(j) of the Mine Act). He would conclude that the *UP&L* assumption is incorrect; the Commission has subsequently recognized that hazards which require the immediate withdrawal of miners cannot universally be abated in a short period. See *Connolly-Pacific Co.*, 36 FMSHRC at 1555 (involving an unstable highwall, which because of its extraordinary height could not be promptly abated).

Accordingly, consistent with *Rochester & Pittsburgh Coal Co.* and the decisions of the Seventh Circuit and Fourth Circuit cited therein, Commissioner Cohen would conclude that the definition in section 3(j) of the Mine Act governs, and that the Secretary is not required to demonstrate that his inspector believed the cited hazardous condition had a reasonable potential to cause serious injury *within a short period of time* in order to sustain the issuance of a section 107(a) withdrawal order.

1555 (June 2014) (quoting *Cumberland Coal Res., LP*, 28 FMSHRC 545, 555 (Aug. 2006), *aff'd*, 515 F.3d 247 (3d Cir. 2008)). While the danger justifying an imminent danger order need not be immediate, the danger must be such as to require the immediate withdrawal of miners because it could reasonably be expected to cause death or serious harm before the danger can be abated. *Freeman Coal Mining Co. v. Int. Bd. of Mine Op. App.*, 504 F.2d 741, 744-45 (7th Cir. 1974). Thus, the Commission has upheld the issuance of an imminent danger order involving an extremely hazardous condition that was created by the potential for fall of material from a long-existing highwall that the operator was not able to abate. *Connolly-Pacific*, 36 FMSHRC at 1555.

An inspector's issuance of a section 107(a) imminent danger order is reviewed under an "abuse of discretion" standard. *Island Creek Coal Co.*, 15 FMSHRC 339, 345-47 (Mar. 1993); *UP&L*, 13 FMSHRC at 1622. A section 107(a) order will be upheld if the Secretary proves by a preponderance of the evidence that the inspector reasonably concluded that an imminent danger existed. *Island Creek*, 15 FMSHRC at 346-47. The Commission has explained that a Judge is not required to accept an inspector's subjective perception that an imminent danger existed but, rather, must evaluate whether it was objectively reasonable for the inspector to conclude that an imminent danger existed. *Id.* at 346. We review the Judge's determination of whether the inspector abused his discretion under a substantial evidence standard. *See, e.g., Connolly-Pacific*, 36 FMSHRC at 1555.

With respect to Order No. 8178569, the Judge determined that a reasonable person possessing a qualified inspector's education and experience would have been warranted in issuing an imminent danger order when confronted with the conditions that Inspector Cain found on May 22 "[g]iven the objective stigmata of dangerous pressure convergence, including floor heaval, rib collapse, compromised jacks, signs and reports that conditions had significantly worsened in recent days, and given that [Mill Branch] had in fact stopped mining and was in the process of retrieving equipment." 34 FMSHRC at 2129.

In reaching his determination, the Judge made many credibility determinations. On review, the Judge's credibility determinations are entitled to great weight and may not be overturned lightly. *Farmer v. Island Creek Coal Co.*, 14 FMSHRC 1537, 1541 (Sept. 1992); *Penn Allegh Coal Co.*, 3 FMSHRC 2767, 2770 (Dec. 1981). Because the Judge "has an opportunity to hear the testimony and view the witnesses[,] he [or she] is ordinarily in the best position to make a credibility determination." *In re: Contests of Respirable Dust Sample Alteration Citations*, 17 FMSHRC 1819, 1878 (Nov. 1995) (quoting *Ona Corp. v. NLRB*, 729 F.2d 713, 719 (11th Cir. 1984)), *aff'd sub nom. Secretary of Labor v. Keystone Coal Mining Corp.*, 151 F.3d 1096 (D.C. Cir. 1998). Nonetheless, we will not affirm such determinations if they are self-contradictory or if there is no evidence or dubious evidence to support them. *Id.* at 1881 n.80; *Consolidation Coal Co.*, 11 FMSHRC 966, 974 (June 1989).

Similar to the hazardous conditions in *Connolly-Pacific* which could not be abated, Mill Branch had ceased mining and had begun retrieving equipment rather than abating conditions in the Southeast Mains, A Left, and B Right areas of the mine. Inspector Cain testified that Acting Superintendent Hensley had informed him that Mill Branch had ceased mining in the B Right area because the No. 6 belt had been squeezed between the floor and roof and could no longer

run. 34 FMSHRC at 2094; 5 Tr. 28-29, 40-41, 159. Therefore, Mill Branch was withdrawing its equipment from the area in order to mine a different section of the mine. 34 FMSHRC at 2094; 5 Tr. 29.¹¹

Inspector Cain testified that he issued the imminent danger order because he believed the mine was “past the point of no return” due to the “squeeze” pressures exerted on the floor, ribs, and roof.¹² 5 Tr. 87-88. He observed that there had been dramatic changes in the mine that had occurred since he last visited the mine in January, and knew from conversations with Hensley and Martin that conditions had “dramatically worsened” in the past week or so. 5 Tr. 84-85, 88; S. Ex. E-1 (Order No. 8178569).

Regarding the floor conditions, Inspector Cain observed floor heaval that reduced the height and width of the area, and affected manddoors. Although the average height of an entry in the mine area was 5 feet, the secondary escapeway had been reduced to a height of 35 to 36 inches in most places, and 25 inches at one place. 5 Tr. 32, 75-76, 101, 146. In the primary escapeway, Cain and Hall observed floor heaval almost to the mine roof. 5 Tr. 181; S. Ex. B-7. Inspector Cain testified that Hensley had acknowledged that the mantrip would not fit in the primary escapeway. 34 FMSHRC at 2096; 5 Tr. 68, 107; S. Ex. F-1 at p. 4. The heaving had caused the manddoors between the primary and secondary escapeways to be inoperable for approximately 1400 feet. 5 Tr. 80-81, 100, 140, 189. Inspector Cain also testified that the door just outby the 7 drive where miners were working would not open. 5 Tr. 141.

The floor heaval also impacted jacks set throughout the area to provide support. 5 Tr. 36, 61. Cain and Hall observed multiple 100-ton jacks that had bent because of the floor heaval. 5 Tr. 36-39, 185-86, 210; S. Ex. B-18. Cain and Hall observed jacks in the secondary escapeway that had been recently set, as evidenced by their lack of rock dust, and that were already leaning due to pressures exerted in the area. 5 Tr. 58, 185; S. Ex. B-14. In addition, the inspectors observed that jacks had been knocked out but not reset in the secondary escapeway. 5 Tr. 61, 217-19; S. Ex. B-18.

¹¹ Hensley testified that the decision was made to stop mining the B Right section on May 22 not because of the impossibility of further mining in the B Right section but because the 4 West area was ready to mine. 6 Tr. 8, 51. The Judge discredited Hensley’s testimony. 34 FMSHRC at 2131. We see no reason to overturn the Judge’s credibility determination. As the Judge found, one of the operator’s witnesses, Alpha Natural Resources Safety Manager McGlothlin, testified that he had learned of the equipment being withdrawn from the area “because of excessive floor heave.” *Id.*; 5 Tr. 304.

¹² The Judge credited Inspector Cain’s testimony, as corroborated by the testimony of Hall and Gauna, regarding the conditions observed and the reasonable inferences drawn from such observations. 34 FMSHRC at 2133. We find no reason to overturn the Judge’s credibility determination. As the Judge found (*id.* at 2131, 2133), and as set forth more fully below, the testimony of these witnesses was internally consistent, consistent with each other, and Cain’s testimony was corroborated by his contemporaneous field notes. *See, e.g.*, 5 Tr. 58-59, 78, 180-81, 185; S. Ex. F-1. Moreover, Safety Manager McGlothlin also testified, “If I’d went through that area, I’d say, ‘we’re pulling out of there.’” 5 Tr. 312.

The floor heaval impacted the safe accessibility of the lifelines in the escapeways. In the primary escapeway, floor heaval was directly under the lifeline. 5 Tr. 72-74; S. Ex. B-1. In the secondary escapeway, the lifeline was positioned against the left rib where supports had been compromised and not reset. 5 Tr. 60-61; S. Ex. B-17.

Regarding the rib conditions, Cain and Hall observed ribs deteriorating on both sides of the primary escapeway (5 Tr. 72, 78, 180; S. Ex. B-6) as well as ribs deteriorating in the secondary escapeway (5 Tr. 53, 183-84; S. Exs. B-8, B-10). When asked whether pictures taken in the primary escapeway by the inspectors showed “pretty major rib sloughage,” Acting Superintendent Hensley admitted that they did and that walking over the sloughage when using the lifeline would be hazardous. 6 Tr. 50-51; S. Ex. B-6.

As to the roof conditions, Inspector Cain observed that there were areas of roof fall that required the re-routing of the primary escapeway. 5 Tr. 80-81, 98-100, 142; S. Ex. A-3. A roof fall occurred in the primary escapeway on April 25, less than a month before the inspection. 5 Tr. 99; S. Ex. A-3. Moreover, the inspectors observed in the secondary escapeway a “cutter,” or crack, where the roof met the ribs, in a crosscut near the 7 drive. 5 Tr. 170-71. The cutter required the inspectors to have the area dangered-off. 5 Tr. 170. Donald Jacobs, the senior manager of geology at Alpha Natural Resources (6 Tr. 144), testified that “typically in the mine, before when we’ve had roof failure, you would typically see cutters where the roof [was] breaking up.” 6 Tr. 156-57. Mill Branch acknowledged that there was a cutter at the 7 drive. 6 Tr. 16-17; MB Br. at 15 n.4.

Gauna corroborated the conditions observed by Cain and Hall, explaining that the overall stability of the area was negatively impacted by the pillar and floor failure. He testified that conditions of closure, or the coming together of the roof and floor, were created by the retreat mining of the B Left and 5 West areas, and that these two areas of failure were trying to merge. 5 Tr. 235-36, 238, 240-42. Gauna observed that there was pillar system failure along the 6 belt area, which is an area between the B Left and 5 West sections. 5 Tr. 241-42; S. Ex. C at p. 2. He stated that “when you see this type of floor heave and you see this type of pillar degradation, it’s a combination pillar failure and floor failure that’s happening simultaneously.” 5 Tr. 234. He explained, “[w]hen you’re in a system failure like this, things can become unpredictable,” and that “you’ve lost control in the overall stability.” 5 Tr. 242. Gauna testified that the operator should have pulled its equipment out sooner because closure is “a trap waiting to happen. It’s like a fish trap.” 5 Tr. 257. He explained that closure could happen at an “indeterminate time,” which could be “instantaneous,” and that it was the first time he had seen miners working in an area with that degree of failure. 5 Tr. 243-44, 258, 260-61.

In contrast, the operator’s expert witness, David Newman, testified that the roof was stable, that the area had reached a state of equilibrium after mining had ceased, and that there were no stability related issues. 6 Tr. 177-78, 185-86, 197-98. In reaching his conclusion, Newman relied upon modeling and checking eleven “bore holes,” or holes that previously had been drilled into the roof of the secondary escapeway. 6 Tr. 165-68, 179-85; MB Ex. LS-4.

There is ample evidence in the record to support the Judge’s crediting of Gauna’s testimony over that of Newman. 34 FMSHRC at 2129 n. 22, 2132. The Judge credited Gauna’s

testimony that the model relied upon by Newman was flawed because the modeling program incorrectly assumed that the roof and floor were of the same material. 34 FMSHRC at 2118, 2129 n.22. Gauna testified that the model did not accurately display the global stability because it overstated the stability of the pillars. 6 Tr. 236. He explained that the pillars could not be stable because they were on a soft floor, and the model did not work with conditions involving a soft floor. 5 Tr. 254; 6 Tr. 237-38. On cross-examination, Newman admitted that the model assumed that the roof and floor were composed of the same rock, although that was not the case at the mine. 6 Tr. 193-94.

Besides finding that the model Newman relied upon was flawed as applied to the mine's conditions, the Judge found that Newman spent little or no time assessing the primary escapeway. 32 FMSHRC at 2132. Newman admitted that he traveled in the secondary escapeway and did not witness conditions in the primary escapeway. 6 Tr. 158.

In addition, the Judge found that Newman's "narrow focus on the 'stability of the immediate roof' raised questions regarding his conclusions about the mine's global stability." 34 FMSHRC at 2132. The Judge gave limited weight to Newman's testimony that the cessation of mining had lessened stresses on the roof and that a state of equilibrium had been attained, and found more persuasive Gauna's testimony "regarding the unpredictable nature of the global environment at Low Splint A, even after the work stoppage." 34 FMSHRC at 2130.

The Judge's credibility determination is supported by the record. MSHA witnesses testified that the miners removing the equipment were in danger even though mining had ceased.¹³ Inspector Cain testified that in order to remove the feeder, the operator would have to use the continuous miner or scoop to make the entry large enough. 5 Tr. 156-57. Acting Superintendent Hensley admitted that the operator might have had to use the continuous miner to get the feeder out of the mine. 6 Tr. 8. Hall testified that as miners moved equipment out and removed the floor in order to clear the equipment, he did not know what was going to trigger a collapse. 5 Tr. 189. He explained that "[t]he ribs are already failed . . . if you continue to let them move that material, . . . I just couldn't predict when it would have a failure." 5 Tr. 189. Moreover, even if the equipment could be removed, an examiner would still need to travel through the area to perform weekly examinations. 6 Tr. 143.

¹³ It is understandable than an operator desires to retrieve expensive mining equipment and machinery before abandoning a section. However, the operator must make that decision before conditions deteriorate to the level of an imminent danger. Once there is a reasonable expectation that the integrity of the mine environment has been compromised and a collapse could occur at any moment, miners must be withdrawn. Equipment may be replaced, the lives of the miners may not.

Accordingly, we affirm the Judge's determination that Inspector Cain did not abuse his discretion in issuing Order No. 8178569 as supported by substantial evidence.¹⁴

B. Citation No. 8178570 – Primary Escapeway Violation

The Commission has recognized that a violation is S&S if, based on the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature. See *Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981). In *Mathies Coal Co.*, 6 FMSHRC 1 (Jan. 1984), the Commission further explained:

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

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

¹⁴ We do not find convincing Mill Branch's argument that MSHA's actions in permitting later investigations are inconsistent with the issuance of the imminent danger order. MB Br. at 17. The unavoidable risk posed by investigating conditions, as permitted by the Mine Act, state law, and the Judge's order, does not undermine an inspector's reasonable belief that an imminent danger existed at the time when the order was issued. Cf. *Wyoming Fuel Co.*, 14 FMSHRC 1282, 1292 (Aug. 1992) (stating that although some "imminently dangerous conditions may require abatement that poses a degree of unavoidable risk to miners[, t]he fact that such actions are necessary to abate a condition . . . does not mean that the condition does not pose an imminent danger").

Further, we need not reach the operator's argument that the Judge erred by assuming the occurrence of an emergency in his imminent danger analysis. Although the Judge considered the S&S violation of section 75.380(d)(1) in his imminent danger analysis, he set forth conditions existing outside of those cited as violative of section 75.380(d)(1) that justified issuance of the imminent danger order. See 34 FMSHRC at 2129.

The Judge concluded that the primary escapeway violation described in Citation No. 8178570 was S&S. 34 FMSHRC at 2126. In satisfaction of the first *Mathies* factor, he found that the operator had failed to maintain the primary escapeway in a safe condition to always assure passage of anyone, including disabled persons, as required by section 75.380(d)(1). *Id.* Regarding the second factor, the Judge determined that the violation contributed to a discrete safety hazard in that miners did not have a safe means of escaping during an emergency at the mine. *Id.* He concluded that the inability of miners, disabled or otherwise, to escape quickly was reasonably likely to cause a serious injury in satisfaction of the third factor. *Id.* Finally, the Judge found that the fourth factor had been satisfied because the inability of miners to get out quickly and safely in emergency conditions would clearly lead to a reasonable likelihood of injuries that would be of a reasonably serious nature. *Id.* at 2127.

Mill Branch disputes the Judge's findings with respect to the second and third *Mathies* factors. It argues that the Judge should have used a sliding scale in considering the difficulty of using the escapeway – that is, a consideration that what constitutes a quick escape in a coal seam with a height of 36 inches is different from what is considered for a coal seam with a height of six feet – and that it was only required to have an escapeway that was approximately three feet high. The operator further contends that the Judge failed to consider that potential fire sources were removed from the area.

We have recognized that the need for adequate escapeways will only arise in the context of an emergency evacuation from the mine and that the S&S nature of an escapeway violation must be considered in the context of an emergency. *Spartan Mining Co.*, 35 FMSHRC 3505, 3508-09 (Dec. 2013). Therefore, we conclude that the Judge accurately described the relevant hazard contributed to by the violation as delayed escape from the mine during an emergency.

We further conclude that substantial evidence supports the Judge's S&S determination. The record reveals the existence of floor heaval directly under the lifeline in the primary escapeway. 5 Tr. 72-74; S. Ex. B-1. In addition, the floor heaval in the primary escapeway was not being scooped, as it was in the secondary escapeway. 5 Tr. 76-77, 180-82. Doors were damaged between the primary and secondary escapeways, thus preventing access between the escapeways for approximately 1400 feet. 5 Tr. 140. The operator's Acting Mine Superintendent admitted that the floor heaval made travel through the area slower and more difficult in an emergency situation. 6 Tr. 45. Moreover, Bruce Martin, the operator's weekly examiner, testified, "[y]ou could get a stretcher down there[,] but you couldn't carry it." 6 Tr. 113. McGlothlin similarly testified that travel through the primary escapeway with a stretcher "wouldn't have been easy," and that travel through the area would be difficult. 5 Tr. 278-79, 307. Thus, there is clearly substantial evidence that the cited conditions would contribute to a delayed escape during an emergency, particularly for disabled miners, and the delay in escape would be reasonably likely to lead to serious injury.

We do not find persuasive Mill Branch's argument that the Judge should have used a sliding scale in considering the difficulty in using the escapeway since it was only required to have an escapeway that was approximately three feet high. In the primary escapeway, inspectors observed floor heaval almost to the mine roof. 5 Tr. 181; S. Ex. B-7. Cain testified that he had difficulty traveling through the primary escapeway even without a stretcher. 5 Tr. 147. Such

evidence amounts to substantial evidence demonstrating a reasonable likelihood of injury under the cited conditions regardless of how low the escapeway was permitted to be. Accordingly, we affirm the Judge's determination that the violation of section 75.380(d)(1) alleged in Citation No. 8178570 was S&S.

C. Order Nos. 8178573 and 8178574 – Weekly Examination Violations

1. Whether the Judge correctly determined that Mill Branch violated 30 C.F.R. §§ 75.364(b)(1) and (b)(2)

Orders Nos. 8178573 and 8178574 allege violations of sections 75.364(b)(1) and (b)(2) because the weekly examiner failed to recognize and record in the weekly examination book hazardous conditions existing in the intake and return escapeways, respectively. The Judge upheld the violations because there were numerous observable hazards in the escapeways that the weekly examiner essentially failed to recognize, record, or report.¹⁵ 34 FMSHRC at 2135, 2136.

As noted above, hazardous conditions in both the primary and secondary escapeways justified the issuance of an imminent danger order. There is substantial evidence in the record that, although such conditions had existed for some time and the operator was aware of them, the conditions had not been reported in the weekly examination book before the May 22 inspection other than the entry on May 8 that the “bottom was hooving in some places.” S. Ex. G, at 2; 5 Tr. 112. The return escapeway had three generations of stopping lines that had been crushed out, rebuilt, and re-patched. 5 Tr. 107-08, 119, 241. The primary escapeway also had damage and rehabilitation to stoppings. 5 Tr. 108. The conditions of the stoppings had existed for some time. 5 Tr. 194-95, 257. In addition, there is evidence in the record that the belt had to be repeatedly raised in May due to the extreme floor heaval that caused the belt rollers to stop turning.¹⁶ 6 Tr. 88-89; 5 Tr. 33-34; S. Exs. B-23 through B-28. There were tracks over the floor heaval in the primary escapeway, indicating that the examiner had passed through the area and was aware of the deteriorating conditions. 5 Tr. 77; S. Ex. B-5. Moreover, Cain testified that Hensley knew that a four-wheeler mantrip could not make it through the primary escapeway. 5 Tr. 69, 85. Such evidence amounts to substantial evidence supporting the Judge's determination

¹⁵ The orders do not allege violations of 30 C.F.R. §§ 75.363 or 75.364(h), which pertain to recordkeeping requirements for examinations. Operator's counsel confirmed that Mill Branch does not argue that an improper standard was cited. Oral Arg. Tr. at 65-66. Accordingly, we do not reach the issue.

¹⁶ Although Hensley testified that the belt had to be raised only one time (6 Tr. 52), weekly examiner Martin testified that the belt was repeatedly raised in May, although he did not know how many times. 6 Tr. 88-89. The Judge found Hensley to be less than fully credible, and we affirm the Judge's credibility determination. 34 FMSHRC at 2131.

that Mill Branch violated section 75.364(b)(1) and (b)(2) by failing to recognize, record, or report hazardous conditions in the escapeways.¹⁷

2. Whether the Judge correctly determined that the violations were S&S

With respect to each violation, the Judge, in a single sentence, adopted the rationale of the Secretary in concluding that the violations were S&S. 34 FMSHRC at 2136.

The Commission requires that a Judge analyze and weigh all probative record evidence, make appropriate findings, and explain the reasons for his or her decision. *Mid-Continent Res., Inc.*, 16 FMSHRC 1218, 1222 (June 1994). The D.C. Circuit has explained that, “[p]erhaps the most essential purpose served by the requirement of an articulated decision is the facilitation of judicial review.” *Harborlite Corp. v. ICC*, 613 F.2d 1088, 1092 (D.C. Cir. 1979). Without findings of fact and adequate justification for the conclusions reached by a Judge, we cannot perform our review function effectively. *Anaconda Co.*, 3 FMSHRC 299, 300 (Feb. 1981) (citations omitted).

The Commission has recognized that “wholesale incorporation of a litigant’s brief is a questionable judicial practice.”¹⁸ *Energy West Mining Co.*, 16 FMSHRC 1414, 1419 n.8 (July 1994). Here, the Judge failed to set forth his findings of fact, indicating which evidence he weighed and any credibility determinations he made, as well as any other reasons for concluding that the violations were S&S. Rather, the Judge adopted the reasoning of the Secretary set forth in a post-hearing brief. Without the Judge’s findings and explanations, we are unable to effectively perform our review function. Accordingly, we remand this matter to the Judge so that he may set forth his analysis and findings supporting his determination that Mill Branch’s violations of sections 75.364(b)(1) and (b)(2) were S&S.

3. Whether the Judge correctly determined that the violations did not result from unwarrantable failure

The Judge concluded that the weekly examiner’s conduct in not recording the conditions alleged in Order Nos. 8178573 and 8178574 did not result from unwarrantable failure. 34

¹⁷ We find unpersuasive Mill Branch’s argument that the orders fail to sufficiently identify hazardous conditions. Section 104(a) requires that each “citation shall be in writing and shall describe with particularity the nature of the violation” 30 U.S.C. § 814(a). We have recognized that the requirement for specificity serves the purpose of allowing the operator to discern what conditions require abatement, and to adequately prepare for a hearing on the matter. *Cyprus Tonopah Mining Corp.*, 15 FMSHRC 367, 379 (Mar. 1993) (citations omitted). Mill Branch’s extensive examination and cross-examination of witnesses concerning the cited conditions demonstrate that Mill Branch was able to adequately prepare for trial and knew what conditions would have required abatement. *See Asarco Mining Co.*, 15 FMSHRC 1303, 1306 (July 1993).

¹⁸ The document setting forth the rationale for the Judge’s decision, that is, the Secretary’s post-hearing brief, is not easily accessible to a reader of the decision.

FMSHRC at 2136. The Judge reasoned that the operator's justification for not recording the hazards, that is, because the hazards were well known, was more "the result of ignorance, misunderstanding, and incompetence than that of intentional misconduct or reckless disregard." *Id.* The Judge further noted that "there remain[] some questions as to the length of time [that] the conditions were known to the operator." *Id.*

Whether conduct is "aggravated" for purposes of unwarrantable failure is determined by looking at all of the facts and circumstances of each case, including: (1) the extent of the violative condition, (2) the length of time that it has existed, (3) whether the violation posed a high risk of danger, (4) whether the violation was obvious, (5) the operator's knowledge of the existence of the violation, (6) the operator's efforts in abating the violative condition, and (7) whether the operator has been placed on notice that greater efforts are necessary for compliance. *See McCoy Elkhorn Coal Corp.*, 36 FMSHRC 1987, 1993 (Aug. 2014); *Manalapan Mining Co.*, 35 FMSHRC 289, 293 (Feb. 2013); *IO Coal Co.*, 31 FMSHRC 1346, 1351 (Dec. 2009); *Cyprus Emerald Res. Corp.*, 20 FMSHRC 790, 813 (Aug. 1998), *rev'd on other grounds*, 195 F.3d 42 (D.C. Cir. 1999).

The Commission has repeatedly made clear that it is necessary for a Judge to consider all relevant factors in determining whether an unwarrantable failure to comply with a standard has occurred. *Coal River Mining, LLC*, 32 FMSHRC 82, 89 (Feb. 2010); *San Juan Coal Co.*, 29 FMSHRC 125, 129-30 (Mar. 2007); *Windsor Coal Co.*, 21 FMSHRC 997, 1001 (Sept. 1999) (remanding an unwarrantable determination for further analysis and findings when the Judge failed to analyze all factors). While a Judge may determine, in his or her discretion, that some factors are not relevant, or may determine that some factors are much less important than other factors under the circumstances, all of the factors must be taken into consideration and at least noted by the Judge. *IO Coal*, 31 FMSHRC at 1351.

Although the Judge set forth the factors that must be considered in an unwarrantable failure determination (34 FMSHRC at 2126), he failed to set forth his findings and analysis applying them. *See id.* at 2135-36.

Moreover, the Judge erred in accepting as a mitigating circumstance the examiner's justification that he did not record the hazardous conditions because he believed they were known to the operator. In promulgating the examination regulations, MSHA recognized that "[e]ffective examinations are the first line of defense to protect miners working in underground coal mines." 77 Fed. Reg. 20700, 20702 (Apr. 6, 2012). Cain and Hall explained that the purpose of an examination and the recording of a hazard is clear communication of any hazards, so that miners and management are not surprised by conditions, know whether they have a safe way out of the mine, and have an opportunity to address the hazardous conditions. 5 Tr. 114-15, 197. Effective examinations and the recording of hazards are particularly important with "worsening conditions," which the Judge found to be occurring in the mine. 34 FMSHRC at 2124. The weekly examiner's determination that conditions did not need to be recorded deprived miners of an important first line of defense and amounted to an aggravating factor.

Accordingly, we vacate the Judge's unwarrantable failure determinations. We remand this matter to the Judge so that he may apply the factors described herein, setting forth his analysis and findings consistent with this decision.

III.

Conclusion

For the reasons discussed above, we affirm the Judge's decision upholding Order No. 8178569, concluding that the violation of section 75.380(d)(1) alleged in Citation No. 8178570 was S&S, and holding that the operator violated sections 75.364(b)(1) and (b)(2) as alleged in Order Nos. 8178573 and 8178574. However, we remand the Judge's S&S determinations with respect to Order Nos. 8178573 and 8178574 so that he may set forth findings and analyses supporting his S&S determinations. Finally, we vacate the Judge's determinations that the violations of section 75.364(b)(1) and (b)(2) did not result from unwarrantable failures and remand for findings and analyses consistent with this decision.

Robert F. Cohen, Jr.
Robert F. Cohen, Jr., Commissioner

Patrick K. Nakamura
Patrick K. Nakamura, Commissioner

William I. Althen
William I. Althen, Commissioner

COMMISSION ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

July 15, 2015

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

Docket Nos. WEVA 2014-395-R
WEVA 2014-1028

v.

POCAHONTAS COAL COMPANY, LLC

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

ORDER

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

These matters arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012). On July 8, 2015, the Secretary filed a Petition for Certification for Interlocutory Review pursuant to Commission Procedural Rule 76, 29 C.F.R. § 2700.76 and a motion to stay proceedings below. This petition seeks review of the Administrative Law Judge’s June 18, 2015, Order Denying the Secretary’s Motion to Reconsider and Order Denying Motion to Stay the Court’s May 22 Order. In her July 2, 2015, Order, the Judge denied interlocutory review of the June 18 Order.

On July 10, 2015, Pocahontas Coal Company, LLC (“Pocahontas”) submitted a letter objecting to the arguments in the Secretary’s petition. Pocahontas also filed on that day a Response in Opposition to the Secretary’s Motion for Stay and Emergency Stay.

This case involves a challenge by Pocahontas to a Pattern of Violations Notice (“POV Notice”) issued on October 24, 2013. The operator served notices of deposition on several attorneys in the Secretary of Labor’s Office of the Solicitor, and the Secretary in turn filed a motion for a protective order, which the Judge granted in part and denied in part. In her May 22, 2015, and June 18, 2015, Orders, the Judge required the Secretary to produce a deponent from the Mine Safety and Health Administration and, ordered that if the operator could not ascertain the necessary facts from the deposition, it should propound interrogatories to the Secretary for the purpose of discovering facts related to the selection of the citations and orders that were listed in the POV notice. May 22 Order at 11-12; June 18 Order at 5.

In its opposition to the Secretary's Motion for Stay and Emergency Stay, the operator states that final written discovery was served upon the Secretary on July 7, 2015. It clarified that this encompassed two requests for production of documents.¹ We understand this to mean that the interrogatories contemplated by the Judge's Orders of May 22 and June 18 were not served on or before July 10, 2015.

Commission Rule 76(a) provides that interlocutory review is a matter of sound discretion of the Commission, and that the Commission may grant interlocutory review upon a determination that the judge's interlocutory ruling involves a controlling question of law and immediate review will materially advance the final disposition of the proceeding. 29 C.F.R. § 2700.76(a).

Upon consideration of the Petition for Interlocutory Review, we have determined that immediate review would not materially advance the final disposition of the proceeding. 29 C.F.R. § 2700.76(a)(2). We therefore deny the petition.

Mary Lu Jordan
Mary Lu Jordan, Chairman

Michael G. Young
Michael G. Young, Commissioner

Patrick K. Nakamura
Patrick K. Nakamura, Commissioner

William I. Althen
William I. Althen, Commissioner

¹ We note that in her May 22, 2015, Order, the Judge stated that if the Secretary objected to the operator's request for production of documents, the Secretary could submit them to the Judge for *in camera* review. May 22 Order at 11.

Commissioner Cohen, dissenting:

I respectfully dissent from my colleagues' decision to deny the Secretary's Petition for Interlocutory Review and Motion for Stay.

Much of the defense of Pocahontas Coal in this case is based on the allegation that the Secretary's decision to issue the Notice of Pattern of Violations ("POV") against it was arbitrary and capricious. *See*, Pocahontas' Memorandum of Law in Support of Motion for Summary Decision. In furtherance on that theory of defense, Pocahontas has sought very broad discovery, including depositions of Heidi W. Strassler, Associate Solicitor for Mine Safety and Health, Jason S. Grover, Trial Counsel for the Mine Safety and Health Division of the Office of the Solicitor, Douglas N. White, Associate Regional Solicitor for the Arlington Regional Office of the Solicitor, and Robert S. Wilson, MSHA Counsel for the Arlington Regional Office of the Solicitor. The Notices of Deposition for these four high-ranking government attorneys required them to produce their "entire file, including but not limited to, any and all notes, documents, memoranda, email correspondence, and any other correspondence in [their] possession which relates in any manner to [their] knowledge as to why Pocahontas Coal Company's Affinity Mine received POV Written Notice Number 7219153 on October 24, 2013, . . ." *See*, Secretary of Labor's Motion for Protective Order, Exhibits A, B, C and D. Not surprisingly, the Secretary resisted this discovery on the basis of the deliberative process privilege, work product doctrine, and attorney-client privilege.

It is clear from the record in this case that the Administrative Law Judge has been mindful of these privileges, and has sought to protect the Secretary from disclosure of "internal deliberations involving opinions, thoughts, conclusions and legal theories." *See*, Order Granting in Part & Denying in Part the Secretary's Motion for a Protective Order, May 22, 2015 ("the May 22 Order"), at 5, 10. However, the Judge's discovery orders in this case contain, in my view, a fundamental flaw which should be corrected before the case proceeds.

Pocahontas' challenge to the POV Notice based on the Secretary's action being arbitrary and capricious (or, to use the Judge's phrasing, an abuse of discretion) goes to the process by which the POV Notice was issued. As the Judge recognized, there were actually two processes involved in the issuance of the POV Notice to Pocahontas. *Id.*, at 3. One process involved the selection of Pocahontas to receive a POV Notice. The other process involved the actual content of the Notice – the selection of 42 alleged S&S violations, out of the overall 124 S&S citations and orders which had been issued to Pocahontas during the 12-month review period, and the ordering of those 42 alleged S&S violations into two distinct alleged patterns.

All of the discovery which is presently at issue involves the second of these two processes. The Judge determined that Pocahontas would be permitted discovery as to both of these processes, including "the selection and grouping of the 42 enforcement actions listed in the NPOV." *Id.*, at 6. I believe that it was error to permit discovery as to the selection and grouping of the 42 enforcement actions included in the POV Notice.

Arguably, the first process – the determination that an operator should be given a POV Notice – is subject to analysis for being arbitrary and capricious or an abuse of discretion. It is conceivable, for example, that a particular MSHA District Manager wants to put the screws to a particular operator and so engineers that operator being given a POV Notice. But no allegation of this nature is before the Commission in this Petition for Interlocutory Relief. Thus, there is no need at this time for the Commission to consider the scope of “arbitrary and capricious” or “abuse of discretion” as applied to the determination that Pocahontas be given a POV Notice.

However, the second process is different. It has nothing to do with the identification of Pocahontas as an operator which should receive a POV Notice – that decision has already been made. The second process involves the parameters of the POV Notice to be given to an already-determined operator. In the second process, the Secretary determines which of a very large number² of alleged S&S violations to rely on, and how to group them.

Fundamentally, the second process involves the Secretary’s strategic and tactical decisions as to how it intends to prove the POV. Since this process occurs after the decision to identify a particular operator to receive a POV Notice, the selection of particular violations to include in the POV Notice is irrelevant to that decision. The second process inherently involves prosecutorial discretion. As such, it is beyond review by the Commission.

Moreover, the decisions here necessarily involve lawyers in the Solicitor’s Office, since these are the people responsible for the litigation when the contested POV Notice comes before the Commission.³ Discovery involving communications among lawyers in the Solicitor’s Office, and between the Solicitor’s Office and MSHA personnel, necessarily implicates some combination of the deliberative process privilege, the work product doctrine and attorney-client privilege.

² The Secretary’s screening criteria do not permit an operator to even be considered for a POV Notice unless at least 50 S&S citations and orders have been issued against it in the most recent 12 month period. MSHA, Pattern of Violations Screening Criteria - 2013. <http://www.msha.gov/POV/POVScreeningCriteria2013.pdf>.

³ In the May 22 Order, the Judge stated, “On April 1, 2015, Pocahontas, after taking the deposition of Kevin Stricklin, the MSHA Administrator, first learned that it was the attorneys in the Solicitor’s Office, not MSHA personnel, who selected the 42 enforcement actions to be included in the NPOV.” May 22 Order, at 6. For Pocahontas to claim that it did not previously know that the Solicitor’s Office was involved in the selection of the 42 enforcement actions is akin to the scene in “Casablanca” where Captain Renault announces he is “shocked” to learn that gambling takes place in Rick’s Café Americain.

The Judge has limited the remaining discovery in this case to “facts” as distinct from “[i]nternal thoughts, opinions and conclusions.” May 22 Order, at 11. In my view, the discovery should have been limited before it got to this point. I would grant the Secretary’s Petition for Interlocutory Review and Motion for Stay in order to give the Commission the opportunity to rule on this very important and delicate issue involving discovery into matters involving prosecutorial discretion.

Robert F. Cohen, Jr.
Robert F. Cohen, Jr., Commissioner

ADMINISTRATIVE LAW JUDGE DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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July 2, 2015

PORTABLE, INC.,
Applicant,

v.

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

EQUAL ACCESS TO JUSTICE
PROCEEDING

Docket No. EAJA 2015-1-M
Formerly WEST 2013-526-M

Mine ID: 24-02016
Mine: Wash Plant

DECISION

Before: Judge Moran

Portable, Inc. (“Portable”), Applicant in this matter, has filed an application for an award of fees and expenses under the Equal Access to Justice Act (“EAJA”), contending that the Secretary of Labor’s action in WEST 2013-526-M was not substantially justified. Thereafter, the Secretary filed an Objection to the Application. Portable then filed a reply and the Secretary submitted a short surreply. Initially, the Secretary’s Objection challenged both Portable’s claim that the Secretary was not substantially justified in proceeding against it as well as the fees and expenses sought. However, the Secretary’s surreply reduced the issues to be resolved to the substantial justification question, the Secretary having conceded, upon reviewing the additional information provided by Portable in its reply, that Portable had subsequently provided additional information in the Declarations attached to its latest brief, which sufficed to show that it incurred the attorney fees and costs which it seeks. As a consequence of that additional supporting information, the Secretary’s surreply stated that he “concedes that Portable is eligible for an award, as it meets the size criteria and has incurred fees in defense of an action on which it was the prevailing party,” while maintaining that, on the merits, it is not entitled to such an award. Surreply at 1.

For the reasons which follow, the Court finds that the Secretary’s action was not substantially justified and awards the fees sought by Portable.

Background

As set forth in the Court's December 5, 2014, decision in WEST 2013-526-M, *Sec'y of Labor v. Portable, Inc.*, 36 FMSHRC 3249, 3250 (Dec. 2014) (ALJ), MSHA's Dennis Bellfi arrived at Portable Inc.'s mine on August 16, 2012, to perform a general inspection. Bellfi's inspection was delayed by approximately one-half hour. *Id.* at 3251. As a consequence of the delay, MSHA contends that Portable unreasonably delayed the inspection, in violation of section 103(a) of the Mine Act, 30 U.S.C. § 813(a) (2012).¹ The Court noted that the issue was whether, in the context of the findings of fact, there was an unreasonable delay in this instance. *Id.* at 3254. For the reasons detailed below, and as set forth in its decision, the Court found that "Portable did not unreasonably delay Bellfi's inspection or indirectly deny access to its mine on August 16, and therefore, did not violate section 103(a)." *Id.* at 3259.

EAJA Actions and the Substantial Justification Issue

In large measure, the parties are in agreement as to the legal test for determining whether the government's position was substantially justified. While the test for establishing substantial justification is not so minimal that the government need only show that it did not act frivolously, it does not require *more* than mere reasonableness to sustain the government's action. The Supreme Court has described the justification as being satisfied if "a reasonable person could think it correct, that is, if it has a reasonable basis in law and fact." *Pierce v. Underwood*, 487 U.S. 552, 566 n.2. (1988).

As the Commission stated in *Black Diamond Constr., Inc.*, 21 FMSHRC 1188, 1194, 1198 (Nov. 1999):

EAJA provides that a prevailing party may be awarded attorney's fees unless the position of the United States is substantially justified. *Contractors Sand and Gravel, Inc.*, 20 FMSHRC 960, 967 (Sept. 1998), *appeal docketed*, No. 98-1480 (D.C.Cir. Oct. 20, 1998). The Supreme Court has defined substantially justified as "justified in substance or in the main," or a position that has "a reasonable basis both in law and fact." *Pierce v. Underwood*, 487 U.S. 552, 565 (1988). In *Pierce*, the Court set forth the test for substantial justification as follows: "a position can be justified even though it is not correct, and we believe it can be substantially (i.e., for the most part) justified if a reasonable person could think it correct, that is, if it has a reasonable basis in law and fact." *Id.* at 566 n. 2. The Court also noted that certain " 'objective indicia' such as the terms of a settlement agreement, the stage in the proceedings at which the merits were decided, and the views of other courts on the merits" can be relevant to the inquiry of whether the

¹ As an alternative theory of liability, the Secretary much later asserted that Portable violated section 103(a)'s prohibition against giving mine personnel advance notice of an inspection. 36 FMSHRC at 3254. This alternative claim was hollow and was dismissed by the Court. *Id.* at 3258. The only theory worthy of discussion in this EAJA matter is the issue of whether the Secretary was substantially justified in pursuing its claim that the inspector was unreasonably delayed in beginning his inspection, running afoul of the right to conduct such inspections of mine property.

government's position was substantially justified. *Id.* at 568. In EAJA proceedings, the agency bears the burden of establishing that its position was substantially justified. *Lundin v. Mecham*, 980 F.2d 1450, 1459 (D.C.Cir.1992). When reviewing an administrative law judge's EAJA decision, the Commission applies the substantial evidence test for factual issues and de novo review for legal issues. *Contractors*, 20 FMSHRC at 966–67. [The Commission then added, agreeing with the administrative law judge's characterization that] the essence of substantial justification is whether reasonable people could genuinely differ.

Portable's Application for an Award of Fees and Expenses under the Equal Access to Justice Act

In its application, Portable notes that,

[p]ursuant to 29 C.F.R. § 2700.69, Judge Moran's decision represents his final disposition of the matter where Portable unquestionably prevailed. The Secretary failed to appeal this decision and it has not been directed for review by the Commission. Therefore, pursuant to Section 113(d)(1) of the Mine Act, this decision is now the final decision of the Commission. As such, Portable meets the minimal standard required by the Act of having prevailing party status.

Application at 6. Portable also asserts that,

[a]s demonstrated at hearing, MSHA was never denied access to the Mine and the inspector was never told he could not inspect[,] . . . [and t]herefore, issuing a citation pursuant to Section 103(a) was contrary to the Mine Act as it was obvious that the inspector was never denied entry to the Mine, [and] he was not unduly delayed on the date of his inspection.

Id. at 7. Noting that the “burden is on the Secretary to establish that his position in this case was substantially justified in law and fact or that special circumstances make an award unjust,” Portable asserts that MSHA's enforcement action was not substantially justified. *Id.*

Although Portable acknowledges that section 103(a) explicitly provides for an inspector's right to conduct an inspection, it replies that Portable never contended otherwise and it asserts that there was never any direct or indirect denial of that right. Application at 8. A fair contention, Portable asserts that when the weakness of MSHA's claim became apparent, the Secretary added the alternative claim of advance warning. *Id.* at 10.

The Secretary's Objection to Portable's Application

Applying the standard for reviewing EAJA claims, the Secretary maintains that its position was based on "sound legal reasoning and factual support." Objection at 6. He argues that unreasonable delay of an inspection comes within the proscription of interference of a mine inspection. The Secretary characterizes the events associated with this matter as an "indirect denial." *Id.* at 7. As framed by the Secretary, "[t]he question before the Court was whether that delay was unreasonable, rising to the level of impeding the inspection."² *Id.*

It is true that the Court held that a thirty minute delay *could* constitute impeding in violation of section 103(a), and that, in finding no delay here, it limited its holding to the particular facts. However, the Secretary goes on to assert that

[a]fter weighing the evidence and making credibility determinations, the Court disagreed with the Secretary as to those facts and their impact, but that does not mean the Secretary's position was not substantially justified[, and that g]iven these facts and the governing law which had not yet dealt with the particularities at issue here, "reasonable people could genuinely differ."

Id. at 8.

This characterization seeks more than is warranted. The analysis is not simply a matter of observing that there was a 30 minute delay and then coupling that with the observation that the law has not yet dealt with "the particularities at issue here." One has to examine all that went on during the time from the inspector's arrival up to the point that he began his inspection, as those circumstances inform whether there was in fact an unreasonable delay. As the Court's decision clearly set forth, under the particular circumstances, there was no unreasonable delay.

The essence of the Secretary's argument asserts that it was the Court's conclusion "that the evidence did not adequately show Portable's intent to impede the inspection [and that] [t]he Court's conclusions were based largely on its credibility findings and its view of the import of the evidence." *Id.* at 9. Discounting that the Bellfi did not inform Portable that he had a legal right to conduct an inspection, the Secretary apparently believed it was sufficient for the inspector to "announce that he was an MSHA Inspector and that he was present to conduct an inspection." *Id.* He adds that "[t]here is no legal requirement that an inspector use any particular words in announcing his right and presence to inspect." *Id.* From this, the Secretary urges that

² Although the Secretary notes that, while the Court concluded that the delay was not unreasonable and that it did not rise to the level of impeding the inspection, he contends that this conclusion was reached through the process of the Court's evaluation of the evidence, by drawing inferences and conclusions and making credibility determinations. He asserts that simply because the Court's conclusions were different than the Secretary's does not mean that his case was not substantially justified. Objection at 7. As explained in this decision, the Court does not agree that the matter can be so described as merely different takes on the same evidence.

“any failure to expressly announce the statutory basis for [the inspector’s] legal authority does not detract from the fact that the Secretary’s position was substantially justified.”³ *Id.* at 9-10.

Noting that the “Court concluded that Portable did not definitively tell Bellfi that he could not inspect the mine,” the Secretary asserts that Portable did this indirectly by pointing to Bellfi’s testimony that he “normally waits five minutes before proceeding with his inspection.” *Id.* at 10. A long stretch, the Secretary contends that Bellfi’s failure to start his inspection within his normal five minute wait “evidence[s] his view that he was being barred from inspecting without an escort.” *Id.* The Secretary then adds that “Bellfi also testified that he told Edwards that the longer he had to wait, the more likely he would be to issue a citation for impeding the inspection.” *Id.* However, this observation undercuts the Secretary’s claim of impeding, because it shows that at that point in time Bellfi acknowledged that no impeding had yet occurred.

The Secretary would have it that he “was entitled to rely upon the statements, observations and opinions of an experienced mine inspector, and could not have anticipated that the Court would credit Portable’s witnesses rather than the inspector’s[.]” again describing any finding of EAJA liability as simply grounded upon credibility findings. *Id.* at 10. As explained below, the Court’s conclusions did not rest only on credibility findings but on the testimony from MSHA’s own witnesses, which significantly undercut the claim that there had been an impeding of the inspection.

The Secretary further contends that Portable asserts “that it is automatically entitled to an award because the Secretary’s ‘enforcement position [] is the subject of an internal disagreement within the agency.’” Surreply at 1. Addressing that contention, the Secretary points out that

Supervisor Petty testified that his internal office procedure is for inspectors to contact him prior to issuing a citation for impeding, and noted that he has waited for 15-20 minutes at Portable for Ms. Rather to walk around with him. But he also stated that an inspector has the right to inspect immediately upon arrival, and did not opine that the citation issued here was improper.

Id. The Secretary then observes that

this Court stated in its decision that a thirty minute delay could constitute impeding an inspection in violation of section 103(a) of the Mine Act[, adding that t]here simply was no internal dispute within the agency of the type at issue in *Black Diamond Construction*, 21 FMSHRC 1188 (1998) and [accordingly the Secretary urges that] Portable’s argument on this issue must be rejected.

Id. at 1-2.

³ The Secretary also adds that the inspector’s failure to first contact a supervisor does not diminish that there was substantial justification because such a requirement was not an established MSHA policy. Objection at 9-10.

Discussion

Having considered the parties' arguments, and upon applying the applicable standard for determining Portable's eligibility for an EAJA award, the Court finds that the Secretary was not substantially justified in bringing an action under section 103(a) of the Mine Act in this instance.

As noted, MSHA contended that Portable unreasonably delayed the inspection, in violation of section 103(a) of the Mine Act, 30 U.S.C. § 813(a).⁴ While the Court agrees with the Secretary that, as a general principle, the section is violated if a mine operator *unreasonably delays* the start of an inspection by denying the inspector access to the mine, the issue here is whether, in the context of the findings of fact, there was an unreasonable delay in this instance.

The length of the delay was minimal. Although the Secretary's civil penalty petition alleges that the MSHA's inspection "was delayed by approximately one-half hour," and that the Court stated that a delay of 30 minutes, or possibly less time, could constitute an interference with the right to inspect, it cannot be ignored that the delay here was minimal and, realistically measured, was far less than 30 minutes.

It is true that the delay stemmed from the operator's claim that a safety escort was needed to accompany the inspector, but that is not the entire measure of ascertaining whether the Secretary was substantially justified in bringing this action. For a significant period of time the inspector acceded to the basis for the delay. To begin, although the inspector told employee Eric Edwards that he was ready to start the inspection and advised that he did not need to sign in, he still agreed to go to the front office to obtain an escort. Importantly, the inspector did not then tell Edwards that he had the right to inspect the mine without an escort, nor did he advise that a citation could be issued for denying him access to the mine. Instead, he told Edwards that the longer it took to obtain an escort, the more inclined he was to issue a citation for impeding the inspection. But that stance meant that the inspector was not then announcing that his inspection would commence forthwith. Accordingly, the clock for measuring any claim of an unreasonable delay could not have started at that time. In fact, Bellfi told Edwards that he would "go ahead and wait downstairs for [Edwards] to get an escort." *Portable*, 36 FMSHRC at 3251. Approximately 20 minutes then elapsed and it was only then that he informed Edwards that he had waited "longer than necessary" and that he was going to issue a section 103(a) citation for impeding his inspection. *Id.* "Edwards' response was that Ms. Rather advised that the inspector could start his inspection by himself." *Id.* at 3. Accordingly, when the inspector announced that he would wait no longer, the Respondent immediately accepted his demand. Thus, a key part of the analysis is that rather than proceeding with his inspection, the inspector went along with the delay and, when he decided he would wait no longer, Portable did nothing to stall or interfere with that decision. Restated, when the inspector advised that no additional delay would be

⁴ As an alternative theory of liability, the Secretary asserts that Portable violated section 103(a)'s prohibition against giving mine personnel advance notice of an inspection." *Portable*, 36 FMSHRC at 3249. "It was not until after the inspection that Bellfi determined that such safety corrections could have been made during the time that he was waiting for an escort. It was such afterthoughts that prompted MSHA's alternative theory of liability, that Portable gave advance notice of the inspection." *Id.* at 3252.

allowed, he was immediately advised by Jennifer Rather, Safety Director, via the dispatcher, that the inspection could commence without an escort. *Id.*

Because the inspector was pacified up to that point in time, which was approximately 20 minutes later, when Edwards came back, Portable's response from Ms. Rather that the inspector could start his inspection by himself demonstrates both that there was no unreasonable delay and that the Secretary's position, *under these particular facts*, was not substantially justified. This is because that was the first point in time when the inspector made an unqualified assertion of the right to inspect and it was then that the Respondent immediately acceded to the start of the inspection, as Edwards' response was that Ms. Rather advised that the inspector could start his inspection by himself. Therefore, the delay was minimal to non-existent, once the inspector insisted that the inspection occur.

Other testimony of record only serves to confirm the correctness of this conclusion that the Secretary was not substantially justified in bringing the section 103(a) action. Inspector Bellfi informed that, prior to becoming an MSHA Conference and Litigation Representative, at a time "when he used to conduct MSHA mine inspections on a full-time basis, he would generally wait about 5 minutes for an escort." *Portable*, 36 FMSHRC at 3251. He advised that if an escort was not present within that period of time, he would begin the inspection and tell mine personnel that the escort could meet up with him. *Id.* Yet, in this instance he did not follow his own announced practice. Instead, he accepted the brief delay. In fact, he advised that "he was trained to allow time for an operator to get a mine representative to accompany him during an inspection, as long as doing so did not unduly delay the inspection." *Id.* at 3252. But, the Court observes that a mine operator must not be left to guess when, by Inspector Bellfi's particular lights, undue delay would be deemed to have occurred.

Thus, it was Bellfi's view that Portable was in violation of section 103(a) of the Act because it refused to allow him to inspect the mine by telling him that he needed an escort to enter mine property, and thereafter failing to provide one for 30 minutes, before then allowing him to begin his inspection without an escort. While that could be true in the abstract, in this instance the inspector did not act in a manner which was consistent with his own professed practices. Instead, even Bellfi considered Portable's actions to be *an indirect denial* of the inspection and, by so characterizing Portable's actions, he conceded that they were in an enforcement gray area. Further, the inspector admitted that he never explained to Eric Edwards, or to anyone at Portable, that there are inspection requirements under section 103(a). This admission does not aid the Secretary's claim that its action was substantially justified.

The Secretary noted that Inspector Bellfi was "legally entitled to commence the inspection without undue delay." *Id.* at 3255. But this is a straw man argument, as the point was not disputed; both sides agreed that an inspector is entitled to inspect without undue delay. The pertinent issue involved the claim of indirect denial of entry. The Court found that did not occur, while also noting that the inspector never attempted to explain his authority, nor did he simply start his inspection. "On these facts it is clear that the Inspector chose to wait much longer than his normal amount of time for an escort. As he stated, he would usually start the inspection after five (5) minutes, proceeding unaccompanied, if necessary." *Id.*

Beyond these observations, the Court noted in its decision:

There was no testimony or documentary evidence presented by either side that Bellfi was told that he was *not permitted* to inspect the mine at any point during the 30 minute waiting period despite the description in the citation suggesting otherwise.⁵ On the contrary, Edwards had returned to Bellfi to tell him the crusher was being shut down and he could begin the inspection unaccompanied when Bellfi decided to issue the citation. Further, Bellfi never told Edwards he had a right to inspect the mine, nor did he attempt to start his inspection despite testifying that he would normally only wait 5 minutes for an escort before beginning. These actions also diminish the Inspector's claim that Portable's actions constituted an indirect denial. In the Program Policy Manual (PPM), a source of MSHA's interpretation and guidelines on enforcement of the Act, indirect denials are "those in which an operator or his agent does not directly refuse right of entry, but takes roundabout action to prevent inspection of the mine by interference, delays, or harassment. There must be a clear indication of intent and proof of indirectly denying entry." Ex. R-27 at 2. Based on the above actions taken by Portable, the court [found] that the record does not evidence such 'clear indication of intent and proof of indirectly denying entry,' and accordingly it is found that the Respondent did not exhibit the intent to indirectly deny access or otherwise delay the inspection.

Id. at 3255-56. The Court also observed that

[i]n addition, testimony from Supervisor Petty and Ms. Rather regarding past practices were particularly enlightening. Petty had performed or accompanied hundreds of inspections in the past, sometimes waiting 30 or more minutes for an escort before beginning the inspection. No citations for impeding were issued as a result of those prior wait times. Petty also explained that MSHA protocol was for inspectors to tell mine personnel that they had a right to inspect the mine immediately and that, after so informing, there was no timeline for issuing the citation for impeding. There is no indication that Bellfi did this. Ms. Rather had been present for all inspections at Portable, except for one, prior to August 16, 2012, and she never had an issue with an inspector waiting up to 30 minutes for her to arrive and be an escort. While a lack of past enforcement by MSHA cannot be the sole reason for vacating this citation, the Secretary's previous interactions with Portable set the stage for its expectations, and was indicative of the amount of time it considered to be a reasonable period to wait.

⁵ As the Court noted at footnote 9 in its December 2014 decision, "[t]his is distinguishable from the facts in *F.R. Carroll* where the inspector repeatedly asked the operator to allow him to proceed with the inspection, and told mine personnel that a 5 hour delay could not be granted. *F.R. Carroll*, 26 FMSHRC at 102.

Thus, it is fair to state that Portable's past experience with MSHA inspections led it to believe that it was acting in a manner consistent with those experiences, and therefore that it was not thwarting any inspection.

Id. at 3256.

Finally, the Court took note that

[i]t is important to recognize [] the Secretary's valid concern that "excusing" a 30 minute delay "would severely impair MSHA's ability to protect miners." . . . Under a different set of facts, intentionally and unreasonably delaying an MSHA inspector for 30 minutes, or possibly, in some circumstances, a delay of less time, could indeed weaken MSHA's ability to protect miners. Accordingly, the Court's decision here is not meant to be broadly interpreted but instead is limited to the specific circumstances of this [] case.

Id. at 3259. Thus, the Court limited its decision to the record evidence and was not making a broader assertion about acceptable delays for inspections. It takes the same approach for this EAJA Application, ruling only that the Secretary was not substantially justified in bringing this particular action.

Conclusion

As noted, after the Application was filed and the Objection to it submitted, Portable then filed a reply and the Secretary submitted a brief surreply. The surreply reduced the issues to be resolved to the substantial justification question, the Secretary having conceded "that Portable is eligible for an award, as it meets the size criteria and has incurred fees in defense of an action on which it was the prevailing party." Surreply at 1. Having found that the Secretary's action was not substantially justified, the Court awards the \$65,217.82 sought by Portable.

So Ordered.

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

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July 2, 2015

MARK GRAY,
Complainant

v.

NORTH FORK COAL CORPORATION,
Respondent

DISCRIMINATION PROCEEDING

Docket No. KENT 2010-430-D
BARB-CD-2009-13

Mine: Mine No. 4
Mine ID: 15-18340

DECISION ON REMAND

Appearances: Tony Oppegard, Esq., Lexington, Kentucky and Wes Addington, Esq.,
Appalachian Citizens' Law Center, Whitesburg, Kentucky, for
Complainant

Stephen M. Hodges, Esq., Penn, Stuart & Eskridge, Abingdon, Virginia,
for Respondent

Before: Judge Rae

This case is before me upon a complaint of discrimination filed by coal miner Mark Gray ("Gray") against North Fork Coal Corporation ("North Fork") under section 105(c) of the Federal Mine Safety and Health Act of 1977 ("the Mine Act"), 30 U.S.C. § 815(c).¹

I. PROCEDURAL HISTORY

A. Original Decision

On May 15, 2009, Gray was terminated from his job as a roof bolter at North Fork's Mine No. 4. Gray subsequently filed a complaint against North Fork alleging discrimination under section 105(c)(3) of the Mine Act. He alleged that he had been fired for a protected work refusal in that he refused to roof bolt a "deep cut," a cut of coal that exceeded the maximum depth allowed by the roof control plan. (Complaint, Dec. 30, 2009.) He also alleged that his

¹ Section 105(c)(1) of the Mine Act provides in pertinent part: "No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner ... because of the exercise by such miner ... of any statutory right afforded by this Act." Section 105(c)(2) permits the Secretary of Labor to initiate an action on a miner's behalf if he determines that discrimination has occurred. Section 105(c)(3) permits a miner to file a discrimination claim on his own behalf if the Secretary decides not to pursue the claim, which is what occurred here.

foreman had “expressed annoyance/hostility when Gray insisted that the ventilation curtains had to be hung while he was roof bolting.” *Id.*

A hearing was held on December 15-16, 2010. I issued a decision on October 20, 2011. 33 FMSHRC 2495 (Oct. 2011) (ALJ). After considering all the evidence and testimony that had been presented at the December 2010 hearing and at Gray’s earlier temporary reinstatement hearing,² I concluded that Gray had failed to make out a *prima facie* case of discrimination because he had failed to prove he engaged in protected activity. My earlier decision is incorporated by reference herein.

B. Scope of Remand

Gray appealed my decision on grounds that he should have been permitted to present expert testimony on the issue of whether his signatures were forged on two written disciplinary warnings that had purportedly been issued to him on February 27, 2009 and April 29, 2009 (Exhibits Compl.-B and Compl.-A, respectively).³ 35 FMSHRC 2349, 2355 (Aug. 2013). Several days before the hearing, Gray had named forensic document examiners Dr. Larry S. Miller and Peter J. Belcastro, Jr. as potential expert witnesses who would testify as to the authenticity of Gray’s signature on the purported disciplinary warnings. (*See* Supplemental Answer of Mark Gray to North Fork’s 2nd Set of Interrogs., Dec. 3, 2010; 2nd Suppl. Answer to 2nd Set of Interrogs., Dec. 6, 2010.) North Fork had immediately moved to preclude Gray from calling the two expert witnesses. I had granted North Fork’s motion and excluded the witnesses on the basis of late disclosure, (Order, Dec. 8, 2010, unpublished), but I had permitted Gray to submit the experts’ reports in an offer of proof at the close of the hearing, (Tr.II 110-21).

On appeal, the Commission found that Gray’s late disclosure of the expert witnesses did not violate any discovery rules such as would have justified excluding their testimony. 35 FMSHRC 2349, 2356-58 (Aug. 2013). To the extent that the late disclosure violated the deadlines set forth in my scheduling order, the Commission found that the witnesses nonetheless should have been permitted to testify in light of the lack of prejudice to North Fork, the absence of evidence of bad faith on Gray’s part, and the importance of the witnesses’ testimony. *Id.* at

² The temporary reinstatement hearing was held on September 2, 2009. *See* 31 FMSHRC 1143 (Sept. 2009) (ALJ). Gray’s case has been the subject of multiple hearings. The hearing transcripts are abbreviated as follows:

Transcript of September 2, 2009 temporary reinstatement hearing – “Temp. R.”

Transcript of December 15, 2010 proceedings on the merits – “Tr.”

Transcript of December 16, 2010 proceedings on the merits – “Tr.II”

Transcript of July 25, 2014 hearing taking expert testimony – “ET”

³ In the closing paragraphs of his petition for review, Gray also asserted that several of my factual findings were unsupported by the record. (Pet. for Discretionary Review 17-18.) However, Gray did not revisit these assertions in his appeal brief, instead focusing solely on the exclusion of the expert testimony, and the Commission declined to address the assertions in its decision. This is consistent with past cases where the Commission has deemed an issue abandoned and declined to address it after the petitioner raised the issue in his PDR but failed to argue it on brief. *RNS Services, Inc.*, 18 FMSHRC 523, 526 n.6 (Apr. 1996), *aff’d*, 115 F.3d 182 (3d Cir. 1997); *ASARCO Mining Co.*, 15 FMSHRC 1303, 1304 n.3 (July 1993).

2360. The majority opined that the expert testimony regarding the written warnings was important both because the written warnings were the “principal documentary evidence supporting North Fork’s claim of Gray’s poor performance” and because Gray’s allegation that the documents were fraudulent touched on the integrity of the proceedings. *Id.* at 2362. The majority further opined that the evidentiary exclusion could have affected the analysis of whether protected activity occurred.⁴ *Id.* at 2362-65. My order excluding the expert testimony was reversed, the decision was vacated, and the case was remanded “for further proceedings, including any necessary discovery.” *Id.* at 2366.

On remand, I am limited to considering the issues that were appealed to the Commission and addressed in the Commissioners’ decision. As always, the Commission’s scope of review on appeal was statutorily limited to the questions raised by Gray in his petition for discretionary review. 30 U.S.C. § 823(d)(2)(A)(iii); *see also* 29 C.F.R. § 2700.70(g); *Saab v. Dumbarton Quarry Associates*, 22 FMSHRC 491, 495 (Apr. 2000). Gray’s PDR focused squarely on whether I should have excluded Miller’s and Belcastro’s testimony. The Commission did not entertain any new theories or evidence and did not grant a *de novo* trial, but merely remanded the case to me for consideration of the expert testimony and its effect on my credibility determinations, along with any necessary discovery, adhering to “the basic principle that parties in Mine Act cases must first present their evidence and advance their legal theories before the Judge, and not for the first time on appeal.” *Black Beauty Coal Co.*, 37 FMSHRC 687, 693-94 (Apr. 2015); *see also Oak Grove Res., LLC*, 33 FMSHRC 2657, 2664 (Nov. 2011); *Beech Fork Processing, Inc.*, 14 FMSHRC 1316, 1321 (Aug. 1992). Accordingly, the scope of this case on remand is limited to my consideration of the testimony of Gray’s handwriting experts, any rebuttal evidence presented by North Fork, and the effect of the expert testimony on all the other witnesses’ credibility and on the outcome of the case.

C. Rehearing

When the case was returned to me, I scheduled a hearing to take the testimony of the two expert witnesses previously identified by Gray, Miller and Belcastro. North Fork filed a motion requesting that I expressly limit the scope of the hearing to those two witnesses’ testimony and any necessary rebuttal testimony. (Mot. to Amend Notice of Hr’g, Jan. 22, 2014). Gray opposed that motion and filed a separate motion seeking leave to introduce additional evidence in the form of (1) testimony from a new lay witness, and (2) evidence from a previously unidentified “mine safety expert” whose anticipated testimony was not described with particularity. (Mot. to Allow Presentation of Add’l Lay & Expert Evidence at Re-Trial, Feb. 14, 2014.)

⁴ Chairman Jordan issued a dissenting opinion stating it was “highly speculative at best” to anticipate that a different result would have been obtained if the experts had testified. 35 FMSHRC at 2367-70 (Jordan, Chairman, dissenting). She opined that a finding of forgery was far from inevitable based on Gray’s offer of proof, and even if proven, the alleged forgery would not necessarily call into question my prior credibility determinations. *Id.* at 2368-70. In this regard, she noted that I had credited the testimony of witnesses who had nothing whatsoever to do with the disciplinary warnings and that witnesses involved with the warnings could still be credited as to matters unrelated to the warnings, including whether Gray engaged in protected activity. *Id.*

On March 4, 2014, I issued an order granting North Fork's motion to limit the scope of the hearing and denying Gray's motion to allow additional evidence. 36 FMSHRC 797 (Mar. 2014) (ALJ). I explained that the scope of the hearing on remand was limited to those issues raised in the petition for discretionary review and accepted for review by the Commission – namely, whether Gray should have been permitted to attack the credibility of North Fork's witnesses by presenting the testimony of Miller and Belcastro. *Id.* at 799-800. Although I recognized that the Commission had contemplated a possible change in the outcome of the case on remand, I noted that such a change was contemplated only to the extent it resulted from Miller's and Belcastro's impact on my credibility assessments. *Id.*

I rejected Gray's argument that he was entitled to a *de novo* trial or presentation of new evidence under Federal Rules of Civil Procedure 59 or 60(b)(2), finding that he did not meet the stringent requirements for either of these extraordinary forms of relief. *Id.* at 800-03. To obtain a new trial under Rule 59 based on affidavits, the movant must file a motion with affidavits within 28 days of entry of judgment; here, Gray's motion and affidavits were filed 28 months after entry of judgment, so his Rule 59 motion was time-barred. *Id.* at 800. Similarly, to obtain relief from judgment based on newly discovered evidence under Rule 60(b)(2), the movant must request relief within one year of entry of judgment, which has been interpreted by the Commission as an absolute requirement; again, Gray did not meet this time limitation. *Id.* at 800-01. In addition, a party seeking to introduce new evidence under Rule 60(b) must show that the evidence was in existence at the time of trial but could not have been obtained even by exercising due diligence, is not merely cumulative, and would change the result. *Id.* at 801. Gray did not make these showings, for the reasons that follow.

First, the new lay testimony Gray sought to admit could have been presented during the initial proceedings and lacked any indicia of reliability such as would show it would change the result of the case. *Id.* at 801-02. The new lay witness, Michael Creech, was a former roof bolter at North Fork's No. 4 Mine who would purportedly testify that he had seen deep cuts being taken at the mine, that he had been told to bolt faster than Gray to make him look bad, and that he had heard an unidentified member of management say he wanted to be rid of Gray for making safety complaints. *Id.* at 801. However, Creech's vaguely worded affidavit did not include any details such as when and where he had observed deep cuts, who told him to bolt faster, or whom he had overheard discussing Gray; in sum, the affidavit lacked any specific facts that would lend credibility to Creech's proffered testimony. *Id.* at 802. The information Creech would provide would not change the outcome of the case in light of the independent documentary evidence and credible testimony that contradicts Creech's affidavit. *Id.* Gray also failed to show that Creech's testimony was unavailable at trial. Although Creech's alleged fear of reprisal from his employer had supposedly prevented him from testifying at the initial hearing, there was no evidence Gray had attempted to secure Creech's presence at that hearing and Creech had stopped working for North Fork at least five months before my initial decision was issued, yet Gray had not filed for a new hearing or made any attempt to identify or secure Creech as a witness. *Id.* at 801-02. I concluded that the affidavit from Creech did not justify reopening the litigation and I still reach the same conclusion having reevaluated the evidence as set forth below.

I also found that the new expert testimony Gray sought to admit could have been obtained before the initial hearing and would not necessarily change the result. Gray was

requesting to call Tracy Stumbo as an “expert on mine safety.” *Id.* at 802. Gray’s counsel did not offer an affidavit or summary of Stumbo’s proffered testimony, but during a conference call he suggested that Stumbo would testify “just generally about taking deep cuts and whether or not that means you will have a roof fall.” *Id.* at 803. There was no proffer that this expert had ever set foot in the North Fork mine during the March through May 2009 period of time or had any particular knowledge of the conditions at that time as did those persons who worked in and inspected the mine during the relevant period. I found that this information could have easily been addressed at the initial hearing, and furthermore there was no showing that Stumbo’s testimony would materially affect the outcome of the case, as the roof fall issue was only one basis upon which I made credibility determinations at trial. *Id.* This is particularly true taking into account MSHA roof specialist Doan’s testimony that no deep cuts were permitted in District 7, the MSHA district where the mine was located, at this time due to the roof conditions. I also took into account the fact that all the witnesses, including Gray, testified that conditions were such that traveling under unsupported top posed a very high risk of danger. Accordingly, I denied Gray’s request to present the new expert testimony. I find it would not have changed my assessment of the evidence or the outcome of the case.

Gray subsequently filed notice that he would call only Miller to testify at the hearing. North Fork filed a motion seeking to exclude or limit Miller’s testimony on the basis that handwriting analysis is not a reliable field of expertise under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).⁵ However, I denied that motion, reasoning that in a non-jury trial the risk of improper influence is eliminated and the reliability of expert testimony goes more to its probative weight than to its admissibility. (Pretrial Ruling on Resp.’s Mot. to Exclude Expert Testimony & Objection to Exhibits, July 25, 2014, unpublished). I also noted that the Commission had specifically directed me to admit the expert testimony.

A hearing was held on July 29, 2014 in Harlan, Kentucky, at which time Gray offered Miller’s expert testimony and related documentary evidence, including Miller’s report, his curriculum vitae, and copies of the signatures he analyzed. Belcastro was not called as a witness. North Fork did not call any rebuttal witnesses. The following decision is based upon my consideration of the new evidence, my thorough review of the entire record, and my observations of the demeanor of the witnesses at the December 15-16, 2010 and July 29, 2014 hearings.

⁵ When addressing expert testimony, the Commission has stated it is guided by the principles established under *Daubert* and Rule 702 of the Federal Rules of Evidence. *In re: Contests of Respirable Dust Sample Alteration Citations*, 17 FMSHRC 1819, 1843 (Nov. 1995), *aff’d sub nom. Sec’y of Labor v. Keystone Coal Mining Corp.*, 151 F.3d 1096 (D.C. Cir. 1998). Rule 702 sets requirements for the admission of evidence deriving from “scientific, technical, or other specialized knowledge.” *Daubert* requires the trial court to evaluate whether the theories and techniques underlying a witness’s testimony meet certain minimum standards of reliability before allowing the witness to testify as an expert under Rule 702. Although *Daubert* dealt specifically with Rule 702 testimony deriving from “scientific” knowledge, the Supreme Court subsequently made clear that the principles set forth in *Daubert* apply equally to testimony deriving from “technical, or other specialized knowledge,” including experientially derived knowledge such as that possessed by forensic document examiners like Miller. *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999).

II. EXPERT TESTIMONY

A. Summary of Expert Testimony

Dr. Larry S. Miller is an expert in the field of forensic document examination, which includes handwriting identification, signature verification, and examination of paper and ink to identify the source of impressions and markings. (ET 9.)

Miller's qualifications are set forth in his testimony and curriculum vitae. He holds Bachelor's and Master's degrees in Criminal Justice and a Ph.D. in Public Health and Safety. He has worked as a forensic science professor ever since he received his Master's degree in 1977, and he currently serves as chair of East Tennessee State University's Criminal Justice and Criminology department and director of its graduate program for forensic document examination. Miller has also worked as a forensic document examiner (FDE) for the state of Tennessee since 1981 and for a private consulting firm since 2008. His earliest training as an FDE was received through the Tennessee Law Enforcement Training Academy and a community college in the 1980s. He later completed the U.S. Secret Service's basic and advanced courses in questioned document examination in 1987 and 2002, respectively. Although there are no state or federal licensing programs for FDEs, Miller is certified by the Board of Forensic Document Examiners, which is accredited by the Forensic Specialties Accreditation Board. (ET 6-17, 52-58; Ex. Compl.-E.)

In this case, Miller was asked to examine the purported disciplinary warnings dated February 27, 2009 (Exhibit Compl.-B, also referred to as "Q1") and April 29, 2009 (Exhibit Compl.-A, also referred to as "Q2") to determine whether Gray's signatures on these documents were genuine. After comparing the questioned signatures to a group of 54 exemplar signatures known to have been executed by Gray, Miller issued a two-page report opining to a high degree of likelihood that the questioned signatures were not penned by Gray. (Ex. Compl.-D.) This conclusion was based on Miller's observation of "numerous significant disqualifying dissimilarities" between the questioned and exemplar signatures, including "dissimilarities in line quality, letter formations, proportional spacings, beginning and ending strokes, and angle/slant." *Id.*

Miller explained his findings in greater detail at the hearing. First he described the theory behind handwriting analysis. Handwriting analysis is a forensic identification procedure that relies on pattern recognition. (ET 101-02.) The underlying principle is that "given a sufficient quantity and quality of handwriting, no writer has ever been found to possess the same characteristics of the writing of another person." (ET 19.) Unlike a fingerprint, each specimen of a person's handwriting is not exactly the same, but it is expected to fall within the "normal curve" representing the natural variation of his known writing. (ET 22-23, 82.) Thus, to authenticate a questioned signature, a handwriting examiner first examines a group of known signatures to become familiar with the characteristics of the subject's writing and then examines the questioned signature to determine whether it falls within the normal curve of the subject's writing. (ET 22-23, 67.)

Miller relied on the 54 exemplar signatures contained in Exhibit Compl.-F to familiarize himself with Gray's usual writing. The exemplars were collected by MSHA investigators during the investigation of Gray's discrimination complaint. Forty of them comprise two lists of "request" exemplars that Gray produced at the request of MSHA Special Investigator Guy Fain on July 21 and 30, 2009. (Ex. Compl.-F, pages 9-10.) There is very little variation amongst the signatures in either of these lists. Miller testified this uniformity is typical for a list of request exemplars because all of them were written under the same conditions. (ET 112.) The other fourteen exemplars display much greater variation. Six of them were taken from Department of Labor forms dating from 2001 to 2005. (Ex. Compl.-F, pages 3-8.) The remaining eight are from unknown sources. One is dated November 20, 2007 and the rest are undated. (Ex. Compl.-F, pages 11-18.)

Miller testified that Gray's known writing (i.e., the exemplars) exhibited an above average degree of natural variation. (ET 24-25.) Because of this wide range of natural variation, Miller's level of confidence in his conclusion that Gray did not pen the questioned signatures was "a notch below certainty." (ET 32-33, 88-89.) Nonetheless, Miller testified he had identified several fundamental differences between the questioned and known signatures that led him to believe they were not written by the same person. (ET 71-72.)

Miller did not define "fundamental difference" or explain what differences he characterized as fundamental in this case. However, he provided a letter-by-letter analysis of the dissimilarities he observed between the questioned signatures and the exemplars, including differences in the formation of the M's, R's, and K's. (ET 25-29.) He also described differences in writing speed, skill level, and slant. The feathering, or fading of the terminal stroke, in the questioned signatures indicated they were written with a greater degree of speed than was apparent in the exemplar signatures. (ET 29.) Miller also felt that the questioned signatures were executed with a greater level of skill than the exemplars, which showed an immature type of writing indicative of someone who does not write frequently. (ET 29-30.) In addition, the right-handed slant in the questioned signatures was more prominent than in the exemplars. (ET 30-31.)

Miller also testified that he had sent the case for peer-review by two other forensic document examiners, both of whom expressed stronger opinions than he did that Gray could be eliminated as the writer of the questioned signatures. (ET 71-72.) These two FDEs were Heidi Harralson and Chris Burkey. (ET 102-03.) Harralson and Burkey's opinions were not submitted into evidence.

On cross-examination, Miller conceded that handwriting analysis does not "fall under the same quantifiable measures" as other sciences such as DNA analysis in that there is an element of subjectivity in quantifying the probabilities involved in handwriting that does not exist with DNA. (ET 90-91.) Examples of this subjectivity are mentioned elsewhere in Miller's testimony. For instance, when asked how many exemplars a handwriting examiner should review before forming an opinion, Miller said the number must be "sufficient" but sufficiency is a judgment call made by the examiner. (ET 63.) Similarly, when asked how many differences are required to rule a signature invalid or not authentic, Miller testified that this is a matter for the examiner's judgment. (ET 71-72.)

Cross-examination revealed there were factors that Miller did not consider in his analysis of the signatures. Although he recognized that numerous extrinsic and intrinsic conditions can affect the appearance of handwriting – including the pen, the writing surface, the general environment where the writing takes place, the positioning of the writer, any physical conditions affecting the writer such as illness or fatigue, caffeine intake, alcohol or drug intake, age and the passage of time, and even stress, anger, and the writer’s state of mind – Miller testified he was unaware of the circumstances under which the disciplinary warnings were signed and did not seek any information about the extrinsic and intrinsic conditions surrounding the writings. (ET 83-88, 105-06.) He explained that he “saw no evidence where [he] would need to” because the questioned signatures were “better signatures than Mark Gray can possibly produce” and the documents themselves gave no indication that any extrinsic or intrinsic factors were at play. (ET 85, 88, 105-06.) Also, Miller did not note the color of the ink on the questioned documents or test it to determine what type it was, although he agreed these factors could be relevant to evaluating whether the documents were written by the same person at the same time. (ET 40-43.)

Miller also failed to supplement his evaluation with a computer analysis. Computer programs exist that are capable of identifying and matching handwriting with a 98% success rate. (ET 68-69, 98-100, 107.) Miller has access to such software and he took his computer with him when he evaluated the questioned documents. (ET 37, 68.) However, he felt that a computer analysis was unnecessary because he is capable of performing the same analysis and this was a simple case involving just two questioned signatures, so it was faster for him to simply look at the signatures himself. (ET 107-08.)

Miller was confronted with two new signatures on cross examination. The new signatures can be found in Exhibit R-21, consisting of Gray’s signatures from interrogatory responses dated August 3, 2010 (Ex. R-23) and November 29, 2010 (Ex. R-22). At first glance, Miller testified these signatures added nothing to his analysis. (ET 75.) He testified that the quality of the November 29 signature, which was a photocopy, was so poor that he could not make it out well enough to discuss the letter characteristics, and neither of the signatures had been enlarged. (ET 76-80.) When pressed, Miller examined the signatures more closely and opined that the word “Gray” in the November 29 signature had a tremulous appearance that indicated the paper had been lying on a rough surface when the signature was written. He suggested the pen may have dipped into something rough or the writer was nervous or had too much coffee that day. (ET; Tr. 80-81.) “[I]t looks like they’re trying to make it appear like the Gray in the [August 3] signature, but it looks like they had a little bit of trouble in the writing,” he said. (ET 80.)

Aside from analyzing signatures, Miller also analyzed and took photographs of a set of ESDA film lifts showing indentations on the two disciplinary warnings. ESDA films are created using an electrostatic data apparatus (ESDA). An electrostatically charged Mylar film is pressed very flat against a piece of paper in a vacuum table such that a dark powder sprinkled over the film will adhere to any indentations in the underlying paper, including minute impressions that would not be visible to the naked eye. The powder is then lifted off of the Mylar film using clear tape to preserve an image of the indentations. (ET 31-32.)

The ESDA film lifts Miller examined were created by government investigators, rather than by Miller himself, but he deemed them adequate for his analysis. (ET 35-36.) North Fork

has submitted photographs of the film lifts in Exhibit R-30. The photographs show that portions of the handwriting and signatures appearing on the April 29, 2009 warning are indented onto the February 27, 2009 warning. (Ex. R-30.) Miller concluded that parts of the April 29 warning were written while it was on top of the February 27 warning. (ET 21, 32-33, 47-49, 97-98.) On cross-examination, he conceded that he could not say when either warning was written, who wrote them, or whether they were written by the same person. (ET 49-50.)

B. Reliability of Handwriting Analysis

In *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, the Supreme Court considered the admissibility of expert testimony under Federal Rule of Evidence 702 and concluded that a trial judge must carefully screen scientific evidence before admitting it in order to ensure that it is based on theories and techniques that meet certain minimum standards of reliability. 509 U.S. 579 (1993); *see also Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999) (applying *Daubert* to Rule 702 testimony derived from technical or other specialized knowledge, not just scientific knowledge). The Court provided the following non-exclusive list of factors to consider in assessing the reliability of a theory or technique relied upon by an expert witness: (1) whether the theory or technique is subject to empirical testing, (2) whether it has been subjected to peer review and publication, (3) the known or potential error rate, (4) the existence and maintenance of standards controlling its operation, and (5) the degree of its general acceptance. *Daubert*, 509 U.S. at 593-94.

North Fork's pretrial position was that Miller's testimony should be excluded or limited under *Daubert* because the "science" of handwriting analysis is not sufficiently reliable. However, I allowed Miller to testify, reasoning that in a non-jury trial the *Daubert* factors go more to the weight of the evidence than to its admissibility. *See Deal v. Hamilton County Bd. of Educ.*, 392 F.3d 840, 852 (6th Cir. 2004) ("The 'gatekeeper' doctrine was designed to protect juries and is largely irrelevant in the context of a bench trial."), *cert. denied*, 546 U.S. 936 (2005); *United States v. Velasquez*, 64 F.3d 844, 848 (3d Cir. 1995) ("[T]he same considerations that inform the court's legal decision to admit evidence under Rule 702 [i.e., the *Daubert* factors] may also influence the factfinder's determination as to what weight such evidence, once admitted, should receive.").

Now that Miller's testimony has been presented and North Fork has been given an opportunity to rebut it, I must assess the weight and credibility of the testimony. Accordingly, I must now reconsider in greater detail the reliability of the theories and techniques that underlie handwriting analysis.

Daubert Analysis of Handwriting Testimony by Other Courts

Before *Daubert*, courts routinely admitted expert testimony on handwriting analysis without questioning the underlying theories and techniques. However, handwriting analysis has received closer scrutiny and some negative treatment since *Daubert*. The fear is that unless forensic document examiners (FDEs) can show that their theories and methods produce reliable results, allowing a handwriting analyst to label himself an "expert" could imbue his testimony with a false air of scientific infallibility that may confuse or mislead a factfinder into attaching

greater significance to the testimony than it truly warrants. In light of this concern, in recent years several trial courts have refused to admit handwriting testimony entirely. *United States v. Johnsted*, 30 F. Supp. 3d 814 (W.D. Wis. 2013); *American Gen. Life & Accident Ins. Co. v. Ward*, 530 F. Supp. 2d 1306, 1311-15 (N.D. Ga. 2008); *United States v. Lewis*, 220 F. Supp. 2d 548 (S.D.W. Va. 2002); *United States v. Saelee*, 162 F. Supp. 2d 1097 (D. Alaska 2001); *United States v. Fujii*, 152 F. Supp. 2d 939 (N.D. Ill. 2000).⁶ Other courts have allowed testimony as to similarities and differences in handwriting but restrained the expert from offering an opinion on the ultimate issue of authorship of a questioned document or signature. *See, e.g., United States v. Oskowitz*, 294 F. Supp. 2d 379, 383-84 (E.D.N.Y. 2003); *Wolf v. Ramsey*, 253 F. Supp. 2d 1323, 1341-48 (N.D. Ga. 2003); *United States v. Hidalgo*, 229 F. Supp. 2d 961 (D. Ariz. 2002); *United States v. Rutherford*, 104 F. Supp. 2d 1190 (D. Neb. 2000); *United States v. Hines*, 55 F. Supp. 2d 62 (D. Mass. 1999).

Even in cases where expert testimony on handwriting is admitted, courts have taken a closer look at the scientific bases for the testimony and have often found it lacking in some respects. This was the case in *United States v. Starzecpyzel*, a seminal early decision critiquing handwriting analysis. 880 F. Supp. 1027 (S.D.N.Y. 1995). In that case, the trial court concluded that handwriting analysis “clothes itself with the trappings of science” yet “does not rest on carefully articulated postulates, does not employ rigorous methodology, and has not convincingly documented the accuracy of its determinations.” *Id.* at 1028. A pre-trial evidentiary hearing had elicited testimony that the two basic principles underlying handwriting analysis are inter-writer variation (i.e., uniqueness) and intra-writer variation (natural variation). *Id.* at 1031. The fundamental issue, the court concluded, is whether FDEs can reliably distinguish between the two forms of variation; “How FDEs might accomplish this was unclear to the Court before the hearing, and largely remains so after the hearing,” the trial judge stated. *Id.* at 1031-32. Although he concluded that expert testimony on handwriting would not be admissible under *Daubert*, the judge ultimately allowed the testimony under a less stringent evidentiary standard because *Daubert* had not yet been applied to non-scientific expert testimony. *Id.* at 1043-46.

Since *Starzecpyzel*, other courts that have admitted handwriting testimony have appeared to agree that handwriting analysis has reliability issues but to skew in favor of giving the jury the opportunity to decide for itself. *See, e.g., United States v. Crisp*, 324 F.3d 261, 271 (4th Cir. 2003) (noting FDE’s primary role is simply to draw jury’s attention to similarities and differences that they can then inspect themselves), *cert. denied*, 540 U.S. 888 (2003); *United States v. Paul*, 175 F.3d 906, 911 (11th Cir. 1999) (finding testimony more probative than prejudicial based on expert’s candid acknowledgement of limitations of the science and jury’s ability to perform its own visual comparisons of the handwriting); *United States v. Jones*, 107 F.3d 1147, 1157, 1161 (6th Cir. 1997) (discussing concerns about reliability but emphasizing parties’ ability to continue to challenge reliability of evidence after its admission), *cert. denied*, 528 U.S. 1023 (1999); *United States v. Prime*, 220 F. Supp. 2d 1203, 1216 (W.D. Wash. 2002)

⁶ In *Johnsted*, *Saelee*, and *Fujii*, the courts noted they were analyzing hand printing rather than handwriting, although each of the courts spent considerable time discussing the evidence on the reliability of handwriting analysis. I find the distinction between handwriting and hand printing to be of minor significance. *See United States v. Prime*, 220 F. Supp. 2d 1203, 1214 n.7 (W.D. Wash. 2002), *aff’d*, 431 F.3d 1147 (9th Cir. 2005).

(finding that handwriting analysis “would come up short” if subjected to stricter scrutiny, but admitting it under flexible reading of *Daubert*), *aff’d*, 431 F.3d 1147 (9th Cir. 2005).

In this case, the parties have not presented much evidence specifically directed to the reliability of handwriting analysis as a science. Gray relies solely on Miller’s testimony, report, and curriculum vitae. North Fork submitted two published studies on handwriting analysis with its pre-trial *Daubert* motion, one of which is a study on the individuality of handwriting and the other on whether certain propositions pertaining to handwriting analysis are generally accepted in the relevant scientific community. (North Fork’s Mot. to Exclude Expert Testimony, July 22, 2014, Exs. A & B.) Except for these studies, North Fork has not presented any other rebuttal evidence. Given the dearth of record evidence on the reliability of handwriting analysis as a science, I have reviewed other courts’ treatment of handwriting analysis with regard to each of the *Daubert* factors in order to inform my assessment of Miller’s testimony.

Empirical Testing; Peer Review and Publication

The first *Daubert* factor, empirical testing, requires an evaluation of whether the theories and techniques underlying the proffered expert testimony can be challenged in an objective, empirical sense and whether they have in fact been subjected to such challenges. The second *Daubert* factor evaluates whether the underlying theories and techniques have been subjected to peer review and publication. This is essentially a measure of whether the empirical testing undertaken in the field has proven reliable enough to withstand review. Because empirical testing and peer review and publication are interrelated, I will consider them together.

The theories and techniques at issue here are described in Miller’s testimony. Miller testified he relied on the theory that everyone’s handwriting displays unique characteristics. (ET 19.) The logical outgrowth of this theory is that handwriting is individually distinguishable. Applying this theory, an FDE can determine whether a particular person penned a questioned writing or signature by comparing it to the person’s known writing to see if it falls within the “normal curve” or “critical region” representing the person’s unique, distinguishable handwriting characteristics. (ET 22-23.)

The theory and technique described above are capable of being empirically tested to validate the underlying principles and establish an error rate. However, Miller did not cite any studies or peer-reviewed literature to show that such empirical testing has been conducted. The only relevant empirical data before me is a journal article submitted with North Fork’s pre-trial *Daubert* motion discussing a study by Sargur N. Srihari, et al. purporting to establish the individuality of handwriting.⁷ (North Fork’s Mot. to Exclude, Ex. A.) In this study, the researchers asked approximately 1500 people to write out three copies each of a 156-word document that featured all the letters in the alphabet, all ten numerals, several distinctive character combinations, and other “attributes of interest.” *Id.* The writing samples were then scanned into a computer, which was able to identify authorship of a given writing sample or partial sample with a high accuracy rate. *Id.* However, the accuracy rate decreased when fewer words and characters were considered. *Id.*

⁷ Sargur N. Srihari, et al., *Individuality of Handwriting*, 47 J. Forensic Sci. 856 (July 2002).

In this case, Miller's task was to determine whether two questioned signatures containing just six distinct characters (M, a, r, k, G, and y) were forged or genuine. The Srihari study does not provide strong empirical support for an FDE's ability to reliably perform this particular task. The amount of questioned writing at issue here is very small, and the Srihari study showed that attribution of authorship becomes less accurate as the amount of questioned writing decreases.⁸ Gray has not presented any other evidence of empirical testing. The reliability of the technique Miller applied is unclear in that there is insufficient evidence for me to conclude it has been subjected to adequate empirically-based peer-reviewed testing to establish its efficacy.

In addition, it is unclear whether the underlying theories Miller relied on have been subjected to adequate empirical testing and peer review. Miller himself agreed on cross-examination that some aspects of handwriting variability remain untouched by empirical investigation, as was noted by one of his students in her graduate thesis. (ET 95-96.) This admission is significant because understanding the variability of handwriting is crucial to analyzing it. The Srihari study provides some support for the common-sense proposition that handwriting is individualistic and therefore distinguishable by examining its variations. Yet it is unclear to what extent the assumption holds true that any given person's handwriting will be unique and distinguishable from everyone else's handwriting, and these fundamental propositions have been questioned by some courts.

For example, in *Starzecpyzel*, the court discussed a study in which an FDE had examined the signatures of individuals with the same name and found that many of the signatures looked so alike that they were not worth photographing. 880 F. Supp. at 1036 (citing John J. Harris, *How Much Do People Write Alike?*, 48 J. Crim. Law & Criminology 637 (1958)); *see also Hidalgo*, 229 F. Supp. 2d at 967 (agreeing with expert witness that hypothesis of uniqueness "has not been fairly tested"); *Lewis*, 220 F. Supp. 2d at 552-53 (noting theories that penmanship characteristics are distinguishable and that there is a base rate of such characteristics in the population have not been tested). After discussing a number of other studies on handwriting analysis, the *Starzecpyzel* court concluded that the field lacks "critical self-examination" and scholarship. 880 F. Supp. at 1037-38. Other courts have reached similar conclusions. *See Jones*, 107 F.3d at 1157 (noting both academicians and FDEs have recognized lack of empirical evidence in field); *Hines*, 55 F. Supp. 2d at 68-69 (finding that studies cited by expert "cannot be said to have 'established' the validity of the field to any meaningful degree"); *Saelee*, 162 F. Supp. 2d at 1102-03 (finding "overall lack" of empirical testing and meaningful peer review); *Fujii*, 152 F. Supp. 2d at 940-41 (noting that studies on handwriting analysis have been criticized for methodological flaws and lack of unbiased peer review).

In a recent case, a federal district judge found that the two main principles on which handwriting analysis is premised, the principles of uniqueness and intra-writer variation, have

⁸ By analogy, in *United States v. Prime*, the court relied in part on the Srihari study to find that the premises of handwriting analysis were sound in the context of that particular case, in which the FDE had been provided with a very extensive array of writing samples that included 112 pages of known writing and 76 questioned documents. 220 F. Supp. 2d at 1211-12.

not been adequately tested. *Johnsted*, 30 F. Supp. 3d at 817-18. The court explained why the lack of adequate testing of these two principles is so troubling:

This lack of testing has serious repercussions on a practical level: because the entire premise of interpersonal individuality and intrapersonal variations of handwriting remains untested in reliable, double blind studies, the task of distinguishing a minor intrapersonal variation from a significant interpersonal difference – which is necessary for making an identification or exclusion – cannot be said to rest on scientifically valid principles. The lack of testing also calls into question the reliability of analysts’ highly discretionary decisions as to whether some aspect of a questioned writing constitutes a difference or merely a variation; without any proof indicating that the distinction between the two is valid, those decisions do not appear based on a reliable methodology. With its underlying principles at best half-tested, handwriting analysis itself would appear to rest on a shaky foundation.

Id. at 818.

In sum, although handwriting analysis has been subjected to some empirical testing and peer review, it appears that reliable data is lacking. There is insufficient evidence on the record before me to establish that the theories Miller relied on have been validated or that the techniques he applied have been proven accurate and effective in cases involving a very small amount of questioned writing.

Error Rate

The task Miller was asked to perform in this case was to determine whether the two questioned signatures were authentic or forged. In evaluating the reliability of his conclusions, it would be useful to know two separate error rates: the rate at which FDEs falsely identify a forged signature as genuine and the rate at which FDEs falsely identify a genuine signature as forged. However, Miller did not provide any error rate at all.

Miller testified that computer technology exists with the capability of matching handwriting samples with a 98% confidence rate, i.e., a 2% error rate. (ET 68-69, 99, 107.) However, he did not use a computer program to analyze the signatures in this case. Thus, the only error rate applicable here would be the rate at which FDEs make mistakes in their work when relying on their own analytical powers rather than a computer program.

It is not clear whether it is possible to assign a definitive error rate to FDEs’ work because, as noted by Miller, the probabilities involved in handwriting analysis are not as readily quantifiable as those involved in other sciences such as DNA analysis. (ET 89-90.) Nonetheless, many courts have found the lack of an error rate in the field of handwriting analysis to be problematic. *See, e.g., Johnsted*, 30 F. Supp. 3d at 820; *Lewis*, 220 F. Supp. 2d at 552-54; *Saelee*, 162 F. Supp. 2d at 1103 (“There is little known about the error rates of forensic document examiners. The little testing that has been done raises serious questions about the reliability of methods currently in use.”); *Fujii*, 152 F. Supp. 2d at 940-41; *Hines*, 55 F. Supp. 2d at 69;

Starzecpyzel, 880 F. Supp. at 1037 (characterizing data on error rate as “sparse, inconclusive and highly disputed” and opining that accuracy testing “must be conducted if forensic document examination is to carry the imprimatur of ‘science’”); *see also Crisp*, 324 F.3d at 280-81 (Michael, J., dissenting). *But see United States v. Mooney*, 315 F.3d 54, 62 (1st Cir. 2002) (accepting without comment expert’s reliance on unnamed study said to demonstrate 6.5% error rate). I find that the lack of an error rate is troubling because it prevents me from ascribing any particular level of confidence to Miller’s methodology.

Standards Governing Operation of Technique

As discussed above, Miller testified that the technique he applied was to first examine the exemplar signatures to familiarize himself with Gray’s known writing and then examine the questioned signatures to determine whether they fell within the normal curve of Gray’s writing. (ET 22-23, 67.) Miller also discussed which features he analyzed, which included the shape of each letter and the slant, speed, and skill level of the writing. (ET 25-31.) His report further states that in conducting his analysis, he employed “standardized (ASTM) questioned document examination techniques” where applicable. (Ex. Compl.-D.)

Beyond these vague descriptions, Miller did not explain what criteria he applied in reaching an ultimate opinion on authorship of the questioned signatures. North Fork has pointed out that the ASTM (American Society for Testing and Materials) standards are non-specific, including such vague directives as “[c]onduct a side-by-side comparison of comparable portions of the bodies of writing” and “[a]nalyze, compare, and evaluate the individualizing characteristics and other potentially significant features present” without defining what constitutes a similarity or difference or which ones are significant. (North Fork’s Mot. to Exclude, paragraph 12.) The ASTM standards also do not explain and Miller did not testify as to what standards FDEs follow to define the parameters of the normal curve of someone’s handwriting. Miller further did not explain what standards are employed to distinguish the natural variation in one person’s handwriting from the variation observed between different writers. He testified there is no standard in the profession for how much known writing an FDE should review before reaching a conclusion; the number of exemplars reviewed must be “sufficient,” but sufficiency is a judgment call made by the examiner. (ET 63.) Miller also failed to provide any standards as to the type or number of dissimilarities that must be identified to determine a signature is inauthentic. He testified that a single fundamental dissimilarity can be sufficient to rule a signature inauthentic, but provided no guidance as to how FDEs determine whether a dissimilarity is “fundamental” or decide how many differences are sufficient, saying only that this determination depends on the examiner. (ET 71-72.) Miller did not even provide a general idea of how many handwriting traits should be compared before reaching a conclusion.

Miller further acknowledged that handwriting analysis is not governed by the same quantifiable standards as some of the other forensic sciences. Unlike fingerprints or DNA, a person’s handwriting or signature does not look exactly the same all the time. (ET 23, 82.) Miller testified that DNA analysis produces a “parametric type statistical inference” that gives DNA experts a scientific basis to present a definite opinion, but handwriting analysis does not “fall under the same quantifiable measures.” (ET 89-90.) Because it is a type of pattern recognition, it is measured in nominal and ordinal levels of measurement rather than interval or ratio levels of

measurement, meaning there is an element of subjectivity in quantifying the associated probabilities that is not present with DNA analysis. (ET 90-91.)

Courts have noted, and at times lamented, the lack of objective quantifying standards governing the operation of handwriting analysis. *See, e.g., Paul*, 175 F.3d at 911 (noting that FDE himself acknowledged lack of quantifying standards); *Ward*, 530 F. Supp. 2d at 1314 (discussing FDE's failure to articulate methodology and characterizing FDE's description of operation of handwriting analysis as "not very enlightening"); *Starzecpyzel*, 880 F. Supp. at 1032-33 (finding that FDE's testimony failed to elucidate his methodology and identifying various standards that were lacking). Several courts have deemed it significant that most FDEs follow the same methodology. For example, in *United States v. Crisp*, the Fourth Circuit admitted an FDE's expert testimony in part because he had "testified to a consistent methodology of handwriting examination and identification" used by most FDEs. 324 F.3d at 271; *see also Mooney*, 315 F.3d at 62; *Velasquez*, 64 F.3d at 850-51. But regardless of the fact that most FDEs seem to apply consistent methods, the real problem is that the standards governing these methods are not *objective*, as was noted by the dissent in *Crisp*. 324 F.3d at 281 (Michael, J., dissenting). The lack of objective guidelines gives rise to an element of subjectivity recognized by Miller that has troubled many courts. *See, e.g., Johnsted*, 30 F. Supp. 3d at 819 (excluding testimony in part because of "extremely discretionary" standards followed by FDEs); *Saelee*, 162 F. Supp. 2d at 1104 (excluding testimony after finding that "[t]he technique of comparing known writings with questioned documents appears to be entirely subjective and entirely lacking in controlling standards"); *Rutherford*, 104 F. Supp. 2d at 1193 (finding it problematic that a handwriting match "is declared upon the subjective satisfaction of the FDE" rather than based on empirically based peer-reviewed standards); *Hines*, 55 F. Supp. 2d at 69 (explaining that nature of handwriting analysis obliges FDEs to make subjective judgments).

The concerns stemming from this element of subjectivity are twofold. First, the FDE's reasoning is shielded from review and scrutiny to the extent that his conclusions are not based on articulable criteria. In *Wolf v. Ramsey*, the trial court explained how this reduces the reliability of the expert's opinion:

Nowhere in the submissions provided by plaintiffs is there any attempt to show by what methodology Mr. Epstein [the FDE] reaches a conclusion of absolute certainty that a given person is, in fact, the writer of a questioned document. ... The underlying notion behind *Daubert*, and all good science, is that a given premise or principle should be capable of being tested to determine whether the principle is, in fact, sound. Thus, if Epstein indicated, for example, that whenever a writer of known material has x number of similarities, there is a given probability that the writer wrote the note – and if this methodology had been tested by reliable means in the past – then Epstein would have shown reliability in the methodology that he used to reach a determination of the likelihood of his conclusion. As it is, however, Epstein's explanation for his conclusion seems to be little more than "Trust me; I'm an expert." *Daubert* case law has indicated that

such an assertion, which seems to be based more on intuition than on scientific reasoning, is insufficient.

253 F. Supp. 2d at 1347.

The second problem with subjectivity is that it gives rise to a potential for bias. Miller agreed that forensic sciences like handwriting analysis are subject to bias, which has presented problems within the field. (ET 56-57.) As an example of unethical bias, he testified that an FDE could pick a single signature that looks nothing like the subject's normal writing and say "of course they don't match." (ET 64.) Conscious bias is certainly a concern. But even an honest and ethical FDE with the best of intentions can fall prey to forms of unconscious prejudice such as confirmation bias, which is a bias of expectation and suggestion. The threat of bias thus decreases the reliability of an FDE's opinion even if there are no signs of conscious bias.

After reviewing the evidence, I conclude that Miller has not established that the technique he applied to analyze the questioned signatures is governed by consistent objective standards. Rather, the methodology he applied contains an element of subjectivity that is troubling because it prevents me from fully evaluating his reasoning and gives rise to a potential for bias.

Degree of General Acceptance of Underlying Theories/Techniques

Except for Miller's testimony, Gray did not produce any evidence that would establish the degree of general acceptance of the theories and techniques underpinning handwriting analysis. Miller testified that the approach he applied to analyze the questioned signatures is generally accepted in the field of forensic document examination because no two people have ever been shown to have the same handwriting characteristics. (ET 18-19.) On the other hand, North Fork submitted a published study purporting to show that various principles of handwriting identification are not generally accepted.⁹ (North Fork's Mot. to Exclude, Ex. B.) The researchers had framed general statements of purported principles about handwriting analysis and asked FDEs and handwriting scientists what they understood their field's degree of consensus to be regarding the validity of each principle. *Id.* They found that FDEs and handwriting scientists appeared not to agree on the acceptability of most of the propositions posed to them, and the handwriting scientists viewed fewer of the propositions as generally accepted. *Id.*

I do not doubt Miller's assertion that the FDE community accepts the general theory underlying his methodology, which is that no two people write alike. However, the study submitted by North Fork shows that many of the principles of handwriting analysis have not yet achieved general acceptance and the technique is still unsettled. In addition, general acceptance by the FDE community is of minimal significance until it can be shown that this community has undertaken the type of critical self-review of its science that would be necessary to empirically validate the pertinent techniques and to establish an error rate and objective controlling standards. *See Saelee*, 162 F. Supp. 2d at 1104-05 (deeming acceptance within field insignificant because of its uncritical nature); *Fujii*, 152 F. Supp. 2d at 940-41 (finding it problematic that

⁹ Michael J. Saks & Holly VanderHaar, *On the "General Acceptance" of Handwriting Identification Principles*, 50 J. Forensic Sci. 119 (Jan. 2005).

acceptance of handwriting expertise is largely by handwriting experts themselves); *Starzecpyzel*, 880 F. Supp. at 1038 (attaching little significance to acceptance within field because field is devoid of financially disinterested parties and there was no showing of acceptance by related scientific or academic communities); *Crisp*, 324 F.3d at 281 (Michael, J., dissenting) (stating that general acceptance comes only from those who have not questioned basic underlying premises).

In analyzing *Daubert*'s general acceptance factor, some courts have found it relevant that all of the Circuit Courts to consider the issue have admitted handwriting testimony. However, under *Daubert*, it is acceptance by the scientific community rather than the court system that is relevant. Moreover, the Circuit Courts that have permitted expert testimony on handwriting have done so under the deferential abuse-of-discretion standard, meaning their opinions can be read not so much as an endorsement of the science than as an unwillingness to impinge upon the trial court's gatekeeping function. See *Johnsted*, 30 F. Supp. 3d at 821.

On the record before me, I cannot say that the theories and techniques underlying handwriting analysis have achieved general acceptance in the relevant scientific community. The study submitted by North Fork suggests a lack of consensus among FDEs as to the significance and even the validity of various principles underlying handwriting analysis. The lack of a cohesive generally accepted theory and technique decreases the reliability of Miller's analysis.

C. Analysis of Miller's Conclusions

Because of my concerns about the reliability of handwriting analysis as a science, I have carefully evaluated Miller's conclusions and reasoning therefor to determine how much weight to accord his opinion that the signatures were forged. Miller made many interesting and helpful observations about the signatures which I have fully considered. However, I find that his ultimate conclusion that the questioned signatures were forged is of low probative value for the reasons discussed below. These reasons include failure to adequately account for the high degree of natural variation in Gray's writing; potential problems with the sufficiency of the exemplars; failure to delineate the bounds of the "normal curve" of Gray's writing or define what would constitute a "fundamental" divergence from this curve; failure to convincingly explain the significance of the dissimilarities observed between the questioned and known signatures; failure to adequately account for certain other relevant factors, including the circumstances surrounding the execution of the disciplinary warnings and the ink, indentations, and other handwriting appearing on the documents; the potential for confirmation bias; and inadequate justification for the high level of certainty Miller expressed in his opinion.

First, the high degree of natural variation in Gray's known signatures, as seen in Exhibit Compl.-F, raises significant doubts about Miller's ability to reliably apply the signature analysis technique he described. As noted above, Miller testified that he analyzed the signatures by first familiarizing himself with the characteristics of Gray's known writing and then determining whether the questioned signatures fell within the "normal curve" or "critical region" of Gray's natural variation. (ET 22-23.) The idea that a person's handwriting will always fall within a certain range of natural variation is essentially a principle of individual discriminability that relies on an assumption that handwriting characteristics are, to a certain critical degree, immutable. Broad variation in a person's handwriting undermines this assumption. Miller

acknowledged that the broad variation in Gray's known signatures decreased his level of confidence to "a notch below certainty." (ET 32-33, 88-89.) However, he did not otherwise discuss how the variation affected his analysis. He did not explain how he accounted for the variation or how he determined that the differences between the questioned and known signatures were attributable to variation between writers rather than to the broad variation seen in Gray's own writing. Furthermore, "a notch below" is hardly a scientific measurement and his use of this term speaks to the subjectivity involved in his analysis.

In addition, I am not convinced that the exemplar signatures Miller reviewed were sufficient to familiarize him with Gray's normal writing to the degree that he would be able to reliably identify or exclude Gray as the signer of other documents. As noted above, Miller reviewed 54 exemplars to familiarize himself with Gray's writing. (*See* Ex. Compl.-F.) Forty of them appear on two lists of request exemplars that were penned at the same time under the same conditions (ET 112), meaning that the 54 exemplars represent Gray's penmanship under just 16 distinct sets of circumstances. Miller did not say whether this is typically considered a sufficient representation of a person's handwriting. He testified that numerous exemplars must be reviewed as opposed to just one or two because of the natural variation in a person's handwriting, but he did not give any indication what number of exemplars is generally considered sufficient, saying only that this is a matter for the handwriting examiner's judgment. (ET 22-23, 63.) He also did not address whether the above average degree of natural variation in Gray's writing would merit an above average number of exemplars. Because Miller did not provide any standards for evaluating the sufficiency of the known writing, he has not provided any assurance that the known writing he relied on was adequate to allow him to accurately delineate the bounds of Gray's normal writing.

Furthermore, the exemplars are not necessarily contemporaneous with the questioned signatures. Miller testified that the closer in time an exemplar is written to the questioned writing, the more accurate the analysis. (ET 65.) Yet seven of the exemplars are undated, others were penned as many as seven or eight years before the questioned signatures, and the only ones that are known to have been produced within three years of the questioned signatures are the two lists of request exemplars and a single signature from an unknown source dated November 20, 2007. (Exs. Compl.-A, -B, -F.) The non-contemporaneous nature of the exemplars detracts from my confidence in the accuracy of the comparison.

Because it is unclear where some of the exemplars came from, it is also unclear under what circumstances they were written and whether the conditions surrounding their execution were sufficiently similar to the questioned signatures to make the comparison useful. Miller would not necessarily have known where the exemplars came from because he did not collect any of them himself. Rather, the exemplars were apparently collected by MSHA investigators. MSHA Special Investigator Guy Fain obtained the request exemplars. Although Gray denied having a personal relationship with Fain, he testified he has known Fain for about ten or twenty years because they used to go to the same church and were involved in a prior case together. (Temp. R. 88-90, 93-94.) Yet Miller testified he would normally recommend against allowing a longtime acquaintance to take writing samples. (ET 50-52.) It is unknown what instructions Fain gave to Gray before he executed the signatures or under what conditions they were written. As is the case with all the exemplars, there is no information as to whether Gray was sitting down or

standing up when he wrote them, what surface he was bearing on, or whether there was anything under the paper, and no information as to his physical state or state of mind at the time. Miller testified that a multitude of conditions both intrinsic and extrinsic to the writer can affect handwriting, (ET 83-87), so all of the factors mentioned above could have affected the exemplars.

Given the potential deficiencies in the exemplars and the uncertainties surrounding their execution, it is not clear that they supplied Miller with sufficient information to accurately delineate the bounds of the “normal curve” of Gray’s widely variable handwriting. Miller also did not make any effort to delineate those bounds in his testimony – he could have, for example, identified distinguishing traits observed in Gray’s known writing that he would have expected to see every time Gray executes his signature, but he did not do so.

An even more significant problem is that Miller did not clearly explain what it was about the questioned signatures that assured him to a high degree of certainty that they fell outside the bounds of Gray’s normal writing. Miller testified that one “fundamental dissimilarity” can be sufficient to rule a signature not authentic and that he had identified several such differences in this case. (ET 71-72.) Yet he failed to explain what makes a difference “fundamental” or even to offer any examples of differences that generally qualify as fundamental, and he did not identify which particular differences he had characterized as fundamental in this case.

Although Miller did not provide an explanation for his key finding of several fundamental differences, he did provide a letter-by-letter analysis of the questioned signatures. He noted differences in the M’s, R’s, K’s, and the overall appearance of the word “Gray.”

Miller testified that the M’s in the questioned signatures were written more quickly than those in the exemplars and had more of an embellished look, with a large loop on the first stroke, and the two top humps were more wedge-shaped with a shorter than usual middle stroke between them. (ET 25-26.) However, as Miller himself suggested, the exemplars display broad enough variation to explain these purported distinctions. As Miller noted, the M’s in the exemplars alternately feature wedge-shaped, bowl-shaped, and printed humps, and at times the first stroke features an embellished loop. (ET 25.) In addition, a contemporaneous known signature of Gray’s that appears elsewhere in the record, his signature on the June 17, 2009 statement he gave to Special Investigator Fain, features an M that strongly resembles the questioned M’s in that its initial stroke begins with an upward loop and its humps are small and wedge-shaped with a truncated middle stroke. The fact that the M’s in the two questioned signatures look more similar to each other than to any of the exemplars could be viewed as a sign that they were written by someone else, but the similar-looking and contemporaneous June 17, 2009 signature shows that the range of natural variation in Gray’s M’s is broader than indicated by the exemplars and likely broad enough to encompass the M’s in the questioned signatures. Furthermore, the questioned signatures were purportedly penned within several months of each other under very similar circumstances – if North Fork’s witnesses are to be believed, both were signed in the mine superintendent’s office during a disciplinary session. Similar circumstances and the contemporaneous nature of the signatures could explain their similarity to each other. In sum, the M’s in the questioned signatures do not appear so different from Gray’s known writing as to constitute a “fundamental” difference.

Miller testified that the lowercase R's in the questioned signatures differed from Gray's normal writing style in that the top of each letter was bowl-shaped, which is common for people who were taught cursive in the Zaner-Bloser style, whereas Gray's lowercase R's were normally either wedge-shaped or flat across the top, which is indicative of American Standard cursive. (ET 26-27.) Similarly, Gray's known writing usually features an American Standard cursive K, which is formed with one continuous stroke that goes up, comes down, forms a "belly," then "kicks out" above the baseline. (ET 27.) By contrast, the K's in the questioned signatures were formed with two separate strokes, with the pen lifting to form the belly and kick out, and in one of them the kick out was actually formed using an unnecessary third stroke. (ET 27.)

Miller testified that an unnecessary stroke is sometimes referred to as patching or retouching and is commonly seen in cases where a person is trying to make a simulated signature resemble a model signature. (ET 27-28.) If Miller was trying to imply that the patching seen in this case is a sign of simulation, I am not persuaded, because the patching does not in any way make the letter look more like an American Standard cursive K or any of the other K's within the spectrum of Gray's known writing.

I accept Miller's conclusion that the R's and K's in the questioned signatures do not look like any of the exemplars. However, given the wide range of variation in the exemplars, I am not convinced that the appearance of the R's and K's is an indication of forgery rather than simply a manifestation of the tremendous variation in Gray's handwriting. It is true that when Gray sat down and wrote out a list of request signatures all at the same time, he produced columns of uniform signatures featuring wedge-shaped R's and American Standard cursive K's. (Ex. Compl.-F, pages 9-10.) But the rest of the exemplars are not at all uniform. Compare, for example, the rounded R and neatly formed K on page 13 of the exemplar packet with the caret-shaped R and illegible K on page 16, then compare both against the anomalous signature on page 18 in which a lowercase cursive A is connected to an uppercase R followed by a standalone printed K. (Exhibit Compl.-F.) In the same vein, looking just at the five exemplars that Miller enlarged for demonstrative purposes on page 2, the lowercase R's and K's show a variety of different shapes and stroke patterns. *Id.* These include variations in the shape of the R; variations in the height, slant, and shape of the first up-and-down stroke forming the back of the K; and considerable variations in the shape of and connection between the belly and kick out on the K. Given the variation in the known writing, it is not at all established that the R's and K's in the questioned signatures diverge from Gray's normal curve.

Miller also testified that the word "Gray" in the questioned signatures differs from the exemplars in that the Y's are proportionately larger and the A's are not intact. (ET 28-29.) On review, however, there are a number of exemplars in which the A is not intact or is only partially intact, including most of the request exemplars. The A was not intact in the very first signature in the exemplar packet and Miller posited that the questioned signatures were modeled after something like that, thereby implicitly recognizing the similarities between the word "Gray" in the questioned signatures and exemplars. (ET 28.) As for the Y's, the Y's in the questioned signatures are proportionately larger than some, but not all of the Y's in the exemplars. Once again, Gray's broad range of natural variation could explain the differences. In addition, one of North Fork's witnesses who was purportedly present at the disciplinary meeting when the second questioned document was signed, Countiss, testified that Gray "appeared to be angry" when he

signed it and “stood up over the paper, when he wrote it and slashed at the end and threw his pen down, and kind of stomped out the door.” (Tr. 120, 135-36.) This testimony is entirely consistent with the jagged, slashing appearance of the word “Gray” in the questioned signature. It is also consistent with Estevez’s testimony that Gray was standing at the desk when he received and signed that warning. (Temp. R. 279.) According to Miller, the appearance of handwriting can be influenced by factors including the posture and position of the writer and the writer’s state of mind. (ET 83-87.) Thus, if North Fork’s testimony is to be credited, Gray was signing the document under the stressful condition of a disciplinary meeting, which could have affected his state of mind and therefore changed the appearance of his handwriting, and he was standing up, which also could have influenced the appearance of the writing and made it look different from signatures executed from the more typical seated position.¹⁰ In sum, even if the word “Gray” in the questioned signatures did not appear to fall well within the range of the natural variation seen in the exemplars, the differences identified by Miller could be explained by the plausible factual scenario North Fork has presented.

Miller testified that the speed and slant of the writing also influenced his opinion. He believed the questioned signatures were written with more speed than the exemplars based on the fading of the terminal stroke, (the final upstroke of the letter Y), in the questioned signatures. (ET 29.) Miller also testified that the questioned writing had a more prominent right-handed slant than the exemplars. (ET 30.) As discussed above, however, the appearance of the signatures could have been affected by the circumstances under which they were written. North Fork’s witnesses suggested at least one of the signatures was written with a quick slashing motion while the writer was standing up. Miller specifically stated that the positioning of the writer typically changes the slant of the writing. (ET 86-87.) Although forgery is a possible explanation for the apparent increase in speed and slant in the questioned signatures, North Fork’s witnesses have suggested the plausible alternative explanation that the signatures were affected by the circumstances surrounding their execution. Additionally, the broad variation in Gray’s known signatures is again worth noting. The exemplars appear to have been written with various degrees of speed and several of them display a prominent right-handed slant. (*E.g.*, Ex. Compl.-F, pages 13-14.) I find that the slant and speed of the writing are not fundamental distinctions that would compel or even strongly support a conclusion of forgery.

Miller also testified that the skill of the questioned writing, which he referred to as “line quality,” was better than that of the exemplars. (ET 29-30.) He opined that Gray’s known signatures demonstrated an immature type of writing indicative of someone without much practice. (ET 30.) Although Miller did not expressly identify skill level as a fundamental difference, he seemed to find it significant, testifying at one point that the questioned signatures “are actually better signatures than Mark Gray can possibly produce.” (ET 85, 88.) Yet Miller did not explain how or why the appearance of the questioned signatures led him to believe they had been executed with greater skill than the exemplars. After reviewing the exemplars, I agree that many of them look as if they were penned by someone who does not write much. This makes sense because Gray is functionally illiterate. (Tr. 224-25.) However, it is still unclear what led Miller to find that the questioned signatures were executed at a higher skill level. To the untrained eye they simply look sloppier than Gray’s normal writing. In addition, some of the

¹⁰ North Fork did not offer testimony on the circumstances surrounding the execution of the other disciplinary warning, but presumably they would be similar.

exemplar signatures strike me as more skillfully executed than others (e.g., those found on pages 13 and 14 of the exemplar packet), although this is speculative on my part because Miller did not provide any criteria to consider when assessing skill level. In sum, Miller has not clearly explained how the “line quality” or apparent skill level of the questioned writing influenced his analysis.

In addition to Miller’s failure to convincingly explain how the numerous minor differences described above translate into “several . . . fundamental differences” (ET 71), there were other factors that he did not consider at all or failed to adequately account for, which further detracts from the weight of his opinion.

First, I find it highly significant that Miller did not consider how the conditions surrounding the signing of the questioned documents could have affected the appearance of the questioned signatures. Miller testified that numerous extrinsic and intrinsic conditions can affect the appearance of handwriting, including the pen, the surface the writer is bearing on, the writer’s position, the writer’s state of mind or emotional state, drug or caffeine intake, stress, intoxication, being cold, and many other factors. Yet he admitted he did not know the circumstances under which the questioned documents were signed and did not ask about them. (ET 83-87, 105-06.) He declared there was no need to consider the surrounding circumstances because if any extrinsic or intrinsic factors were in play, he would have been able to see some sign of them in the signatures, but in this case the “similarities and dissimilarities did not reflect any problems with extrinsic and intrinsic characteristics.” (ET 105-06.) In other words, “you have to find the evidence in the paper,” but there was nothing on the paper that spurred his curiosity. (ET 88.) This explanation makes no sense. There is no reason to think that a person examining a questioned writing can always tell from the writing itself whether any external influences were at play.

Miller’s stubborn refusal to consider that any extrinsic or intrinsic conditions may have affected the appearance of the questioned signatures clashes with his attitude at other times during the hearing. For example, he explained the lack of variation in the request exemplars as being fairly typical because they would have been written under the same intrinsic and extrinsic conditions, unlike the rest of the exemplars. (ET 112.) Miller also immediately resorted to extrinsic and intrinsic conditions to explain the appearance of the two signatures he was confronted with for the first time at the hearing, testifying that the tremulous appearance of the word “Gray” in one of the signatures could have been caused by a rough writing surface or by the writer having too much coffee or being nervous. (ET 80-81.) When Miller’s reluctance to admit that extrinsic or intrinsic conditions may have affected the questioned signatures is contrasted with his willingness to resort to such conditions as an explanation for the appearance of writing in other situations, the contrast suggests a certain defensiveness on his part. He seemed unwilling to admit he may have overlooked something.

Another factor Miller failed to address was the significance (or insignificance) of Gray’s functional illiteracy. Presumably, an individual’s particular style of writing is partly dependent on fine muscle memory acquired through repetition. Illiteracy could disrupt this process. However, it is unclear whether Miller was aware that Gray was illiterate, and he did not say whether this factor had any impact on his analysis.

Miller also failed to analyze any aspects of the disciplinary warnings except the questioned signatures. The original warnings were not submitted to the record. Miller took digital photographs of the warnings but did not note the color of the ink or submit color copies of the photos, and at the hearing he could not recall the ink color or whether all the ink was the same color. (ET 39-42.) He at first testified the color of the ink was not important, but later conceded it could be relevant to an allegation that the documents had been written by the same person at the same time. (ET 42-43.) This is the precise allegation Gray has raised. Miller also did not test the type of ink on the warnings, although he had equipment he could have used for that purpose. (ET 40.) Ink type, similar to ink color, could have been relevant to Gray's allegation that the documents were written at the same time or to North Fork's allegation that they were written at different times by different people. Miller also did not analyze all of the handwriting appearing on the warnings. He was asked only to determine whether Gray's purported signatures were genuine, not to determine who actually wrote or signed the documents, and he could not offer any opinion as to when the documents were written or whether they were written by the same person. (ET 49, 91-92.) But an analysis of the different handwriting appearing on different parts of the disciplinary warnings could have been relevant to evaluating the parties' divergent accounts of how the warnings were written.

The indentations revealed by the ESDA films are also relevant to the parties' accounts of how and when the warnings were written. Miller testified that portions of the writing from the April 29, 2009 warning were indented onto the February 27, 2009 warning, as is evident from Exhibit R-30, but he failed to explain the significance of this finding. (ET 32-33.) The form on which each of the warnings were written consists of a set of boxes that can be checked to indicate the type of warning that is being issued, a section labeled "Explanation" where the issuing supervisor can write in a description of the offense, and a signature block with spaces for the supervisor, a witness, and the offending employee to sign and date the form. The February warning is marked as a verbal warning issued for substandard performance and bears Gray's undated signature and the signature of former mine superintendent Ison dated February 27.¹¹ (Ex. Compl.-B.) The April warning is marked as a final written warning for substandard performance and bears the signatures of mine superintendent Estevez, foreman Countiss as witness, and Gray, all dated April 29.¹² (Ex. Compl.-A.) The dates next to Estevez's and Gray's signatures seem to be written in the same handwriting. *Id.* The "explanation" sections of the two warnings appear to bear different handwriting, although Miller did not offer an opinion in this regard. The following handwriting from the April warning is indented onto the February warning: almost all of the handwritten "explanation" section; Estevez's partial signature and the date next to his name; the

¹¹ The "explanation" section contains the following handwritten note: "Notified Mark that his performance was poor that other could bolt more with same machine and partner and that he is going to have to pick up on his job falling behind in his duties even had complaints from his foreman and partner of his lack of performance. Dayshift has shone [sic] lack of keeping up compared to other shift." (Ex. Compl.-B.)

¹² The "explanation" section states: "Mark has been warned in the past about his work performance and his job duties. His foreman Tom Cornett has brought it to my attention and Mark's that he would have to perform better on the job. With his experience at his job he should be one of our top performers and Tom feels like he isn't tring [sic] or doesn't care." (Ex. Compl.-A.)

date next to Gray's name in the signature block, which is not perfectly aligned with the other indentations, indicating the paper was rotated; and another partial misaligned blurb, which Miller identified as part of Gray's signature but which actually appears to resemble part of Countiss's signature or some other unidentified writing. (ET 47-49, 97-98, 110; Ex. R-30, page 4.) Other unidentified indentations are present on both documents that read: "Copy these. Label as examples of documents viewed by handwriting expert Section #," and "Copy first two pages. Call them Section #7." (Ex. R-30.) Presumably these are from the litigation. Miller did not discuss them.

Gray contends that the indented writing from the April warning proves that (1) Estevez and Countiss lied about the circumstances surrounding the issuance of the April warning, and (2) the two warnings were not prepared on the dates they purport, but presumably after Gray was fired. (Posthearing Br. of Mark Gray, 24, 28.) However, the indented writing proves neither of these allegations.

With regard to the first allegation, Countiss' and Estevez's testimony was as follows. Countiss testified that he was called to Estevez's office for the disciplinary meeting; Estevez was sitting behind the desk and Countiss was beside it; Estevez spent about 15 to 20 minutes explaining the contents of the April disciplinary warning to Gray before handing it to him; Gray angrily signed it with a slashing motion and stomped out of the room; then Countiss signed it at the end of the meeting. (Tr. 109-14, 118-20, 135-36.) Estevez testified he believed he had filled out the boxes and explanation section at the top of the warning the day before calling Gray and Countiss into the office for the disciplinary meeting; afterward, he had handed the warning to Gray, who was standing in front of the desk, and asked him to read it and make sure everything they had discussed was written down; Gray had signed it and handed it either to Estevez or to Countiss, who was standing next to the desk; Countiss signed it and handed it back to Estevez; then Estevez signed it and dropped it into Gray's file in the drawer. (Temp. R. 278-90; Tr. 37-46, 50.) Estevez did not recall whether there was anything under the April warning when he filled it out, but he specifically denied that the February warning was under it. (Temp. R. 284; Tr. 44-46, 50-51.) Although the personnel files are in his office, he did not recall looking at Gray's file before writing the April warning or becoming aware of the February warning until later. (Temp. R. 286-90; Tr. 46-50.)

After reviewing the testimony, I find that Countiss and Estevez have given largely consistent and credible accounts of the purported disciplinary meeting. The only discrepancy is Estevez's testimony that the February warning was not underneath the April warning, which is disproven by the indentations. But I do not find this discrepancy fatal to Estevez's credibility. He indicated throughout his testimony that he did not recall the disciplinary meeting with perfect clarity and was basing his account in part on his knowledge of the way he usually conducted such meetings, and I find that his testimony was not inconsistent with what a supervisor would be expected to remember or forget about a routine disciplinary matter. He could have had Gray's personnel file or a piece of the file on his desk underneath the April warning and simply not remembered that fact when he was called to testify months later. The February warning could have been under another piece of paper in the file, which would explain how the indentations were transferred to the February warning without his knowledge of that warning being on his desk. If I assume that Estevez was simply mistaken about the February warning not being on his

desk at the time the April warning was executed, the indentations are entirely consistent with a scenario wherein Estevez filled out the top part of the April warning while it was sitting on top of the February warning, resulting in the transfer of the indentations from the “explanation” section; Estevez then passed it to Gray, who signed it without dating it, and Countiss, who signed and dated it; then Estevez signed and dated it, if he had not already done so, and wrote in the date next to Gray’s name, transferring those indentations onto the February warning. The indentations do not decisively establish that this scenario occurred, but it seems at least as plausible as Gray’s allegation of forgery, which would require me to assume that the warnings and the witnesses’ testimony were all part of an elaborate, rapidly orchestrated conspiracy to frame Gray for poor performance.

As for Gray’s allegation that the documents were not prepared on the dates they purport, the indented writing clearly does not prove this. It also fails to prove that the documents were prepared at the same time or that they were prepared after Gray was fired. In fact, the indentations do not reveal any information about the dates the warnings were written except to confirm that the April warning was probably written after the February warning, as it was lying on top of the earlier-dated document. (ET 49.) This does not advance Gray’s forgery claim.

Another factor I have considered in assessing the weight of Miller’s testimony is the objectivity of his analysis. North Fork argues that Miller was exposed to information which could cause bias in that he was hired by Gray’s attorney and assumed Gray disputed the authenticity of the questioned signatures. (North Fork’s Br., 10-11.) Miller’s testimony confirms that he assumed his client was claiming the signatures were forged. (ET 34.) This knowledge exposed Miller to the risk of confirmation bias. Although it is impossible to tell whether or to what extent confirmation bias may have influenced his opinion, there were subtle signs that Miller may not have viewed the evidence in an appropriately objective light. One telling factor was his reluctance to consider the potential effects of the extrinsic and intrinsic conditions surrounding the execution of the questioned documents, discussed above. When North Fork’s counsel confronted Miller with two previously unviewed signatures at the hearing, Miller’s reaction raised further doubts about his objectivity. Miller appeared very reluctant to examine the signatures on the stand. He referred to the author of one of the signatures as “they” and seemed to assume it was forged, although it was not. (ET 75-81.) North Fork characterizes Miller’s reaction to the new signatures as a “confusing monologue” that failed to generate confidence in his ability to analyze signatures. (North Fork’s Br., 12.) I agree. I also find that his reaction evinced defensiveness and a lack of scientific objectivity, in that his demeanor suggested he was trying very hard not to say anything that would damage his client’s position or undercut his own previously stated opinion. Defensiveness does not reflect favorably on Miller as an objective expert witness or as a scientist.

I also note that Miller did not keep any notes about his lab work other than the brief report he submitted to the court. (ET 73.) Thus, his conclusions were subject to post-hoc rationalization. This does not necessarily mean that he reached a conclusion first and conducted the analysis later, which obviously would be improper. However, it would have been reassuring if at the time he issued his opinion he had provided something beyond the terse summary of his analysis that appears in his report.

Miller's conclusion that the signatures were forged was not definitive. He said his confidence level was to a "high degree of probability" or "a notch below certainty." (ET 32-33, 88-89.) He did not adequately explain how he reached this high degree of confidence. He did not identify any error rate for the methodology he applied. He noted that the wide range of natural variation in Gray's writing affected his confidence level, but he did not clearly explain how he accounted for the variation or exactly how it affected his degree of confidence. Miller also testified that as a statistician, he is opposed to ever saying he is 100% certain of any conclusion. (ET 89.) Presumably he meant to say that he tends to err on the side of caution, but this seems to be an arbitrary way of quantifying a confidence level and is inappropriate as a scientific opinion.

Miller testified his opinion was corroborated by two other FDEs, both of whom expressed a stronger opinion than Miller that Gray could be excluded as the writer of the questioned signatures. (ET 71-72, 102-03.) However, their purported corroboration of Miller's opinion is of limited probative value here, since their opinions are not before me, they were not subject to confrontation by North Fork, and I lack the information necessary to evaluate their credibility. Although hearsay is admissible I place very limited weight on it under these circumstances. The only other opinion before me is Peter J. Belcastro's report, which was submitted with Gray's offer of proof at the 2010 hearing. Belcastro found that inconsistencies between the known and questioned signatures indicated Gray "may not have prepared" the questioned signatures, but "[d]ue to the presence of unexplained characteristics, the nature of the questioned and known signatures, and characteristics of possible simulation, tracing, or distortion, a definite determination could not be reached." (Offer of Proof #2.) This opinion does not corroborate Miller's conclusion or his level of confidence.

A computer analysis could well have lent credibility to Miller's conclusions. Miller testified that computer programs like Cedar Fox, the software he uses, contain a database of thousands of handwriting specimens. (ET 68.) The examiner can enter a questioned signature into the database along with other similar signatures, and the computer will come up with three or four potential matches that the examiner then eyeballs to come up with a final match. (ET 68-69, 99-100.) The success rate or confidence interval is about 98%. (ET 69, 99.) However, Miller said that he did not need to conduct a computer analysis here because this was a simple case. (ET 107.) He further testified, "I know what the computer is looking for because ... I've had training under Sargur Srihari, who designed the program," and thus it was more time-effective "to just do it the old fashioned way without the computer." (ET 107-08.) This may be true, but the value of a computer analysis is that the computer program has a known error rate and must apply the same algorithm in each case to reach its conclusion. This provides a measure of quality control and an assurance of consistency that are lacking from human judgment calls.

For all the reasons discussed above, I find that Miller's testimony does not establish to a high degree of probability that the questioned signatures were forged.

D. Conclusions

In weighing expert testimony, the Commission has stated that a judge may consider factors such as the expert's credentials, the scientific bases for the expert's opinion, and how objective and convincingly stated his testimony is. *In re: Contests of Respirable Dust Sample*

Alteration Citations, 17 FMSHRC 1819, 1843 (Nov. 1995), *aff'd sub nom. Sec'y of Labor v. Keystone Coal Mining Corp.*, 151 F.3d 1096 (D.C. Cir. 1998); *Cyprus Tonopah Mining Corp.*, 15 FMSHRC 367, 372-73 (March 1993); *ASARCO, Inc.*, 14 FMSHRC 941, 949 (June 1992).

Miller's credentials are sound. His training and experience, particularly his completion of the U.S. Secret Service's training courses for forensic document examination and his decades of experience working as an FDE for the state of Tennessee, make him well-qualified to testify as an FDE in this case. However, I accord low probative weight to Miller's opinion for the following reasons.

First, the probative value of Miller's opinion is diminished to the extent its scientific bases have not been proven reliable. As detailed above, the evidence before me does not establish that the theories and techniques underlying handwriting analysis have been validated through rigorous empirical testing and peer review and publication. Although there is some support on the record for the common-sense principle that handwriting is individualistic, the evidence does not give me a clear sense of whether any FDE could reliably perform the task that Miller faced, namely, determining whether two signatures containing a total of just six distinct characters fall within Gray's very broad range of natural variation. The error rate for this task is unknown. Miller did not articulate the objective standards he followed in performing this task. It appears that handwriting analysis in general lacks generally accepted governing standards. This permits a troubling degree of subjectivity to enter into handwriting experts' opinions, giving rise to a potential for bias and somewhat obscuring the reasoning behind such opinions. In short, handwriting analysis is not the type of technique that produces scientifically reliable results.

Given my lack of confidence in the reliability of Miller's conclusions, the most helpful part of his testimony was not his ultimate opinion but the information he provided about how he reached that opinion, particularly his description of the differences he observed between the questioned signatures and the exemplars. But Miller did not convincingly explain how these differences, which included differences in letter formations and in traits such as slant, speed, and skill level, led to the conclusion that the questioned signatures were forged. He did not explain how he defined the normal curve of Gray's writing. It is not clear that the exemplars were sufficient to allow him to do so, especially considering the high degree of natural variation in Gray's writing. Miller did not adequately explain how he accounted for this problematic level of natural variation. He also did not identify the fundamental differences that he cited as signs of forgery or explain how he distinguished them from Gray's natural variation. He failed to consider potentially significant factors such as the effect of intrinsic and extrinsic conditions on the appearance of the handwriting. He did not explain the significance of his conclusions with regard to the indentations revealed by the ESDA films or how they support his finding of forgery. In addition, Miller was exposed to information that could cause bias and displayed subtle signs at the hearing that he did not view the evidence completely objectively. Finally, Miller also failed to adequately justify the high level of certainty he expressed in his opinion.

For all the reasons discussed above, I find that Miller's testimony does not establish that the February 27 and April 29 disciplinary warnings were forged. I find that these warnings are authentic and were issued to Gray on the dates alleged.

E. Effect on Prima Facie Case

A complainant alleging discrimination under section 105(c) of the Mine Act establishes a prima facie case of prohibited discrimination by presenting evidence sufficient to support a conclusion that (1) he engaged in activity that is protected under the Mine Act, (2) he suffered an adverse employment action, and (3) the adverse action complained of was motivated in any part by the protected activity. *Gray v. North Fork Coal Corp.*, 35 FMSHRC 2349, 2355 (Aug. 2013), citing *Turner v. Nat'l Cement Co. of California*, 33 FMSHRC 1059, 1064-67 (May 2011); *Sec'y on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2799 (Oct. 1980), *rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3d Cir. 1981); *Sec'y on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 817-18 (Apr. 1981). To rebut a complainant's prima facie case of discrimination, the mine operator may show either that no protected activity occurred or that the adverse action taken against the complainant was in no part motivated by his protected activity. *Gray*, 35 FMSHRC at 2355, citing *Robinette*, 3 FMSHRC at 818 n.20.

Gray takes the position that Miller's testimony impeaches the testimony of North Fork's witnesses, and requests that I now find that North Fork has violated the Mine Act. In making this argument Gray relies largely on the points set forth in the Commission's decision, wherein the majority speculated that Miller's testimony could lead me to overturn most if not all of my prior credibility determinations and thereby reach a different outcome.

I do not find that the disciplinary warnings or Miller's testimony play the central role Gray envisions in establishing his *prima facie* case although I have rejected Miller's testimony and found the written documents authentic. Aside from the expert handwriting evidence, the entirety of the evidence Gray has presented in support of his *prima facie* case is as follows: his own testimony; Exhibits Compl.-A and -B, which are the two disciplinary warnings; the testimony of Anthony Estevez and Stephen Countiss, who were called as adverse witnesses to discuss their signatures on the April disciplinary warning and the circumstances surrounding its issuance; Exhibit Compl.-C, which is a written statement given by Russell Ison to MSHA investigators to the effect that he issued the February warning to Gray for poor work performance; and the testimony of MSHA Inspector Kevin Doan, who said he did not recall making a comment about how slowly Gray was working the day he was fired. Of this evidence, the only direct evidence Gray has presented to support the first requisite element of his *prima facie* case, the element of protected activity, is his own testimony.

Gray notes that direct evidence of discriminatory motive is rarely available and theorizes that Miller's testimony regarding the alleged forgery is the essential cog proving that a violation of section 105(c) of the Mine Act occurred. (Posthr'g Br. for Mark Gray, 28-29.) It is true that direct evidence of discriminatory motive is rarely available, but the same cannot be said of direct evidence of protected activity. Assuming *arguendo*, Gray's theory – the theory that forgery corroborates his entire *prima facie* case – it would require me to reason that (1) because the documents were forged, mine management must have been trying to cover up a hostile or retaliatory motive to fire Gray; (2) the hostility must have been provoked by protected activity under the Mine Act; and (3) therefore, Gray has established that the protected activities he

alleges did in fact occur. This inferential line of reasoning is attenuated at best and fails to persuade.

The Commission opined in its majority decision having left open the possibility that the documents were forgeries found my evaluation of the witnesses' credibility was lacking and that the testimony of the expert witness may materially affect that evaluation. I will, therefore, set forth below a summary of each of the witnesses' pertinent testimony and address with greater specificity how I determined the credibility of each witness. My analysis of the credibility of the witnesses with regard to the written counseling warnings is set forth above and will not be repeated; it will be contained to the remainder of the testimony provided by each witness. My analysis goes beyond a finding that each of the witnesses for North Fork corroborated one another although that is one factor always properly considered in such an analysis. My determination of credibility is based upon an exhaustive review of the record, my observations in hearing of each of the witnesses' comportment, and their possible biases and motivation to provide the testimony they gave. I have also compared the testimony to the documentary evidence (the witnesses' written statements) and considered the time at which the documents were prepared and under what circumstances.

Because the establishment of a *prima facie* case is inextricably interwoven with the assessment of Gray's credibility as well as that of North Fork's witnesses' claims of substandard performance, I will discuss their testimony regarding the alleged incidents of protected activity and Gray's performance without differentiating between the *prima facie* case and evidence of an affirmative defense. I find this necessary because there is no evidence of the protected activity alleged save for Gray's assertions, which makes his credibility essential. In order to find he has established a *prima facie* case, there must be sufficient evidence to support a conclusion that he engaged in protected activity which, at least in part, resulted in the adverse action alleged. See *Turner v. Nat'l Cement Co.*, 33 FMSHRC at 1064-67. I interpret the meaning of "sufficient evidence" to mean sufficient credible evidence.

III. SUMMARY OF TESTIMONY

Mark Gray

Gray testified at hearing that he has been a roof bolter for 17 years with mining experience totaling 29 years and has worked for 30 different mines during that period of time. (Tr. 166.)

Gray had worked the day shift on the 001 section since the summer of 2008 after being transferred from the night shift on the same section where he had worked since the winter of 2007. (Tr. 171-73.) The roof bolting machine he operated was a two-person bolter; he was on the operator's side which made it primarily his responsibility to hang the ventilation curtains as the bolter advanced. (Tr. 178.) The ventilation plan in effect at the time allowed for 40 foot cuts on a four foot bolting pattern. (Tr. 180.) He and his roof bolting partner, Chris Sheeks, would each install a bolt in the middle of the roof and then swing the boom of the bolter out installing bolts on either side of the middle bolts and then tram the bolter four feet forward and repeat the process in subsequent rows. (Tr. 181.)

In the March 2009 time frame, Anthony Estevez was the mine superintendent and Steven Countiss was the mine foreman. (Tr. 176.) Thomas Cornett was the 001 section day shift foreman. Gray he could not recall how long he had been working for Cornett. (Temp. R. 24.)¹³

On June 15, 2009, Gray filed a discrimination complaint stating, “I feel I was terminated because I refused to roof bolt an entire cut through of about 60 feet plus in depth. I also made safety complaints.” (Temp. R. Ex. R-1.) He told MSHA investigator Guy Fain that his complaint was based upon two alleged deep cuts of 60 feet that he was told to bolt; the first one he did, the second one he refused. (Temp. R. Ex. R-2.) He also later alleged a complaint about hanging ventilation curtains. (Temp. R. Ex. G-1.)

The First Deep Cut

Gray testified that he was told by his foreman, Tom Cornett, to bolt a cut that he estimated to be about 56 to 60 feet deep. (Tr. 182.) Although he never provided a date on which he bolted this deep cut, he stated that it was three days before a second alleged deep cut was made, which occurred one week before he was fired. (Tr. 188, 191, 203.) Gray was fired on May 15 which would indicate this first deep cut occurred on or about May 5. Cornett told him and Sheeks that the cut needed to be made for ventilation purposes and he told them to bolt it. (Tr. 184.) Gray stated that he was “job scared” and bolted the cut although he believed the roof was dangerous. (Tr. 183, 188.) He stated that it took 14 rows of bolts to complete the cut which would mean the cut was 56 feet deep on a four foot bolting pattern. (Tr. 182.) He testified that he told Cornett after bolting the deep cut that he was not going to do it anymore. (Tr. 183.) He described Cornett’s reaction as walking off in a huff without saying anything. (Tr. 183.) Thereafter, he said, Cornett just ignored him. (Tr. 183-84.) He changed his testimony and stated later that he said nothing about bolting this first deep cut to anyone – not Sheeks, not Estevez, not Countiss and not Cornett. (Tr. 213-14.)

The Second Deep Cut

Gray testified that a few days after the first deep cut was made, a second one was mined on the 002 section. (Tr. 185.) He thereafter stated it was on the 001 section.¹⁴ (Tr. 186.) The cut, he said, was 50 to 60 feet deep which he could tell just from looking at it. (Tr. 187.) He testified that it was in the #4 cross cut which had been punched all the way through. (Tr. 187.) He told Cornett to his face that he was not going to bolt it because the top had too much swing in it. (Tr. 188, 214.) Sheeks was with him and heard him refuse to bolt this cut. (Tr. 209.) Cornett then told him and Sheeks to bolt in another area beside this crosscut. (Tr. 185, 216.) Gray further said that Sheeks, like Cornett, would no longer speak to him after this incident. (Tr. 184-85.) Although there was only one other bolting crew on the day shift with Gray, he testified that he had no idea who would have bolted this alleged second deep cut if he and Sheeks did not. (Tr. 217.) When asked who the other two roof bolters on his crew were, he initially answered by saying he could

¹³ Cornett became Gray’s foreman one month before Gray was fired. (Tr. 227.)

¹⁴ Gray never worked in the 002 section which was located approximately 1½ miles away from the 001 section. (Tr. 169; Tr. II 53.)

not even recall their names; he could only do so after their names were suggested by counsel for Respondent. (Tr. 216.)

Gray testified at the temporary reinstatement hearing that he did not see who made either of the deep cuts. He stated the miner man's name who would have made the cut was Steve. (Temp. R. 80, 91-92.)

When asked if Gray was aware of deep cuts being taken in Kentucky in his 30 years of mining experience in Kentucky, he said it was not unusual. (Tr. 189.) Upon further probing by the Respondent's counsel, Gray could not "recollect" how many mines he had worked in that took deep cuts. He never reported any of these violations to MSHA. (Tr. 202.) He stated he had bolted a deep cut but he did not have "a number that comes to mind" when asked how many times this occurred. (Tr. 202.)

Hanging Curtains

Gray testified at hearing that the issue of hanging curtains, which he alleges was part the general "other safety issues" he put in his original discrimination complaint, occurred on the same day as the second deep cut that he refused to bolt which was one week before he was fired. (Tr. 203.) Gray said he was not required to advance the curtain after each row of bolts was installed. He would do so every 2½ rows, or 10 feet. (Tr. 209-10.) He moved the curtain as required, he said, and was never criticized for failing to do so. (Tr. 210.) Gray said that he had stopped to hang curtains and Cornett mumbled something to him and just walked off as he had done with regard to bolting the deep cuts. (Tr. 204.) Again, Gray could not identify what Cornett said, and had no idea if it was because Cornett did not want him to hang the curtains. (Tr. 204.) Nor did he know if he was fired in part because he hung a curtain that Cornett did not want him to hang. (Tr. 207.) Gray insisted that Cornett never got after him for not hanging curtains before. (Tr. 209.) In fact, he was never criticized by Cornett for anything concerning his work performance. (Tr. 210-12.) Gray told Investigator Fain that the mine is gassy and the methane sensors on the bolter would often shut it down at a reading of 2% which happened often if the curtain was not properly advanced. (Tr. 156; Temp. R. 26; Temp. R. Ex. G-1.)

When Gray was asked why he did not go higher up the chain of command than Cornett in reporting his complaints, he stated that "Mr. Cornett was the one that I needed to go to first." When asked why he did not report his complaints to Estevez, he responded, "Because Mr. Cornett would have handled it. I thought Mr. Cornett would have handled it." (Temp. R. 95-96.) Gray confirmed that he had known Investigator Fain for 20 years from attending the same church. (Temp. R. 89.) He also testified that he knew Inspector Harris, Fain's supervisor, for about 10 years. (Temp. R. 89.) He explained Harris called him as a witness in a federal court case where a mine was charged with "mining out of law" and ventilation violations. (Temp. R. 96-97.)

Gray confirmed that MSHA inspectors were in the mine every other day but he said nothing to them about the deep cuts. (Tr. 220.) In addition to being acquainted with Fain and Harris, he was also acquainted with MSHA inspector Silas Brock and spoke to him quite often at the mine. (Temp. R. 32, 78.) He did not report his safety concerns to any of them.

Gray's Termination

At the end of the shift on May 15, Gray was approached by a scoopman as he was coming out of the drift and was told Estevez wanted to see him in his office. (Tr. 191.) When he got there Estevez told him he needed his rescuer because he had to let Gray go. When Gray asked why, Estevez replied that it was because "people had complained about him." Gray asked who had complained and Estevez replied he could not tell him but he would believe his foreman over Gray. Gray then walked out, got into his truck and went home without comment. (Tr. 192.)

Guy Fain

MSHA Investigator Guy Fain was assigned to investigate Gray's claim of discrimination by his superior, Gary Harris. (Temp. R. 101.) He testified that Gray did not mention curtains in his initial complaint. (Temp. R. 102.) In pursuit of his investigatory duties, Fain interviewed Anthony Estevez on June 23, 2009. (Temp. R. 108; Ex. R-11A.) Among other things, Estevez told Fain that he and Cornett had discussed problems with Gray's performance such as slowing down, burning up bits and not putting pressure on the drill to install bolts. (Temp. R. 109.) These issues led to Gray's termination. (Temp. R. 110.) Fain did not ask Estevez anything about the curtain complaint. (Temp. R. 111.)

Fain also interviewed Thomas Cornett, the section foreman. (Temp. R. 111.) Cornett told Fain that Gray never made the alleged safety complaints to him about bolting deep cuts. He denied deep cuts ever being taken in the mine. Cornett stated that he had given Gray a verbal warning for not spot-bolting and not hanging curtains. (Temp. R. 113.) He said Gray was a slow worker and was off task when he was supposed to be moving the drill or putting up curtains. (Temp. R. 113.)

The other crew members on the 001 section, William Peak, William McFarland and Jerry Lynn Hall, also provided information that Gray was not a good worker. They denied ever seeing or hearing about deep cuts or hearing Gray complain about safety issues. (Temp. R. 116-22.)

After interviewing Cornett, Fain returned to Gray's home on July 31 to ask him if he had any other safety complaints. (Temp. R. 124-25.) Specifically, it was Tom Cornett's comments about Gray not hanging curtains that first brought up the question about curtains and caused Fain to return to ask Gray about them. (Temp. R. 124-26.) At no time prior did Gray mention curtains to Fain. (Temp. R. 126.)

At trial, Fain was asked to elaborate on Gray's comments about the curtains. Fain stated that Gray told him he had to rehang curtains because the curtains would be pulled down sometimes when tramming the bolter and it would shut the miner off due to a buildup of methane. (Temp. R. 138-39.) Gray further told Fain that he was directed by his foreman to hang the curtains. (Temp. R. 139.) Fain stated that if the curtains were not put back up, there would be a safety issue and confirmed that if the foreman told them to reinstall them, as Gray said, it would be to improve safety. (Temp. R. 140.) When Fain was asked how Gray's statement that Cornett directed him to hang the curtains could be construed as a safety complaint, he could not do so. (Temp. R. 141.) Fain had reported in his summary of interview from July 31 that Gray

said “he had complained several times about mine ventilation curtains not being up to Tom Cornett, the section foreman.” (Temp. R. 142; Temp. R. Ex. G-1.) Gray further said he had complained to two other foreman about the curtains, one of whom he could only identify as “Moondog” who told him to just shut down the machine and hang the curtains. Gray went on to say, Cornett seemed to get mad if Gray shut down to hang them but the machines would shut off by themselves if he did not. (Temp. R. 142-43.) Fain testified that he thought Gray must have had a dispute about whether he should shut the machine down or let the methane monitor shut it down when he did his curtain work to explain how the curtain issue could be interpreted as a safety complaint. (Temp. R. 156.)

Fain also spoke to other regular mine inspectors William Clark, Kevin Doan and Silas Brock as to whether they had ever seen deep cuts in the mine. None had. (Temp. R. 128-29.) Doan had reported to Investigator Sturgill that he (Doan) was at the mine and watched Gray roof bolting on the day Gray was fired. (Temp. R. 132.)

Stephen Countiss

Stephen Countiss was the day shift mine foreman from November 2008 to March 2010. (Tr. 123.) He observed Gray on an occasional basis and found him to be a slow worker. He saw Sheeks waiting for Gray to catch up. (Tr. 124.) Sheeks complained to him about Gray’s work performance because he was concerned it might affect his job as well. (Tr. 125.) The other bolting crew complained because they had to shoulder more of the load when Gray and Sheeks would not do as much. Cornett also complained to him about Gray. (Tr. 126.) Cornett had asked Countiss to speak with Gray about hanging the curtains because Gray was not doing it as required. (Tr. 126.)

Countiss stated that he was underground almost every day and never saw a 56 foot cut nor had anyone ever told him about or complained of a deep cut. The mine was on a 40 foot plan but it had been a long time since anyone had attempted a cut of that depth because the roof was in poor condition. (Tr. 126.) Gray had never made a complaint about a deep cut nor did he ever complain to him about anything regarding ventilation curtains. (Tr. 128.) Once Gray was fired and replaced, the production picked up considerably. (Tr. 129.)

Countiss was aware of Gray having been counseled by Russell Ison on February 27, 2009 for his performance. Ison told him that it was a verbal warning so it was not signed by a witness. (Tr. 116; Ex. Compl.-B.) Countiss stated that Ison was mistaken if he said that he (Countiss) was not present when this verbal warning was given to Gray. Countiss recalled an additional written warning given to Gray a couple months before Ison issued the verbal warning in February. It was for substandard performance. (Tr. 121.) Countiss, Ison and Gray signed this document but Countiss did not know what happened to it. (Tr. 121-22.) This warning should have been in Gray’s personnel file but it could not be located. (Tr. 133-35.) Countiss believed Ison gave Gray a copy of this warning. (Tr. 120.)

Countiss was a witness to the final counseling given to Gray on April 29, 2009. (Tr. 118; Ex. Compl.-A.) He did not recall Estevez speaking to Gray about any of the prior warnings at this meeting. Countiss could not recall whether he had informed Estevez of Gray’s prior

counseling before or after Gray's termination, but he did tell Estevez about it at some point in time. (Tr. 117.) Countiss did not know if there were any documents on Estevez's desk when he had Gray sign the April warning. (Tr. 118.) What he did recall was that Estevez was at his desk when he talked to Gray about his performance. (Tr. 111, 114.) Countiss watched Gray sign the document. Gray was standing over the document and signed his name with a slashing motion at the end, threw the pen down and stomped out the door. (Tr. 120.) As Countiss recalled, Gray did not take a copy of the letter with him. (Tr. 120.) After Gray left the room, Countiss signed the document as a witness. (Tr. 110-11.)

Following Gray's termination and filing of the discrimination complaint, Countiss was interviewed by Fain and signed a written summary of interview. (Ex. R-12.) In his statement, he did not mention the earlier written warning to Fain. (Tr. 131.) He also did not tell Fain that the other crew and Cornett complained about Gray's performance because he was not asked that question. (Tr. 132.) He did state that Sheeks complained about Gray, however. (Tr. 132.) He was asked if he had any personal issues with Gray to which he responded in the negative. (Tr. 133.)

Countiss stated that there was no progressive disciplinary system at the mine that he knew of. He had never personally been asked to fill out the pre-printed disciplinary form and did not know how they were to be filled out. (Tr. 136-37.)

Chris Sheeks

Sheeks had been employed by North Fork since 2005 and was trained as a roof bolter by Mark Gray. (Tr.II 61, 81.) He and Gray operated a dual-headed bolter. (Tr.II 62.) The other roof bolter on the shift was operated by William Peak and "Snappy." (Tr.II 62-63.) It was the roof bolters' responsibility to hang curtains within four feet of the back of the drill. (Tr.II 63.) It was primarily Gray's responsibility to do this. (Tr.II 63.) As Sheeks trammed the drill forward, the curtain had to be rolled up and then dropped back down which was Gray's responsibility but he did not do it; Sheeks had to. (Tr.II 68-69.) He would have to drive the drill, throw the miner cable over, and roll up the curtain himself while Gray would be standing around talking. (Tr.II 80.)

Sheeks testified that Gray was lazy and very slow. (Tr.II 64.) He and Gray bolted about 1½ places to every five or six done by the other team in the same amount of time. (Tr.II 64.) Sheeks had observed Gray spin the drill without putting pressure on it on a few occasions. (Tr.II 65.) Cornett had often spoken to them about picking up production and moving faster. (Tr.II 66.) Estevez and Countiss had also spoken to them about their production being too slow. (Tr.II 67.) This led to Sheeks asking both Countiss and Estevez to change bolting partners so he would not get fired for Gray's poor performance. (Tr.II 67-68.) Gray's performance resulted in the other bolting team having to bolt more places to pick up their slack, the third shift having to finish the job or their having to finish the following day. (Tr.II 68.)

Sheeks testified that Gray told him that he had been written up three or four times, once by Estevez and the other times by Russell Ison. (Tr.II 69, 90.) Gray said he was written up once for not having enough cable to move the drill which would stop production until the cable was pulled and hung up so the rest of the equipment could operate. (Tr.II 70-71.) On another

occasion, Sheeks and Gray were brought to Estevez's office with Steve Countiss for disciplinary reasons. (Tr.II 71.) Cornett was present as well. (Tr.II 71.) Estevez showed them a production report that tracked the number of bolts installed by the other bolting team compared to their numbers. They were told to pick up their pace. Gray remarked to Sheeks that the other team was lying about their numbers and he could not work any faster. (Tr.II 72.) Sheeks met with Estevez a second time without Gray to ask Estevez to move him to another crew or give him a new roof bolting partner because he did not think it was right that he was being reprimanded for Gray's poor performance. (Tr.II 72-73.)

Gray had told Sheeks that the company could not fire them because it had a bad name and they could not get anyone else to work for them. Gray further stated that he would sue them if he could not get unemployment. (Tr.II 74.) Gray stated that he kept an attorney on retainer. (Tr.II 75.)

Sheeks had never seen a cut of 50 feet or deeper in the mine, he had never heard Gray refuse to bolt a cut of 50 feet or deeper and he had never heard Gray make any complaints about the company not keeping the curtains up. (Tr.II 76.)

Sheeks had observed Gray put up four foot rope bolts which are designed to allow the roof to move. It took Gray 30 to 45 minutes to install one bolt whereas it should take two or three minutes. (Tr.II 79.) Sheeks described Gray as being able to do his job well if he chose to but he was lazy. (Tr.II 105-07.)

On the day Gray was fired, Estevez and an MSHA inspector came to the 001 section while Sheeks and Gray were in the number one entry installing the first row of bolts. The drill they were using had a new feature on it; it was the only one in the mine with rock guards. (Tr.II 78.) A few hours later Estevez and the MSHA inspector returned at which time Sheeks and Gray had installed about seven bolts. They should have had about 70 bolts installed in that amount of time. (Tr.II 77.)

Jerry Lynn Hall

Hall was the continuous miner operator for North Fork on the 001 section day shift for approximately three years. (Tr.II 13.) He had been a miner operator for seven or eight years with 26 years of mining experience. Hall testified that he was the only miner operator on the day shift. (Tr.II 9.) Hall was not specifically aware of Gray being written up and warned however he had heard "hearsay" to that effect. (Tr.II 15.) Hall had never heard Gray complain about or refuse to bolt a deep cut. The typical cuts in that mine were 20 feet. (Tr.II 7.)

William "Snappy" McFarland

McFarland was a roof bolter on Gray's shift. (Tr.II 22.) The depth of the cuts in the mine was never in excess of 20 feet. (Tr.II 22-23.) He had never seen cuts in excess of 50 feet nor had he heard of anyone saying there had been any such cuts. (Tr.II 23.) He described the general condition of the roof as pretty bad. If a cut of 50 feet had been made, there would be a lot of draw rock falling down. (Tr.II 23-24.)

There were times when they had to cross the cable of the other bolter to tram to their next entry because Gray's team was lagging behind them. (Tr.II 25-26.) Once Jim Pennington replaced Gray, the speed picked up. (Tr.II 26.)

William Peak

Peak was McFarland's roof bolting partner on the 001 day shift. He observed that Gray and Sheeks did not bolt at the same pace; they would bolt five to six places for every one or two places Gray and Sheeks bolted. The effect would be that production would slow down and it would put more work on him and his partner. He complained to Cornett about it. (Tr.II 32.) When Pennington was hired, they two teams bolted equally fast. (Tr.II 33.) The typical depth cut was 20 feet or less. (Tr.II 33.)

Peak had never seen a cut of 50 feet. The top was real bad and a cut of that depth would have been extremely dangerous. He never been asked to bolt a deep cut or heard anyone else say they were asked to bolt one. He never heard Gray said he had been asked to bolt a deep cut. He had heard Gray had bolted a deep cut at some other mines but not at North Fork. (Tr.II 34-35.) Peak told Fain that he had never seen a crosscut mined all the way through without being bolted. He also told Fain that the deepest cut he ever saw was 40 feet deep and that was two years prior in a different coal seam where the roof conditions were better. (Ex. R-9.)

Peak was no longer working for North Fork as he was out on long term disability. (Tr.II 32.) He had been terminated because his disability was permanent. (Tr.II 38.)

Marty Bates

Marty Bates was the 001 section second shift foreman in May 2009. (Tr.II 42.) The first and second shifts were production shifts where the third shift was only maintenance. (Tr.II 43.) The depth of the cuts being taken were 18 to 20 feet and no more. (Tr.II 43.) Had a cut of 50 feet been taken, the roof would cave in. (Tr.II 44.) There were no cuts taken of 50 feet or more, no one ever asked him to make a cut of that depth and no one ever complained about taking such a cut. (Tr.II 44.)

Kevin Doan

Kevin Doan is an MSHA roof control specialist of five years. (Tr. 149.) He visited the mine in the day Gray was fired. (Tr. 142.) Doan had no present recollection of the events; he testified from his notes. (Tr. 146. He traveled with Estevez to the section. (Tr. 146.)¹⁵ He entered

¹⁵ Doan testified that he went to the 002 section; however, it was clear from the testimony that he went to observe the only roof bolting machine that had the rock deflector shields (ATRS) installed which was Gray's machine. Additionally, he testified that he recognized "Tom" in the courthouse as the foreman on the section. (Tr. 153.) He also confirmed that he spoke with Gray during the inspection. The 002 section was located 1½ miles away from the 001 section. (Tr.II 53.) Additionally, Estevez testified that the citation Doan issued that day was corrected during
(continued...)

the mine with Estevez sometime around eight or nine. (Tr. 151.) He made an imminent danger run across the working section starting at the number one heading and going across to six. (Tr. 152.) He was interested in seeing the Automatic Temporary Roof Support system (ATRS) that had been installed on one of the roof bolters as he had never seen one before. (Tr. 152-53.) The machine was in the number one heading. (Tr. 153.) Doan was extremely reluctant to state how long it took for him to travel from entry one across to six and come back again. He finally estimated one hour or more. (Tr. 158.) He cited a rib roll as well as an improper test hole along the way. (Tr. 156.) Estevez was with him the entire time. (Tr. 158.) When they came back to the number one entry, the roof bolter was still in the same entry bolting the same cut as they had been when they first saw it. (Tr. 158-59.) Doan testified, however, that he could not recall making a comment about how slow they were bolting as Estevez stated. (Tr. 159.)

Doan stated that no roof control plans in District 7 allowed for cuts as deep as 50 feet. (Tr. 161.) Doan stated that he had never seen 56 foot unbolted cuts in this mine nor had he ever written a citation for deep cuts in the mine. (Tr. 161.) No miner had ever told him deep cuts were being taken in the mine. (Tr. 161.) Doan confirmed that he had seen and issued citations for cuts exceeding the roof control plan in other mines which he discovered during his inspection. (Tr. 163.)

Thomas Cornett

Cornett had been a section foreman for 26 years. He started on the 001 day shift in April 2009. (Tr. 227.) He was Gray's immediate supervisor. (Tr. 227.) His responsibility was to ensure safety and production and to supervise the crews underground involved with cutting and hauling the coal and bolting the roof. (Tr. 228-29.) In his observations of Gray, he felt Gray started out as a good worker for the first few days but then started to slow down in his job and not hang the ventilation curtains as required. (Tr. 229.) It was Gray's duty to keep the curtain within four feet of the bolter at all times. (Tr. 229.) Every time the bolter moves up four feet, the curtain is to be moved up four feet as well. (Tr. 230.) Gray would at times use the wrong size bolts as well. (Tr. 229.)

In comparison to the other bolters, Gray and Sheeks bolted two places to every five the other team bolted. The other crew was made up of William McFarland and Bill Peak. (Tr. 232.) Cornett spoke to Sheeks and Gray about their performance and kept a personal notebook in which he entered notations about speaking with these two bolters about their performance.¹⁶ (Tr. 233; Ex. R-3.) Cornett testified that he personally photocopied the pages from his notebook and

¹⁵ (...continued)

the termination inspection by putting the spad number from the mine map on the paperwork which coincided with the 001 section. (Tr. II 59.) I conclude Doan was on the 001 section where Mark Gray was working.

¹⁶ Counsel for Gray objected to the photocopied notes being entered into evidence under the best evidence rule, there being no originals by which to test their authenticity or his
(continued...)

produced all notes pertaining to Gray and Sheeks. (Tr. 236.) As he stated, Gray only worked for him for a month or so. (Tr. 255.) His notes document numerous instances of Gray's misbehavior. Some examples are: (1) 4-14-09 Gray was not putting pressure on the drill, meaning he was not putting up pressure on the drill to install the bolt. Cornett observed this when Gray was unaware he was being watched; (2) 4-22-09, Gray was making remarks that "the men could f*** over a boss and cut coal run down," and it took him 25 minutes to spot one bolt. Sheeks was listed as a witness to this; (3) 4-23-09 he spoke to Gray and Sheeks about doing a safe job bolting because they had installed too wide a bolt; (4) 4-28-09 curtains were not hung as required in #6 and #4 and a 6-foot bolt instead of a 12-foot rope bolt was installed in the corner; (5) 4-28-09 Gray was told to quit holding up production, he did not hang the two curtains and spot bolted again with a 6-foot bolt; and, (6) 5-11-09 it took Gray three hours and twenty minutes to install nine bolts. (Tr. 237-44.) Cornett testified that he had to speak to Gray on a daily basis for a while about keeping up with hanging curtains. (Tr. 240.) On April 29, 2009 he gave Gray a verbal warning about curtains and spot bolting, which was similar to the warning Gray had received the day before. (Tr. 243.) He was warned on three subsequent days to pick up the pace of bolting. It took Gray over three hours to spot bolt nine bolts when it should have taken about twenty minutes. (Tr. 244.) Cornett did not inform Fain, when interviewed, that he had these notes. (Tr. 272.) He stated that he did not think to produce the notebook until counsel for North Fork asked for any notes he may have on Gray. (Tr. 233.) He could not recall what Fain asked him but he did tell Fain that he had problems with Mark Gray. (Tr. 273.)

Cornett testified that typically cuts of about 18 feet were being taken in the April to May 2009 time frame because there was draw rock on the roof that could come down, creating a safety hazard. (Tr. 245-46.) No one took a cut deeper than 30 feet in the mine. Had a 50 or 60 foot cut been taken, the roof would have fallen in. (Tr. 246.) He had not seen a deep cut in many years. (Tr. 262.) A deep cut would also have been observed by the bolters, car drivers, the miner man and the foreman. (Tr. 248.) Gray never mentioned deep cuts to him, he never pinned a deep cut, he was never asked to bolt a deep cut and he never refused to bolt a deep cut. (Tr. 248.) Gray never complained about wanting to hang curtains, it was the other way around; he complained because Cornett told him he had to do it. (Tr. 248.) Gray's response was that he complained about it and said it was somebody else's job. (Temp. R. 227.)

¹⁶ (...continued)

credibility. (Tr. 235.) The objection was overruled as the strict rules of evidence do not apply in administrative hearings before this Commission. Additionally, as Gray alleges that these notes could have been written at any time after Gray's termination, having the originals would not tend to prove or disprove this allegation. If there was a grand design as Gray alleges to fabricate documents to prove poor performance after his termination, Cornett could have just as easily have fabricated the entire notebook after the fact as well. Additionally, Cornett produced the same photocopied entries at the Temporary Reinstatement hearing at which time counsel for Gray did not object to their admission. (Temp. R. 224.) Counsel stated that the court advised Cornett to maintain the originals for trial but that comment was not contained in the record of trial from the earlier hearing. What is contained in the record is counsel for Gray asking Cornett to hold on to the originals because he intended to subpoena them. (Temp. R. 252-53.) He never did so. (Tr. 234.) I have considered the fact that the original notebook was not produced in my assessment of the credibility of the witness and the authenticity of the notes themselves.

Cornett was not aware Ison had counseled Gray. (Tr. 262.) He did not tell Estevez about Gray not putting pressure on his drill although it was serious thing. (Tr. 266.) Countiss, however, was aware of it. (Tr. 266.) At the temporary reinstatement hearing Cornett also testified that he had discussed Gray not putting pressure on the drill on April 14 with Ison. (Temp. R. 232.) He also told Ison that he verbally counseled Gray on April 22 for not spot bolting. At one time Cornett recommended to Ison that Gray be fired but nothing came of it. (Temp. R. 250.) He did speak to Estevez about Gray's performance but not the specifics and never told Estevez to fire Gray. (Tr. 267-69.)

Cornett testified that Gray had made threats to sue the company from time to time as far back as when he worked on the night shift about one year prior to his termination. (Temp. R. 246-48.)

On the day Gray was fired, two inspectors were at the mine. (Tr. 251.) Kevin Doan was one of them who accompanied Estevez to the section Gray was working on that day. (Tr. 252.) Cornett's notes indicated that both Gray and Sheeks took 2½ hours to bolt the #4 right break. Sheeks was verbally counseled by Cornett but he was not fired because Cornett saw that Sheeks was bolting faster and waiting for Gray to put his bolts up. (Tr. 260.) After Gray was fired and his replacement was put in place, production evened out between the two bolting teams. (Tr. 249.) Prior to Gray's termination Cornett spoke to Estevez about Gray being the reason why that bolting team was slow. (Tr. 250.)

Anthony Estevez

Estevez had become the superintendent at the North Fork #4 mine in late March 2009. (Tr. 36, 61.) Upon taking control of the mine, he traveled the entire mine, observed the different shifts and evaluated every aspect of the mine. (Tr. 611.) He studied production reports for the various sections and established a cut sequence to be followed for ventilation and methane issues. (Tr. 63.) Soon after taking control, he noticed that the 001 day shift under Cornett was not complying with the plan. When he asked Cornett why there was a problem, Cornett stated that he had problems with the roof bolters staying caught up. Specifically, he indicated it was the Gray/Sheeks bolting team that was the problem. (Tr. 63.) Cornett told Estevez that he felt Gray was the problem. He was slowing down, burning up bits, spinning the drill without putting up pressure on it, not bringing enough cable to move the equipment and not hanging the curtains according to the ventilation plan. (Ex. R-11A.) Estevez observed them every time he was on the section. (Tr. 64.) Not only did he see that they were always behind in bolting but he observed on two occasions they did not have enough cable to move the bolter from one place to another. On the first occasion, the entire section was down because their machine blocked all the other equipment while they were trying to pull enough cable to get them out of the way. (Tr. 65.) On the second occasion, the same thing happened but Estevez told them to move out of the way and Estevez and some other miners pulled the cable. (Tr. 66.) Another time he was on the section he observed a cable jumping up and down as the bolter was exiting the entry. When he approached the bolter, he found Sheeks backing out on his own. When asked where Gray was, Sheeks said he did not know. Estevez helped Sheeks back out of the entry as two operators are required when doing so. (Tr. 66.)

Having observed the bolting on the shifts, Estevez found the Gray/Sheeks machine to bolt well below the pace of the other crew; they were moving two to three times slower than the crew. In early April Estevez called Gray and Sheeks into his office to show them production reports and explained to them that they were below standard. They stated they would do better. (Tr. 67-68.) Gray stated that he felt like he was doing a good job. On that particular day, Sheeks and Gray bolted 1½ rows during that shift while the other team had bolted 5½ rows. (Ex. R-11A.) When performance had not improved, they were called into Estevez's office one at a time. Sheeks said if he had a better partner he could do a better job. He said it was Gray's fault because Gray was often missing when he needed to move the machine, he was always waiting on Gray and Gray was not hanging the curtains. (Tr. 68-69.) When Gray was questioned and given an opportunity to explain his performance, he said he could do better but said nothing else. (Tr. 69.) This was before any disciplinary letters were issued. (Tr. 70.)

Estevez held weekly safety meetings and daily meetings before or after each shift when he was at the mine. All miners were present at the meetings. He also maintained an open door policy. (Tr. 70.) Gray had never made any safety complaints at any meeting nor did he ever mention any deep cuts in excess of 20 feet or anything about curtains. (Tr. 71, 76.) Had a deep cut been taken, those responsible would have been terminated, Estevez said. (Tr. 73.) A deep cut would endanger the miner operator, two shuttle car men and the roof bolters. (Tr. 73.) Cuts in excess of 20 feet were not being taken. (Tr. 74.) There were three or four MSHA inspectors at the mine almost every day traveling in the working areas looking for things such as deep cuts and unsupported top. (Tr. 74-75.)

Estevez testified that he accompanied MSHA inspector Doan on his inspection of the 001 section on the day Gray was terminated. They traveled to where Gray and Sheeks were bolting the first row of bolts. They left the area to make a run across the entire section. When they returned about two hours later Gray and Sheeks had only advanced to the second row of bolts in that time. (Tr. 51-52.) That would have been a total of about 12 bolts which was extremely slow. Doan had wanted to see the reflector pads on the bolter which Gray and Sheeks operated. (Tr. 50-51.) Estevez had expected them to be done bolting by the time they returned so that Doan could look at the front end of the bolter. When they found Gray and Sheeks still bolting the same entry upon their return, Doan said something to the effect of "I can't believe they're still in it." Estevez replied that he realized he had a problem that he was going to take care of. (Tr. 50, 54-55.) Estevez testified that Doan's comment played no part in his decision to fire Gray. (Tr. 57.) At the temporary reinstatement hearing, he stated that he had decided if there was no improvement in Gray's performance firing was inevitable but when an outsider commented on it, he felt like it had gone too far. (Tr. 57.)

When Estevez fired Gray, Gray did not mention deep cuts, curtains or any safety complaints. (Tr. 76.) Gray asked why he was being fired and Estevez told him it was because he had been warned about his poor performance already and it had not improved. It was now a safety issue. Gray responded, "That's okay, I'll have a job tomorrow." (Tr. 77.)

IV. CREDIBILITY OF WITNESSES

Mark Gray

Gray testified that up until the day he was terminated, he had never been disciplined by any one in management, he had never been called into Estevez's office with Sheeks for any reason and he had never been told he was performing too slowly nor was he ever shown production reports. He had never failed to secure enough cable on the miner to tram it to a new location. (Tr. 221-24.) He denied that he told Sheeks that he had been written up by Ison on previous occasions. (Tr. 222.) He denied that he told Sheeks he could not be fired because North Fork could not get other roof bolters. (Tr. 222.) He denied that he told Sheeks that if he was fired, he would file an unemployment claim and if that was denied, he would sue the company. (Tr. 222.) He denied that any foreman had ever kept after him for hanging curtains as required, he never ran his drill without putting upward pressure on it, he did not tell Estevez on the day he was fired that he would have a job the next day and he was never fired or received any written warnings from any of the 30 mines he had worked in in 29 years. (Tr. 209-12.) Most importantly, Gray denied ever having seen, received or signed any written counseling warnings given to him by Russell Ison in February or by Estevez in April, 2009. (Tr. 192.) Gray claims his purported signature on the documents are forgeries made by someone on behalf of North Fork.

Essentially, if Gray is to be believed, all of the witnesses for North Fork, management and non-management alike, have conspired against him and have created an intricate and detailed fabrication of performance down to the last detail to which they all testified under oath. I find that not only do the witnesses for North Fork provide credible testimony that contradicts Gray's assertions, but also the statements and admissions made by disinterested parties directly contradict or cast significant doubt on Gray's testimony. I further find Gray's own testimony contradictory and lacking credibility on its face.

Deep Cuts and Hanging Curtains

There are several troubling omissions in detail, inconsistencies and lapses in memory in both Gray's testimony at trial and the temporary reinstatement hearing held in September 2009 and his statement to Investigator Fain.

Gray's account of what protected activities he engaged in and when evolved over time. His initial complaint mentioned only one deep cut and did not provide any details as to when that cut was made. (Temp. R. Ex. R-1.) Subsequently Gray told Investigator Fain that this cut was made about a week before he was fired, then he added that he had bolted a similar deep cut "a couple of days prior." (Temp. R. Ex. R-2.) At the temporary reinstatement hearing he initially said that the first deep cut was made two days before the second deep cut. (Temp. R. 38.) He later said that it was three days before. (Temp. R. 56, 79; Tr. 188.) In his second statement to Investigator Fain, Gray for the first time said he had also made complaints about ventilation curtains. He said he had made these complaints to two foremen "since the first of 2009." (Temp. R. Ex. G-1.) He later testified that there was one specific incident in which he complained about curtains to Cornett and Cornett appeared to be angry, walked off, and thereafter exhibited a cold attitude toward Gray. (Temp. R. 27-28, 71-72.) At the temporary reinstatement hearing he testified he was sure that the alleged curtain incident he complained of occurred about two weeks

before he was discharged. (Temp. R. 28, 69.) Gray testified at trial, however, that the curtain incident occurred on the same day he refused to bolt the second deep cut, which was one week before he was fired. (Tr. 203.) Gray never gave a date on which any of these events occurred.

Gray testified at the earlier proceeding that Sheeks was not with him when he refused to bolt the second cut and he could not recall where Sheeks was at the time. (Temp. R. 42-43.) Later in his testimony when questioned by the court he stated that Sheeks was with him when he told Cornett he was not going to bolt the second cut; Sheeks was sitting on the drill. (Temp. R. 57.) Sheeks heard him refuse to bolt the second cut. (Temp. R. 86.) At hearing he testified unequivocally that Sheeks was with him at the time he refused to bolt the second cut. (Tr. 209.)

At the temporary reinstatement hearing, Gray was asked directly why he bolted the first deep cut. He said that he did so because “Tom” told him he needed it for air so he bolted it. (Temp. R. 49.) He then stated several times that directly after bolting this cut, he told Cornett that he bolted this one but he would not bolt another one. (Temp. R. 37-39, 52-53, 55-56.) It was not until the hearing some fifteen months later that he testified that he bolted the first deep cut because he was “job scared.” (Tr. 183.)

At trial Gray acknowledged that he stated in his complaint to MSHA that the deep cuts were 60 feet deep. (Temp. R. Ex. R-2.) At the earlier proceeding and at trial, he said he knew the first one was 56 feet by counting the bolts installed and he could tell the second one was the same as the first just by looking at it. (Temp. R. 38, 74; Tr. 182, 187.) He took no notes of the incidents to help recall the number of bolts he installed and could not recall the bolting pattern in the other mines he worked in but he was certain about his recollection here even though he could not provide a date certain on which any of the three alleged incidents occurred. (Temp. R. 75.) He could not recall, moreover, the name of the miner man who made the deep cut although there was only one on the shift. (Temp. R. 75.) He later identified the miner man who made both cuts as “Steve.” (Temp. R. 80.) The miner man’s name was, in fact, Jerry Lynn Hall. (Tr. II 6.) Nor could he recall the names of the other two roof bolters on his section until provided their names by counsel for Respondent.

Gray repeatedly called his section foreman “Tom Caudill” at the earlier proceeding. (Tr. 23-24.) Despite being given Cornett’s name by counsel several times, Gray continually referred to Cornett as Caudill although he later stated that there was no one by the name of Caudill that worked with him. (Tr. 37, 39, 42, 43, 47.) Gray also could not identify the area in the mine he was working in May 2009, only that he was on the 001 section. (Tr. 35-36.)

I find the inconsistencies in Gray’s testimony and his inability to recall the dates on which the events took place or even the sequence of events to be extremely perplexing at best. The stark contrast between his testimony at the earlier hearing that he bolted the first cut because he was asked to so he just did it and his assertion of being “job scared” is difficult to attribute to anything but having had many months to embellish his story. The vacillations between his statements whether his roof bolting partner did or did not hear his refusal to bolt the alleged second deep cut, along with his inability to properly identify his day to day foreman or the one and only miner man on his shift or the two other roof bolters with whom he had worked for months or anyone who would have seen the second deep cut are inexplicable. These events are the crux of the alleged protected activity yet he cannot recall such obvious and important details

or keep his story straight having had one year and seven months from the time of his termination to trial to prepare. It would stand to reason that he should have a far clearer recollection and more believable account of the events, if they did in fact occur. These apparent lapses and inconsistencies make his testimony seem disingenuous and fabricated.

Gray's testimony does not withstand reasonably objective scrutiny. For example, Gray trained his roof bolting partner, Chris Sheeks. At trial he said the reason he bolted the first alleged deep cut was because he was "job scared" and he said nothing to anyone including Sheeks or Cornett about bolting the area. (Tr. 183.) But he further stated that immediately after he bolted the cut he faced off with Cornett and told him that he would not bolt another one. (Tr. 182-83; 213-14.) This is particularly incredible taking into consideration that at the earlier hearing just a short time after the alleged events, he utterly failed to mention that he was fearful of Cornett or losing his job. His explanation for bolting the cut was because he was told to. (Temp. R. 38, 49.) And, despite his claim that Cornett was angry with him for refusing to bolt the second cut, Cornett just told him and Sheeks to bolt another place. (Tr. 185.) Had Gray been "job scared" it apparently lasted only for a few seconds as he faced up to Cornett immediately after bolting a deep cut and refused to Cornett's face to bolt another deep cut just three days later. And had Cornett been angry with him, as Gray asserts, Cornett's reaction was surprisingly mild in merely directing him to bolt another area and bringing in another crew to bolt this allegedly illegal deep cut. It is also difficult to believe that despite being the highly experienced bolter responsible for his partner's safety as well as his own, Gray allegedly entered into unsupported roof in a 56 foot cut without saying a word to Sheeks or anyone else in this momentary period of being job scared.

As another example, Gray confirmed Estevez's testimony that he held weekly safety meetings that Gray attended yet Gray said nothing about the deep cuts that he was allegedly so concerned about. Estevez also testified that he held informal safety talks before or after a shift when he was down in the mines but Gray never raised the issue there either. Estevez was new as superintendent of the mine and there was no allegation by Gray that Estevez harbored an animosity towards Gray which would prevent him from speaking up at these meetings. When Gray was asked at the temporary reinstatement hearing why he did not complain to someone up the chain of command, he lamely responded that Cornett was the one he needed to tell and who would have handled it. (Temp R. 95-96.)

As a third example, Gray could not identify who would have bolted the second cut although there was only one other bolting duo on the shift. When asked by Respondent's counsel if someone bolted up the second alleged deep cut, Gray responded as follows:

Q. And somebody bolted up that 56 foot place you're telling the Judge about?

A. I suppose so.

Q. What do you mean, you suppose so? You saw it bolted up, didn't you? Later on?

A. I didn't see nobody bolt it up.

Q. You saw it bolted up after it was –

A. Yes, it was bolted up.

(Tr. 216-17.) Counsel for Gray attempted to explain this oddity by establishing anyone else could fill in on a bolting machine if the regular crew was absent. However, there was no evidence to

suggest such an occurrence despite the opportunity to ask the other roof bolters who appeared at trial if that was possible. Gray also testified that he had no idea who would have seen the second cut besides Sheeks. (Temp. R. 79.) Obviously, Cornett would have seen the cut as he allegedly directed that it be made and that Gray and Sheeks bolt it. The car drivers who would haul the cut coal away would also see it, not to mention the other bolters who bolted it. Gray's inability to state even the obvious lacks an objectively logical explanation and leads to the conclusion that he was having difficulty thinking on his feet while spinning a tale.

Gray asserted that deep cuts were "not unusual" in Kentucky yet when he was asked which mines he worked in that took deep cuts or how often this occurred he could not come up with any answer whatsoever. He stated that he never reported any of these illegal cuts to MSHA over the 30 years of his career as a miner despite being so concerned with safety and being acquainted for years with Fain, Harris and Brooks whom he could have approached outside of the mine environment had he been truly "job scared" about making a safety complaint. And then, suddenly on or about May 12, 2009, he squared off with his section foreman the first time when was asked to bolt a deep cut and refused to bolt a second one.

Gray's allegations that these two deep cuts were made is completely unsubstantiated aside from his own testimony which is contradicted by the rank-and-file miners as well as non-company witnesses alike. As Fain testified, not one of the regular inspectors of North Fork reported ever seeing any deep cuts. (Temp. R. 128-29.) Doan did an imminent danger run across the entire 001 section on the day that Gray was fired and saw no dangerous roof conditions. (Tr. 160-63.) Every miner on the 001 day shift testified that no such cut had been made. There was not a single witness that had ever heard Gray refuse to bolt a deep cut or make any type of safety complaint to anyone.

Counsel for Gray asserts that a deep cut would never be reported to MSHA voluntarily and therefore it would never be known to have occurred. However, Doan, a roof specialist, testified that he was aware that deep cuts had been made in Kentucky in the past and they were in fact discovered during inspections at the mines. Despite having cited North Fork for a rib roll on the day he was there, Doan had not seen evidence of a deep cut at North Fork. (Tr. 160-64.) Fain testified that during the investigation of Gray's complaint, William Clark and Silas Brock, two other inspectors who frequented the mine, were asked if they had ever seen deep cuts. None had despite the frequency with which they were on site. I find that Gray's allegation that deep cut would not be discovered by MSHA is without merit. I also find it would be highly unlikely that a foreman would order an illegal cut in a mine with a roof in extremely poor condition that is crawling with MSHA inspectors on almost a daily basis for the sake of "ventilating the face" as Gray claims Cornett did.

I find that the Gray's assertion that two deep cuts had been made in the months preceding his termination is unsubstantiated, contradicted by credible evidence from MSHA inspectors as well as management and rank-and-file witnesses and is lacking credibility.

With regard to the curtain allegation, Gray's assertion that Cornett appeared to become angry and walked off in a huff when he stopped to hang curtains is highly subjective and questionable. Gray could not say what if anything Cornett said or what exactly he did that Gray

interpreted as anger towards him on Cornett's part. Gray's theory of the case is that Cornett acted perturbed because it would slow production when Gray stopped bolting to hang ventilation curtains. However, the methane sensors on the roof bolter would often shut the machine down when methane rose. (Tr. 156, 179.) The only way to prevent this from happening was to advance the curtain once a new row of bolts was installed. Each time the bolter shut down due to a rise in methane, production would cease. There is no objectively logical explanation for why Cornett would be upset with Gray for not hanging the curtains in this scenario if his goal was to keep the mine producing. The more logical explanation is Cornett's testimony that he had to tell Gray repeatedly to keep up with hanging his curtains because he was not doing so as he stated and recorded in his notes. (Tr. 240; Ex. R-3.) Gray testified that he had to advance the curtain after every 2 ½ rows of bolts installed which would be every 10 feet. (Tr. 210.) However, Cornett stated that the curtain was to be advanced after each row of bolts was installed which would be every four feet. (Tr. 229-30.) This was also confirmed by Sheeks. (Tr. 63.) So, by Gray's own testimony, he was not following the ventilation plan. All of these factors would be an objectively reasonable basis for Cornett to be annoyed with Gray each time he had to tell Gray to hang the curtains.

Casting further doubt on Gray's credibility with respect to hanging the curtains is the fact that Gray never mentioned anything about curtains in his initial complaint to MSHA. (Temp. R. 102.) Nor did he mention anything about curtains to Investigator Fain when first interviewed by him. (Temp. R. 126; Temp. R. Ex. R-1.) Moreover, when he did provide a statement to Fain regarding the curtains, it made no sense. Fain testified that he was the one who asked Gray on a subsequent interview if he had anything to say about hanging curtains. (Temp. R. 124-25. Fain confirmed that he got the idea of asking Gray about curtains only after his interview with Cornett who told Fain that he had a problem with Gray not hanging the curtains as required. (Temp. R. 126.) When finally questioned by Fain about the curtains, Gray made some very vague comment which Fain did not readily understand. As Fain testified, Gray told him his foreman directed him to hang the curtains. Fain could not state how hanging the curtains as directed could be interpreted as a safety complaint. He confirmed, in fact, that this would promote safety. (Temp. R. 139-41.) Fain then stated that the only statement Gray made that he could interpret as a complaint was that Gray told him "he had complained several times about ventilation curtains not being up to Tom Cornett, the section foreman." (Temp. R. 140-42.) One objective interpretation of Gray's statement that it was not "up to Tom Cornett" would be that Gray was saying Cornett had no business telling him to hang the curtains. This interpretation is supported by Cornett's testimony that when he got on Gray about hanging curtains, Gray responded by saying it was not his job. (Temp. R. 227.) It is further supported by Gray's overall negative attitude toward management as Sheeks had testified.

Gray told Fain during the second interview that he made similar complaints to two other foreman, one he could only identify as "Moondog" who told him to go ahead and hang the curtains. He stated that he made these complaints since the first of 2009 yet he never mentioned this in his initial complaint nor did he mention it at trial. (Temp. R. Ex. G-1.) He again provided no dates, time frames or details to support this allegation. (Temp. R. Ex. G-1.)

Complainant posits that Gray raised the issue of curtains in his initial complaint when he said that he had made "other safety complaints." However, it is not sufficient to say Gray

mentioned “other safety complaints” to overcome this very important and telling omission on Gray’s part. The time to identify what “other complaints” he was referring to would have been at his first interview with Fain, not after Fain had provided him with a suggestive opportunity to do so. And yet, when Fain had done so, Gray still could not articulate a scenario in which his hanging curtains could be interpreted as having brought about the animus of Cornett for engaging in safety-related behavior.

I find this allegation of having made any sort of safety complaint concerning ventilation curtains (in any sense of the discrimination context) wholly unsupported by the evidence. It flies in the face of Gray’s own statement to Fain that he was directed by his foreman to hang the curtains. (Temp. R. 139.)

Counseling Issues

Gray denied ever having been counseled for his performance by anyone at any time. He categorically denied that he had been presented with the two written counseling documents at issue here. Most notably, Gray testified at hearing that the first time he was aware of the written counseling warnings, Exhibits Compl.-A and -B, was at his second interview with Fain in late July. He said Fain brought them to him after speaking with management and said, “I thought you wasn’t wrote up for nothing.” Fain then showed him the two documents, at which time Gray simply responded by saying he had never seen them before. (Tr. 194.) At the earlier temporary reinstatement hearing in September 2009, however, Gray testified that Fain came back to talk with him in late July and showed him “some papers” but he could not remember what those papers were. (Temp. R. 68-69.) Considering the alleged forgeries are the epicenter of Gray’s case¹⁷ it is incredible that just two months after being confronted by Fain with the allegedly forged documents, he would forget what the documents were. And yet somehow he recalled in detail at trial, nearly two years later, being shown the counseling documents in July and denying he had seen them before. (Tr. 193.) It is difficult to fathom how someone who is confronted with two false counseling documents would not remember very clearly the details just two months later. It is also extremely difficult to believe that when confronted with forged personnel records one would reply as Gray did rather than vehemently and immediately deny their authenticity. Yet Gray said “I’ve never seen this before.” (Tr. 194.)

For the reasons set forth herein and those discussed above regarding my analysis of the handwriting expert’s testimony, I find Gray’s assertions that he never received the counseling on February 27 and April 29 not credible.

Gray’s counsel makes much of the fact that Gray worked for North Fork for over a year before being fired. Counsel suggests that if Gray’s performance were as poor as the witnesses indicated, it would have been absurd to keep him on the payroll. But Cornett, Sheeks, and

¹⁷ I find the entire issue of the alleged forgeries to be a red herring. The crucial point is that there is no credible testimony to support Gray’s allegation that he engaged in protected activity and he has failed to establish a *prima facie* case. There is more than substantial evidence provided by MSHA inspectors, rank-and-file miners and Gray’s statements themselves to establish that Gray had been verbally counseled repeatedly by several managers for poor performance that led to his termination.

Estevez have explained that Gray escaped being fired sooner only because there were a number of management changes around the time he was switched to the production shift and began having trouble keeping up. For one thing, Gray's immediate supervisor was fired and replaced by Cornett. (Temp. R. 192.) Cornett began noting problems with Gray's performance almost immediately, but he did not have firing authority. (Tr. 265-71.) He testified he complained about Gray to the former superintendent, Ison, but no action was taken until Estevez had stepped in as new superintendent and evaluated the situation. (Temp. R. 192-93, 239-40, 251, 270-71.) I do not find it suspicious that mine management took the time to assess the situation carefully before deciding to terminate Gray's employment.

As discussed above, I find that Gray harbored a resentment towards management providing a motive for his allegations of discrimination. His attitude is exhibited by his inability to remember or disinterest in remembering any of his supervisors' names or how long he worked for them, his telling his partner that they could not be fired because the mine had a bad reputation, using profanity when stating what he could do to management by working slowly,¹⁸ deliberately not putting pressure on his drill, not carrying enough cable to tram the bolter, causing the entire section to stop production, not using the correct size or type of bolt, advancing his curtain every 10 feet rather than every 4, being off task, and telling the foreman that it was not his job to hang the ventilation curtains.

Most telling of his attitude is his comment to Sheeks that if he was denied unemployment, he would sue the company. Gray confirmed that he had been involved in a federal court case in which management was charged with illegal mining and ventilation violations. (Temp. R. 96-97.) He was called as a witness in that hearing by Harris. Gray was aware, therefore, of the results he could bring about by making such a claim against North Fork. This lends credence to Sheeks' testimony and it would explain why each of his allegations regarding the deep cuts, the curtains and the forged counseling documents are such general allegations which do not hold up to objective reasonable scrutiny. Moreover, it explains why there is not a single witness who could support his allegations even among the MSHA investigators and non-management personnel that these events took place during between March and May 2009.

Chris Sheeks

I find Sheeks' testimony to be credible. Sheeks came across as an unsophisticated person who was relatively new to the mining industry at the time of these events. He was trained as a roof bolter by Gray and thereafter they worked together every day for over one year. (Tr.II 81.) I find it likely that Gray would share his thoughts and comments with Sheeks as his roof bolting partner more freely than with anyone else. I also find Sheeks would have been in a better position to observe Gray's work habits and his attitude toward management than anyone else. That Gray would make the comments Sheeks attributed to Gray, therefore, does not come as a surprise.

¹⁸ Gray did not deny making this profane comment.

Sheeks testified that Gray told him he had been written up on three or four occasions; once by Estevez and the other times by Ison.¹⁹ (Tr.II 69, 90.) Gray told him one was for production and another for not having enough cable pulled when tramming the bolter. (Tr.II 70.) Neither of these counselings were for issues related to the two allegedly forged documents involved here, meaning that any doubts Gray has raised about the authenticity of the questioned documents does not affect the credibility of Sheeks' testimony on this point. Sheeks stated he had seen Gray fail to pull the proper amount of cable several times which had stopped production. (Tr.II 71.)

Sheeks stated that he and Gray were reprimanded for poor performance before Gray was fired. He testified that Gray had mentioned being written up at least three or four times, including once by Estevez for not pulling enough cable and three times by Ison for poor performance. (Temp. R. 170, 197-201; Tr.II 69-70, 91.) Although Sheeks did not see any of the written warnings, he knew that Ison had spoken to Gray in the mine office because "You'd be in the office getting your supplies for the day, and you'd hear Doe [Ison] talking to him [Gray]." (Temp. R. 205-06.) Countiss also testified that he was aware of Ison counseling Gray on February 27, 2009 for poor performance because he was present, but Ison had said it was a verbal warning so he did not need to sign as a witness. (Tr. 116.) Countiss recalled one additional written warning given by Ison to Gray two months prior to the February one which he did sign as a witness. This document could not be found in Gray's file and Countiss had no idea what had happened to it. (Tr. 121-22.) Countiss' statement lends credence to Sheeks' testimony that Gray said he had been counseled by Ison on more than one occasion as Countiss was witness to two of them. In addition, Estevez's testimony confirms that he counseled Gray for the cable issue. (Temp. R. 259, 296-97; Tr. 65-66.) The final warning written by Estevez in April 2009 would make at least four warnings that Gray would have been referring to in his conversations with Sheeks. In addition, Estevez testified he had found in Gray's personnel file a note written on yellow paper by former section foreman Eddie Cox referencing problems with Gray. (Temp. R. 293.) I find this testimony credible. Estevez had not been the superintendent when Cox worked at the mine and therefore had no personal knowledge of what problems the note referenced, but the existence of the note lends additional credibility to Sheeks' testimony that Gray had been in trouble with mine management before.

Sheeks testified to an attitude Gray held toward management. Gray's comments to Sheeks about the mine having a bad reputation and filing for unemployment and suing the company exemplified this attitude. These comments had nothing to do with the alleged forgeries. Gray in fact did file for unemployment and then sued when denied as Sheeks had testified he would do. (Temp. R. 87-88; Tr. 222-23.) I find it doubtful that Sheeks would have the savvy to make up this testimony after the fact.

¹⁹ Russell Ison was called as a witness by the Complainant at trial but asserted his Fifth Amendment rights based upon the advice of independent counsel and refused to testify regarding the counseling documents at issue. I do not draw a negative inference from this. Ison was represented by counsel at hearing and was instructed by him to take the Fifth which is entirely understandable. His attorney would not have been worth the retainer had he allowed Ison to testify. It appears MSHA sent the questioned documents to the US Attorney to investigate Gray's allegations of forgery. After receiving Belcastro's handwriting analysis report of August 31, 2009, the US Attorney declined to pursue Gray's claim sometime thereafter.

Sheeks' testimony is also corroborated by non-management and MSHA witnesses on several issues. Fain corroborated the fact that the regular MSHA inspectors who were at North Fork on an almost daily basis reported no signs of deep cuts. Doan, a roof control specialist, corroborated that he was on the section Gray was on the day Gray was terminated to view the reflector shields as Sheeks stated. He observed them bolting the very entry that Sheeks testified they were in and confirmed that after approximately one and one half hours, Sheeks and Gray were still bolting the same entry. (Tr. 158-59; Tr.II 77-78.) This corroborates Sheeks' testimony regarding the slow rate at which Gray performed and Gray's overall attitude towards management and his job. Doan also testified that no roof control plans allowed for cuts near the depth Gray alleged and that he had never seen one or cited North Fork for one. He had, however, discovered such cuts in other mines during his inspections. And although he spoke with Gray on the day he was fired, Gray never mentioned any deep cuts to him. (Tr. 161-63.) This independent testimony from an MSHA inspector corroborates Sheeks' testimony as well as all the other witnesses' testimony that no such deep cuts were taken and Gray never made any safety complaints about deep cuts in the period Gray alleges.

As a general matter, in order for Sheeks to have made up all of the comments and actions he attributed to Gray he would have had to have been thoroughly coached, rehearsed and informed of the intended testimony of each of North Fork's managers down to such minute details as being shown production reports by Estevez when called into his office, asking both Estevez and Cornett for a new partner, Gray being counseled for not having enough cable pulled to tram the bolter, Gray not putting pressure on the drill to drive in the bolt, installing the wrong sized bolts, and so forth, in order to be as consistent in his testimony as he was. I find this extremely unlikely. This is especially true considering that Sheeks testified in a similar manner at the reinstatement hearing just three months after Gray filed his discrimination complaint. Such a plot as that alleged by Gray would likely take significantly longer to successfully orchestrate. Objectively consistent is the fact that Gray acknowledged that he did file for unemployment upon discharge and filed this complaint immediately upon being denied those benefits just as Sheeks testified Gray had said he would do. Also objectively supported is the fact that the mine roof by all accounts was in poor condition and no deep cuts were allowed in District 7. Shallow cuts, spot bolting with rope bolts that enable the roof to move, and a four foot bolting pattern were being used to help control the top. Under such circumstances, cuts of 56 feet would create an unreasonable danger of a significant roof fall, exposing several miners to injury or death. Yet, no such occurrence took place.

The Commission majority felt it was significant that Sheeks described being "written up" as being presented with a written document on which one was asked to sign. If the two written documents are forgeries then, the majority opined, Gray never made the statements to Sheeks about having been "written up" two or three times and Sheeks was lying. As discussed above, I find credible support for Sheeks' testimony that Gray told him he had been counseled three or four times. Additionally, while Sheeks may have interpreted being "written up" as requiring a signed document, he was merely repeating what Gray had told him. Gray may have an entirely different perception of what written up means to include verbal counseling. Furthermore, one of the counseling sessions Gray told Sheeks about concerned not having enough cable to tram the bolter which has nothing to do with the content of the two questioned documents but was corroborated by Estevez's testimony. Estevez testified that on two occasions he witnessed the

bolter being moved without enough cable pulled. On one occasion, he told Gray and Sheeks to keep moving and had other miners assist him in pulling the cable as the entire section was unable to move. Estevez had also observed Sheeks attempting to move the bolter by himself against mine policy when Gray was not to be found. (Tr. 66.) I do not find the majority's concern with Sheeks' credibility to be founded.

Hall, McFarland, Peak

The testimony of these rank-and-file miners is not in any way affected by the allegation that the counseling documents were forged. They were not involved in any way with disciplinary measures taken against Gray or the counseling documents Gray alleges are forgeries.

Hall testified that except for hearsay statements, he was not even aware that Gray had been counseled. His testimony was most relevant with respect to the fact that he would have been the miner man who made the deep cut. He denied that he or anyone else was making cuts deeper than 20 feet due to the condition of the roof. (Tr.II 7-12.) This was confirmed by roof specialist Doan who said no mine in District 7 was allowed to take cuts of the depth Gray alleged and he had never seen or heard of any at North Fork being taken. (Tr. 161.) I find Hall credible.

Peak testified that he and McFarland were bolting five to six places to Gray's and Sheeks' two and he had complained about it to Cornett. (Tr.II 31-32.) He stated that the pace picked up after Tim Pennington replaced Gray. (Tr.II 33.) Also confirmed by McFarland was Peak's testimony that the top was in very poor condition, making a deep cut extremely dangerous. (Tr.II 22-24, 33-34.) Neither Peak nor McFarland had ever heard Gray or anyone else complain about deep cuts at the mine. (Tr.II 23, 33-34.) Again, Doan's testimony with regard to never having seen deep cuts in the North Fork mine lends credibility to Peak's as well as the other bolters' and miner man's credibility. Doan also confirmed that Gray and Sheeks had not finished bolting a cut in more than one hour on the day of his inspection. Peak was receiving long-term medical disability and no longer employed by North Fork at the time of trial and, therefore, had no reason to testify on behalf of North Fork. (Tr.II 33-36.) I find his testimony credible.

McFarland testified similarly with respect to the condition of the roof and the depth of the cuts being taken in the mine in 2009. He also confirmed that Gray and Sheeks were slower bolters and he had had to cross their cable to advance his equipment. (Tr.II 25-26.) I find McFarland's testimony credible also based upon Doan's testimony as stated above.

Marty Bates

Bates also confirmed that the roof at North Fork was extremely bad and a deep cut of 60 feet would cause it to cave in. As the second shift foreman on the 001 section, he knew that no deep cuts were taken for that reason; they were limited to 18-20 feet. (Tr.II 43-46.) As a foreman, he would lose his card if he violated the roof control plan which I find makes his testimony more credible in view of the fact that inspectors were at this mine constantly, making discovery of a deep cut an unreasonably high risk. (Tr.II 46.)

I find Bates has nothing at stake here in providing false testimony. He was not involved in any counseling of Gray. The fact that he could lose his license as a foreman if he was involved in making deep cuts is far outweighed by the fact that he would expose himself to death if the roof caved in. In fact it provides an additional motivation not to make such dangerous cuts in this mine.

Thomas Cornett

I find Cornett's testimony that Gray was a slow worker who failed to advance the curtains as directed to be credible. I also find his testimony that deep cuts were not taken in the mine and Gray never made any complaints to him about bolting deep cuts to be credible.

The curtains would often be knocked down when moving the equipment requiring them to be rehung. According to Gray, the curtains had to be hung every two and one-half rows of bolts which would be every ten feet. (Tr. 209-10.) Like Sheeks, Cornett testified that they were required to move the curtain after every four foot row of bolts was installed, not every ten feet, to be compliant with the mine's plan. (Tr. 230; Tr.II 63.) Fain corroborated Cornett's testimony that Gray did not hang the curtains as required in that he testified that when interviewed, Gray told him that Cornett directed him to hang the curtains. (Temp. R. 113; Temp. R. Ex. R-8.)

Cornett elaborated on his assessment that Gray was a poor performer. He stated that Gray and Sheeks bolted about two places for every five other bolting team did. (Tr. 232.) He documented many instances of Gray's performance in his notebook. (Ex. R-3; Tr. 233.) As set forth above, the notes reference occasions when Gray failed to put pressure on the drill, made an obscene comment about management, used the wrong size and type of bolt, placed the bolts too far apart and did not hang the curtains. (Tr. 240-43.)

The Commission majority casts doubt on the authenticity of the notebook for two reasons: first, because the complete original notebook was not produced, and second, because the notes do not include any mention of a verbal warning being issued to Sheeks on the day Gray was fired. Taking the second objection first, to the extent that the majority believes that the notes did not mention Sheeks, this factual finding is absolutely incorrect. As Gray's attorney pointed out, the notes from May 11, 12 and 15 specifically state that Sheeks and Gray were bolting too slowly. (Tr. 260; Ex. R-3.) Gray's counsel asked why Sheeks was not counseled along with Gray. Cornett's response was that he was already aware that Sheeks bolted faster than Gray and was waiting on Gray to finish. (Tr. 260.) Cornett testified that when he spoke to both Gray and Sheeks it was because they were a team but he was well aware from his own observations that it was Gray holding up production. It was also Gray who made the obscene comment about management, which Gray did not deny. It was also Gray who was primarily responsible for moving the curtains as Gray acknowledged himself. Cornett need not have included Sheeks' name in each of the notes when he was aware Gray was the problem and not Sheeks. I find the lack of Sheeks being mentioned as having been counseled does not detract from the authenticity of the notes.

Addressing the former of the majority's concerns, the majority also mistakenly states that the judge at the temporary reinstatement hearing instructed Cornett to maintain the original

notebook. There is no such instruction by Judge Melick in the transcript from that hearing. Gray's counsel asked Cornett to keep the original because he intended to subpoena it. (Temp. R. 252-53.) However, as counsel for North Fork stated at trial, Gray's counsel never issued any discovery. (Tr. 234.) Also of note is the fact that the pages Cornett produced were introduced at the earlier hearing without objection from Gray. (Temp. R. 244.) As set forth in footnote 15 above, I find having the original notebook would not lead to a different finding of authenticity.

I find there are other indicia of authenticity. Despite the fact that Cornett testified he did not mention the notebook to Fain when interviewed, he related the essential contents of the notes to Fain in saying that he had repeated problems with Gray including Gray not hanging the curtains as required, spinning his steel, and working slowly. (Ex. R-8.) Significant entries in the notebook were confirmed by other witnesses. The pace at which Gray bolted was confirmed by Doan on the day Gray was fired. The failure to hang the curtains as directed was confirmed in part by Gray's statement to Fain and his testimony that he hung the curtains every ten feet rather than every four as required. Gray's overall attitude towards doing as told was confirmed by Gray's comments to Fain. That the other roof bolters testified similarly with respect to these issues is not a product of collusion but independent observations by witnesses who had no involvement with the alleged forged counseling documents or Cornett's notebook entries. And lastly, as Cornett stated, Gray had only worked for Cornett since about April. (Temp. R. 212; Tr. 227, 256.) The first note is dated April 14, 2009 which would coincide with Cornett having had the opportunity to observe Sheeks and Gray for a few weeks and having drawn the conclusion that Gray was a poor worker. The date also coincides with Estevez's statement that he called Sheeks and Gray in to his office the first week of April to warn them about their poor performance. (Ex. R-11A.) It also tracks Estevez's testimony that he had told his foremen to take notes of significant events that take place during their shift. (Tr. II 53-54.)

I find the entries from Cornett's notebook were made on the dates indicated and are authentic.

Cornett's testimony that Gray never made any safety-related complaints to him about deep cuts or hanging curtains is also sufficiently substantiated and more credible than Gray's assertions that he did. I make this finding based upon my discussion of Gray's credibility above. I also consider the fact that Cornett testified that the condition of the roof was such that a deep cut as Gray alleges would have caused a roof fall exposing the entire mining crew as well as himself to a very dangerous situation. Had such a cut been taken, it would have been seen by the car drivers, the other bolting crew, the miner man and the foreman. Cornett would have called the superintendent had he seen a deep cut. (Tr. 247-48.) Although these statements may be self-serving, I find it extremely unlikely that a foreman would expose himself and his entire crew to such a dangerous situation and would do so with the presence of MSHA inspectors at the mine on an almost daily basis. As stated above, that the subject of curtains was not raised as an alleged safety complaint by Gray until Cornett told Fain he had a problem with Gray hanging the curtains. Only then did Fain return to Gray and ask him if he had something to say about hanging curtains at which time Gray made the statement that it was not up to Tom Cornett. I find this lends credence to Cornett's testimony as well. I note that Cornett's credibility on these issues is not affected in anyway by the alleged forgery of the counseling documents as suggested by the majority in its remand decision.

Anthony Estevez

Estevez had become the superintendent of the mine just two months prior to Gray's termination. There is no reason to believe he had any prior knowledge of Gray before March 2009 nor did Gray allege any animus on Estevez's part towards Gray. As he testified, he made rounds in the mine and observed the miners at work and reviewed production reports from each shift to familiarize himself with the operation. It was his personal observations and review of records that alerted him to the problems on the 001 section day shift. When he asked the shift foreman, Cornett, what the problem was Cornett stated that he had problems with Gray and Sheeks. They were bolting one or two places to every five to six places the other bolting team was per shift. Cornett further identified Gray as the primary problem as he had observed Gray spinning his steel, burning up bits and not replacing the ventilation curtain when moving the drill. Estevez then made his own observations of Gray not keeping up with Sheeks. He also observed two occasions where Gray had not pulled enough cable to tram the machines and one occasion when Sheeks was backing the equipment on his own when Gray was nowhere to be seen against mine rules. (Tr. 63-67.) During the first week of April Estevez confronted Gray and Sheeks in his office and warned them to pick up the pace and then brought them in separately shortly thereafter, which is when Sheeks asked for a new partner. (Tr. 67-69.) Estevez then gave Gray the written counseling warning on April 29, 2009 which Gray signed. On the day Gray was fired, Estevez observed Gray and Sheeks had bolted less than two complete rows in a new cut during the time that he and Doan traveled the 001 section and returned, which took in approximately two hours. (Ex. R-11A; Tr. 52-55.)

Many of Estevez's observations as related to Fain and as he testified to in court have nothing to do with the subject matter of the purportedly forged warnings. His observations were confirmed by Cornett and the notations in Cornett's notebook and by the testimony of Chris Sheeks. Most notably, Estevez's testimony regarding Gray's slow performance was also confirmed by Doan's testimony that upon returning to inspect the roof bolter after making the run over the 001 section, Gray and Sheeks were still bolting a cut that should have been completed. While Doan said he did not recall making a comment about how slow they were bolting, he did confirm they had not completed bolting the entry in a significantly long period of time. (Tr. 159.)

Gray confirmed Estevez's testimony that he was not hanging curtains as required. As previously stated, Gray testified that he advanced the curtain every ten feet when he was required to advance it every four feet. Estevez's testimony that he held safety meetings on a regular basis at which Gray was in attendance but never made any complaints was also confirmed by Gray. (Temp. R. 84-86.)

On the day Gray was fired, he did not make any mention of curtains or deep cuts. Gray testified that Estevez told him someone had complained about him and he (Estevez) believed his foreman and Gray then left without saying a word. Estevez testified that Gray was told he was fired because his performance had not improved despite being told numerous times he needed to improve. He said Gray's response was "It's okay, I'll have another job tomorrow." (Tr. 77.) Whether Gray said nothing or said he would have another job the next day, the fact that he did not react by raising the issue of being forced to bolt a deep cut or being treated unfairly by his

foreman for hanging curtains is odd, at best. Gray's reaction would make sense, however, if he was well aware of his substandard performance, had been counseled several times and his being fired was not unexpected. Whether or not Gray was counseled in writing or verbally before he was fired is immaterial. Estevez had made personal observations of Gray's performance, had spoken to Gray about it and had spoken with Cornett about it as well which formed the basis for his decision to terminate Gray. It was Estevez's observations of Gray's performance when Doan was in the mine that solidified Estevez's decision to fire him. The mine had no progressive disciplinary program and Estevez had the right to terminate Gray on the spot had he chosen to do so.²⁰ (Tr. 136-37, 273.)

I find Estevez's testimony credible.

Stephen Countiss

Countiss, the mine foreman, testified that he had observed Gray on an occasional basis and found him to be a slow worker and observed Sheeks waiting for Gray to catch up. (Tr. 124.) Sheeks had complained to Countiss about Gray as he was afraid of losing his job based upon Gray's performance. The other bolting crew also complained about Gray's slow bolting and Cornett told Countiss that Gray was not hanging curtains as required. (Tr. 125-26.) I find this testimony credible based upon the fact that Countiss was not alleged by Gray to harbor any ill will towards Gray.

Countiss' confirmation that no 40 foot cuts had been made in North Fork for a long period of time due to poor roof conditions was corroborated by all other witnesses, including the rank-and-file miners. It was also corroborated by Fain's and Doan's testimony that none of the regular inspectors who frequented the mine had ever seen any indication of deep cuts. The testimony that no deep cuts were taken corroborates his testimony that Gray never made any complaints to that effect.

By Countiss' account, he was present when Ison gave the February verbal warning to Gray about his performance. While Ison told Fain that Countiss was not present on this occasion, Ison and Sheeks both confirmed that a counseling session had taken place and Sheeks testified Gray had been written up by Ison on more than one occasion. (Ex. Compl.-C; Temp. R. 199-201, 205; Tr. 69-70.) Countiss recalled a previous counseling by Ison that was signed by Gray and Ison and him for poor performance that was not found in Gray's personnel file. (Tr. 121-22, 133-35.) The only way Sheeks would know of the multiple counseling sessions would have been through Gray himself as Sheeks was not present at those counseling sessions. Sheeks' testimony that Gray told him he had been written up more than once by Ison is then consistent with Countiss' testimony, which corroborates Sheeks' testimony that Gray told him he had been

²⁰ It is not Commission's place to decide whether the operator's disciplinary program is fair. In analyzing an operator's asserted business justification for taking adverse action against an employee, the Commission is limited to a "restrained" analysis and may not substitute its own business judgment for that of the operator. *Cumberland River Coal Co. v. FMSHRC*, 712 F.3d 311, 319 (6th Cir. 2013); *Haro v. Magma Copper Co.*, 4 FMSHRC 1935, 1937-38 (Nov. 1982); *Sec'y of Labor on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2516-17 (Nov. 1981), *rev'd on other grounds*, 709 F.2d 86 (D.C. Cir. 1983).

written up more than once by Ison. Had management engaged in a concerted effort to manufacture evidence, particularly documentary evidence, after Gray was fired to justify their actions as the Complainant asserts, it would stand to reason that they would have “found” this earlier signed counseling document as well which they did not. I find this lends credence to Countiss’ testimony on the issue.

Countiss testified that when Gray signed the April counseling letter, Gray appeared angry and made a slashing motion at the end of his signature and then stomped out of the room. (Tr. 120, 135-36.) As discussed above, this would account, in part, for the appearance of Gray’s signature being inconsistent with some of his known exemplars. It also stands to reason that Gray would have been angry.

While Countiss confirmed that he did not tell Fain during his interview about the earlier counseling warning, he did tell Fain that Sheeks had asked for another roof bolting partner because Gray was making him look bad and that when “we got on Gray” about his slow bolting he would improve for a few days and then revert to bolting slowly again. (Ex. R-12; Tr. 132-33.) Countiss stated that Fain did not ask questions regarding the other issues. Fain confirmed that he did not investigate the ventilation curtain complaint when he conducted his initial interviews. (Temp. R. 123-24.) It is apparent from the brevity of the written summary that the Countiss interview lacked any detail and I therefore do not find Countiss’ omissions detract from his credibility.

Summary

Overall, I find Gray’s credibility to be lacking. I find that he did not engage in protected activity by making any sort of safety complaints at the North Fork mine. His allegations were likely contrived and fabricated as a result of being denied unemployment benefits and hatched out of a disdain and animosity he harbored for persons in positions of authority. I find that there is more than substantial credible evidence presented by not only management but rank-and-file miners and MSHA personnel as well to prove that no deep cuts were taken in this mine during Gray’s employment and that he did not make a safety complaint regarding the hanging of ventilation curtains. In sum, I find for the reasons set forth above that Gray has failed to produce a scintilla of credible evidence that he engaged in protected activity and has not established a *prima facie* case.

My evaluation of the evidence as set forth in my earlier decision stands as written. As the majority indicated in its remand decision, it is important to consider “the nature of the evidence” and “the integrity of our proceedings.” 35 FMSHRC at 2362. The nature of the evidence is that Gray was counseled numerous times for poor performance by his supervisors. When he failed to respond appropriately, he was formally counseled and eventually fired. Gray thereafter embarked on a crusade against North Fork raising broad and nondescript accusations of discriminatory behavior by his foreman and the mine superintendent that are simply not substantiated by credible evidence. His attempt to prevail was not fortified by the expert testimony of Dr. Miller whose substandard methods of analysis and his apparent bias make his inconclusive findings lacking in probative value.

For the reasons set forth herein and as set forth in my original decision incorporated by reference herein, I dismiss Mark Gray's discrimination complaint.

ORDER

It is hereby **ORDERED** that the Complainant's discrimination claim be **DISMISSED**.

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

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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July 2, 2015

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

v.

MILL BRANCH COAL CORPORATION,
Respondent.

CIVIL PENALTY PROCEEDINGS

Docket No. VA 2013-366
A.C. No. 44-07150-320574

Docket No. VA 2014-240
A.C. No. 44-07150-346197

Mine: Osaka Mine

DECISION AND ORDER

Appearances: Thomas J. Motzny, Esq., U.S. Department of Labor, Office of the Solicitor, Nashville, Tennessee, for Petitioner;
K. Brad Oakley, Esq., Jackson Kelly, PLLC, Lexington, Kentucky, for Respondent.

Before: Judge Paez

This case is before me upon the petitions for the assessment of civil penalty filed by the Secretary of Labor (“Secretary”) pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d) (“Mine Act”). In dispute are one section 104(d)(1) citation and three section 104(d)(1) orders issued to Mill Branch Coal Corporation (“Mill Branch” or “Respondent”) at its Osaka Mine. To prevail, the Secretary must prove his charges “by a preponderance of the credible evidence.” *In re: Contests of Respirable Dust Sample Alteration Citations*, 17 FMSHRC 1819, 1838 (Nov. 1995) (citing *Garden Creek Pocahontas Co.*, 11 FMSHRC 2148, 2152 (Nov. 1989)), *aff’d sub nom., Sec’y of Labor v. Keystone Coal Mining Corp.*, 151 F.3d 1096, 1106–07 (D.C. Cir. 1998). This burden of proof requires the Secretary to demonstrate that “the existence of a fact is more probable than its nonexistence.” *RAG Cumberland Res. Corp.*, 22 FMSHRC 1066, 1070 (Sept. 2000) (citations and internal quotations omitted), *aff’d*, 272 F.3d 590 (D.C. Cir. 2001).

I. STATEMENT OF THE CASE

Chief Administrative Law Judge Robert J. Lesnick assigned Docket Nos. VA 2013-366 and VA 2014-240 to me in separate assignment orders, and pursuant to Commission Procedural Rule 12, 29 C.F.R. § 2700.12, I consolidated them for hearing with Docket Nos. VA 2013-252 and VA 2013-299. The parties informed me that the latter two dockets settled prior to hearing,

and I disposed of them in separate decisions approving settlement. Thereafter, I held a hearing on January 6, 2015, in Abingdon, Virginia.¹

Four alleged violations remain at issue, all of which were issued under section 104(d)(1) of the Mine Act. First, Citation No. 8180209 charges Mill Branch with violating its roof control plan under 30 C.F.R. § 75.220(a)(1) for failing to replace damaged roof bolts. In connection with this citation, MSHA also alleges in Order No. 8180210 that Mill Branch had not performed an adequate preshift examination of the area pursuant to 30 C.F.R. § 75.360(b)(3). Next, Order No. 8180213 alleges that Respondent violated 30 C.F.R. § 75.507 because a non-permissible electrical box was located in a return air course.² Finally, in Order No. 8180214 the Secretary alleges that Mill Branch violated its duty under 30 C.F.R. § 75.512 to perform an adequate electrical examination when it did not identify the non-permissible box for over a year. The Secretary designated each of these alleged violations as significant and substantial (“S&S”)³ and contends that each is the result of Respondent’s unwarrantable failure to comply with a mandatory health or safety standard.⁴ The Secretary also argues that all four violations were the result of Respondent’s high negligence and has proposed a total penalty of \$14,936.00.

At the hearing, the Secretary presented testimony solely from MSHA Inspector James Larry Bryant. Mill Branch presented testimony from former Electrician Charles Fields, former Mine Foremen Jeffrey Chad Lane, Section Foreman Matthew Gilliam, and Superintendent Hagy Barnett. The parties each filed closing and reply briefs.

II. PARTIES’ ARGUMENTS AND ISSUES TO BE DECIDED

The Secretary argues that allegations underlying the citation and each of the three orders are valid and that his proposed penalties are appropriate. (Sec’y Reply at 7.) Respondent contends that the violations were neither S&S nor unwarrantable. (*See* Resp’t Br. at 11, 17–18, 21, 23–24, 27–28; Resp’t Reply at 3, 8–10.) In disputing the Secretary’s allegations regarding the roof bolt violations, Mill Branch claims Inspector Bryant misunderstood the type of roof bolts it

¹ In this decision, the hearing transcript, the Secretary’s exhibits, and Respondent’s exhibits are abbreviated as “Tr.,” “Ex. S-#,” and “Ex. R-#,” respectively. The parties also admitted a list of stipulations in a joint exhibit, which was admitted as Joint Ex. 1.

² The inspector initially issued Order No. 8180213 as a section 104(a) citation resulting from Mill Branch’s high negligence, but later modified it to a section 104(d)(1) order alleging high negligence and unwarrantable failure. *See* discussion *infra*, Part VI.A.

³ The S&S terminology is taken from section 104(d)(1) of the Mine Act, 30 U.S.C. § 814(d)(1), which distinguishes as more serious any violation that “could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard.”

⁴ The unwarrantable failure terminology is taken from section 104(d)(1) of the Mine Act, 30 U.S.C. § 814(d)(1), which establishes more severe sanctions for any violation that is caused by an “unwarrantable failure of [an] operator to comply with . . . mandatory health or safety standards.”

used, disputes the length of time these conditions existed, and argues that the Secretary has not shown the cited conditions affected the structural integrity of the mine roof. (*See* Resp't Br. at 4–5, 10–11, 13; Resp't Reply at 1–7.) Further, Respondent argues it held a good faith belief that the cited conditions did not violate its roof control plan. (*See* Resp't Br. at 12–13; Resp't Reply at 8.) As to the Secretary's allegations regarding the non-permissible electrical equipment, Mill Branch points to the amount of methane, as well as the high air velocity and long distance from the working section of the mine, to claim that injuries were not reasonably likely. (Resp't Br. at 23–24; Resp't Reply at 9.) Respondent also argues that the failure of both state and MSHA inspectors to previously cite the condition mitigates its negligence. (Resp't Br. at 25–26; Resp't Reply at 9–10.)

Accordingly, the following issues are before me: (1) whether the Secretary has satisfied his burden of demonstrating the length of time the cited roof bolt conditions existed on Respondent's working section; (2) whether, as to the roof bolting violations, Respondent had an objectively reasonable and good faith belief that its conduct complied with its roof control plan; (3) whether the Secretary has satisfied his burden of demonstrating that the alleged violations were S&S; (4) whether the Secretary has satisfied his burden of demonstrating that each of the alleged violations constituted an unwarrantable failure to comply with a mandatory health or safety standard; and (5) whether the Secretary's proposed penalties are appropriate.

For the reasons set forth below, Citation No. 8180209 and Order No. 8180210 are **AFFIRMED** as S&S and as the result of Respondent's high negligence but **MODIFIED** to remove the unwarrantable failure designations. In addition, Order Nos. 8180213 and 8180214 are **AFFIRMED** as written.

III. BACKGROUND AND STATEMENT OF FACTS

The Osaka Mine is an underground coal mine located in Norton, Virginia. (Ex. S–2; Ex. S–4 at 1.) Mill Branch employs large continuous mining machines with 800 foot long power cables to develop the room-and-pillar mine. (Ex. S–2; Tr. 123:18–24, 157:23–25, 235:12–24; *see, e.g.*, Tr. 53:11–22.) This type of mine requires Respondent to cut long, parallel pathways—known as entries—through the coal seam. (Tr. 218:25–219:7; Ex. S–2; Ex. S–4 at 10–11.) As Mill Branch advances deeper into the mine, it also cuts perpendicular pathways—known as crosscuts—that connect the entries. (Tr. 218:25–219:7; Ex. S–2; Ex. S–4 at 10–11.) However, Respondent does not remove the square-shaped pillars of coal that remain between the entries and crosscuts because these pillars are necessary to support the rock and dirt separating the mine from the earth's surface. (Tr. 38:6–39:6.) When viewed from above, the Osaka Mine resembles a checkerboard with entries and crosscuts surrounding pillars of coal. (Ex. S–2.)

Because the rock and dirt above an underground coal mine places downward pressure on the mine roof (*see, e.g.*, Tr. 49:20–50:5), the operator must secure the roof against cave-ins and roof falls to protect the miners working below. *See, e.g.*, 30 C.F.R. § 75.202(a) (requiring operators to support or otherwise control the roof, face, and ribs to protect persons from hazards related to falls of the roof). Deep cover increases the amount of downward pressure on the roof and ribs, and the Osaka Mine is located 1,500 to 2,200 feet beneath the surface. (Tr. 37:24–38:16, 39:19–41:2, 292:24–293:14; Ex. S–4 at 1.) In addition, the laminated sandstone roof at the

mine is not a solid formation of rock; instead, it contains individual layers. (Tr. 37:13–23, 48:14–49:6.) Finally, a mine roof that shows cracks or “cutters” may indicate that it is beginning to sag under the pressure above. (Tr. 257:6–25.)

One method of supporting a mine roof from collapse is to install metal bolts. (*See, e.g.*, Ex. S–4 at 4, 6.) Mill Branch employs large roof bolting machines to drill holes and to insert long metal roof bolts into the mine’s roof along with a resin glue (or grout) to hold the bolt in place. (*See, e.g.*, Tr. 34:7–13, 35:11–18.) Some roof bolts are fully grouted, meaning that the entire bolt is covered with resin glue. (Tr. 35:19–21, 188:19–189:3, 210:22–211:5, 255:3–17.) Fully grouted bolts create a larger “beam” effect that transfers the downward force along the beam and to the pillars of coal left behind. (Tr. 255:18–256:12, 290:13–291:24, 292:21–293:14.)

Other bolts—known as torque tension bolts—include threads in addition to glue. (Tr. 35:9–18, 36:10–13, 135:14–16, 156:5–13.) Although tension bolts may be fully grouted when they are installed, torque is also applied to the bolt’s nut and secures the bolt to the roof above. (Tr. 35:9–21, 135:10–25, 188:19–189:3, 210:22–211:5, 255:3–17, 285:5–15.) In addition, torque tension bolts include a bolt plate between the end of the nut and the roof itself. (Tr. 34:24–35:18, 156:5–13.) Unlike normally glued bolts, the bolt plate on torque tension bolts is firm against the roof and helps to secure loose rock within the first few inches of the roof, also known as the “skin.” (Tr. 35:9–18, 35:22–36:7, 47:2–11, 48:2–9, 135:10–25, 214:5–15, 288:17–289:3, 293:15–295:2, 296:7–297:6.) If a torque tension bolt is missing its head or plate, it must be replaced. (Tr. 224:5–13, 258:2–10, 259:6–13, 288:17–289:3.)

When installed correctly, approximately one or two inches of the torque tension bolt extend beyond the surface of the mine roof. (Tr. 36:8–18, 212:19–24.) Torque tension bolts are normally installed with 165 to 225 pounds of torque, and the amount of torque on the bolt may be tested after installation. (Tr. 115:18–21, 134:23–135:9, 136:3–13, 189:20–191:2, 212:25–213:11, 213:19–24; Ex. S–1 at 14; Ex. S–4 at 6.) These bolts are sometimes installed on a 5 to 15 degree angle to accommodate mining conditions. (Tr. 60:4–12, 225:5–20; Ex. S–4 at 4.) As a result, Mill Branch uses a special washer on all of its bolts to compensate for angles and maintain bolt plates tight to the roof. (Tr. 60:4–12, 150:5–17, 158:25–159:11, 189:14–19, 225:5–20, 256:13–257:2, 295:7–296:2, 297:19–298:3; Ex. S–4 at 4.)

In accordance with the Secretary’s regulations at 30 C.F.R. § 75.220(a)(1), MSHA approved a roof control plan applicable to the Osaka Mine on January 30, 2013 (“January 30 Plan”). (Ex. S–4.) However, the plan did not specifically define when a bolt should be considered “damaged” or be replaced. (Tr. 114:21–115:9.) Moreover, MSHA had not published any materials about what constituted a “damaged” roof bolt. (Tr. 116:24–117:5.)

In addition to securing the roof against collapse from the weight above, coal mine operators must also follow detailed ventilation plans to sweep noxious gasses out of their mines. In particular, underground coal mining releases methane into the mine atmosphere. Methane is an explosive gas and ignites at certain concentrations.⁵ Accordingly, the Secretary’s safety

⁵ The Osaka Mine had a poor history of methane ignitions. (Tr. 112:9–14.) In addition,
(continued...)

regulations also require mine operators to take precautions to prevent methane ignitions. (*See* Tr. 109:12–18.) Mine operators must design ventilation systems to direct fresh air through an “intake” entry to the active working face and then sweep dangerous gases away through a “return” entry. (*See* Tr. 55:7–57:4.) Because the air traveling in the return entry can contain methane, mine operators may only use permissible equipment in those entries. (*See* Tr. 84:1–22, 100:23–101:2.) Permissible equipment is specifically designed to prevent electrical sparks from escaping into the mine atmosphere. (Tr. 84:1–22.)

Careful and consistent examination by qualified mine personnel also helps to ensure safe conditions within an underground coal mine. Preshift examiners may begin up to three hours before a shift starts and must take air readings, inspect roof and rib conditions, and identify areas for cleanup across the entire working section. (Tr. 68:5–69:5.) Similarly, electrical examiners trace the power cable from the power center to the electrical equipment, ensure that the cable has not been damaged, and ensure that the attached equipment is permissible. (Tr. 90:14–25, 178:24–179:21, 281:12–15.)

IV. PRINCIPLES OF LAW

A. Significant and Substantial

A violation is S&S “if, based on the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature.” *Cement 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, 103 (5th Cir. 1988) (approving the *Mathies* criteria).

The Commission has provided guidance to Administrative Law Judges in applying the *Mathies* test. The Commission indicated that “an inspector’s judgment is an important element” in an S&S determination. *Mathies*, 6 FMSHRC at 5 (citing *Nat’l Gypsum*, 3 FMSHRC at 825–26); *see also Buck Creek Coal*, 52 F.3d at 135 (stating that ALJ did not abuse discretion in crediting opinion of experienced inspector). The Commission has also observed that “the reference to ‘hazard’ in the second element is simply a recognition that the violation must be more than a mere technical violation—i.e., that the violation present *a measure of danger*.”

⁵ (...continued)

MSHA was required to provide spot inspections of Osaka Mine every 15 working days because it liberated more than 200,000 cubic feet of methane every twenty-four hours. (*See* 30 U.S.C. § 813(i); Tr. 85:1–16.) The Secretary did not elicit testimony specifying the explosive range of methane, but I take judicial notice that methane concentrations of 5 to 15 percent are explosive.

U.S. Steel Mining Co., 6 FMSHRC 1834, 1836 (Aug. 1984) (emphasis added) (citing *Nat'l Gypsum*, 3 FMSHRC at 827). Moreover, the Commission clarified “the correct inquiry under the third element of *Mathies* is whether the hazard identified under element two is reasonably likely to cause injury.” *Black Beauty Coal Co.*, 34 FMSHRC 1733, 1742 n.13 (Aug. 2012). Finally, the Commission has specified that evaluation of the reasonable likelihood of injury should be made assuming continued 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)).

B. Unwarrantable Failure Determinations

In *Emery Mining*, the Commission determined that an unwarrantable failure is aggravated conduct constituting more than ordinary negligence. 9 FMSHRC 1997, 2001 (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, 194 (Feb. 1991); *see also Buck Creek Coal*, 52 F.3d at 136 (approving the Commission’s unwarrantable failure test).

Whether conduct is “aggravated” in the context of unwarrantable failure is determined by looking at all the facts and circumstances of each case to see if any aggravating factors exist, such as the length of time that the violation has existed, the extent of the violative condition, whether the operator has been placed on notice that greater efforts are necessary for compliance, the operator’s efforts in abating the violative condition, whether the violation is obvious or poses a high degree of danger, and the operator’s knowledge of the existence of the violation. *See Consolidation Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2000); *Cyprus Emerald Res. Corp.*, 20 FMSHRC 790, 813 (Aug. 1998), *rev’d on other grounds*, 195 F.3d 42 (D.C. Cir. 1999); *Midwest Material Co.*, 19 FMSHRC 30, 34 (Jan. 1997); *Mullins & Sons Coal Co.*, 16 FMSHRC 192, 195 (Feb. 1994); *BethEnergy Mines, Inc.*, 14 FMSHRC 1232, 1243–44 (Aug. 1992); *Peabody Coal Co.*, 14 FMSHRC 1258, 1261 (Aug. 1992); *Quinland Coals, Inc.*, 10 FMSHRC 705, 709 (June 1988). The Commission’s factors are “viewed in the context of the factual circumstances of each case, and some factors may not be relevant to a particular factual scenario.” *Consolidation Coal Co.*, 22 FMSHRC at 353. All “relevant facts and circumstances of each case must be examined to determine if an actor’s conduct is aggravated” or whether mitigating circumstances exist. *Id.*

V. FURTHER FINDINGS OF FACT, ANALYSIS, AND CONCLUSIONS OF LAW — DAMAGED BOLT CITATION AND PRESHIFT EXAM ORDER — MARCH 4, 2013

A. Further Findings of Fact

1. Inspector Bryant’s Inspection — March 4, 2013

On March 4, 2013, Inspector Bryant visited the Osaka Mine to collect rock dust samples from the 1 West Panel of the mine. (Tr. 15:15–16:12.) As Bryant traveled with Foreman Johnny Mullins, he noticed a portion of the mine roof near survey station number 2178 with draw rock, a few damaged bolts, and a missing roof bolt. (Tr. 16:13–17:13, 18:1–9, 25:12–17, 118:9–119:15; Ex. S–1 at 7–8.) Although this area was not part of the active working section, Bryant was

concerned enough about the mine's roof that he decided to inspect the working section. (Tr. 16:24–17:13, 20:8–21, 24:8–26:17, 119:15–18; Ex. S–2; Ex. S–1 at 7–8.)

Bryant arrived in the active working area at approximately 3:00 p.m., which was near the end of the day shift at Osaka Mine.⁶ (Tr. 28:1–3.) Mill Branch was in the process of developing the 2 Southeast Panel of the mine, which intersected at a right angle with the 1 West Panel. (Tr. 18:18–19:10; Ex. S–2.) Looking toward the face, the 2 Southeast Panel consisted of six entries that were numbered 1 through 6 from left to right. (Ex. S–2.) On that day, Respondent had mined just one crosscut deep into the 2 Southeast Panel and was in the process of developing a second crosscut between Entry No. 1, Entry No. 2, and Entry No. 3. (Ex. S–2.) Entry No. 5 was an intake entry that provided fresh, ventilating air to the panel. (Tr. 30:12–18, 55:19–24.) As the intake air approached the last open crosscut, it split into two air courses to accommodate the 2 Southeast Panel's two continuous miners. (Tr. 53:11–55:6, 55:19–56:12, 205:1–206:5.) Entry Nos. 1 and 6 served as return air entries, and the coal feeder and conveyor belt transporting mined coal to the surface were located in Entry No. 3. (Tr. 22:25–23:22, 29:23–30:11, 30:21–31:1, 55:7–12.) In addition, Mill Branch had built a brattice line—an airtight partition—separating the air courses in Entry Nos. 5 and 6 approximately two days prior to Bryant's inspection. (Tr. 21:7–16, 65:13–66:12, 74:9–12, 215:16–216:12; Ex. S–2; *see* Ex. S–1 at 19.) At the time, Mill Branch typically completed eight cuts in a given shift, and installed six-foot torque tension bolts that were fully grouted. (Tr. 188:16–20, 219:14–20.) Respondent had already installed approximately five thousand bolts on the 2 Southeast Panel. (Tr. 116:11–23, 264:24–265:5.)

Inspector Bryant visited each of the six entries on the 2 Southeast Panel during his inspection. Beginning in Entry No. 6, he identified a total of thirteen damaged bolts, including: five near Survey Station No. 2153 in the intersection with the second to last crosscut, three near the newly constructed brattice line separating Entry Nos. 5 and 6, three near the intersection with the last open crosscut, and two near the face. (Tr. 20:22–21:19, 27:15–19, 34:19–35:8, 41:3–42:5; *see* Ex. S–1 at 10–12; Ex. S–2.) One of the bolts near Survey Station No. 2153 had been sheared off. (Tr. 20:22–21:19, 34:19–35:8, 120:8–20, 156:18–157:1; *see* Ex. S–1 at 10–12; Ex. S–2.) He characterized the others as bent or damaged. (Tr. 34:19–35:8, 41:3–42:5, 121:10–123:10; *see* Ex. S–1 at 10–12; Ex. S–2.) Nearby Survey Station No. 2153, he also observed Foreman Gilliam's dates, times, and initials indicating he had examined the area at 11:14 a.m. and 1:50 p.m.⁷ (Tr. 19:6–20:4, 21:20–22:7; 27:20–28:12; 31:5–32:17, 67:3–7, 70:4–72:21, 239:4–22; Ex. S–1 at 10, 19; *see also* Ex. S–8.) The area near Survey Station No. 2153 was well rock dusted. (Tr. 33:7–19, 66:14–19, 74:7–18; Ex. S–1 at 19.) Although Bryant saw footprints in

⁶ Mill Branch operated the Osaka Mine on three overlapping shifts. (*See* Tr. 67:25–68:4, 143:7–11, 146:1–10, 187:17–19, 223:3–5; Ex. S–7; Ex. S–9.) At the time, Mill Branch was “hot seating” its equipment, meaning that miners stayed at their equipment until the next crew arrived to take over. (Tr. 236:23–237:8.)

⁷ Because onshift and preshift examinations require examiners to check many of the same conditions, foremen often complete them concomitantly. (Tr. 70:9–21; Ex. S–6; Ex. S–10; Ex. R–8; *see, e.g.*, Tr. 238:20–240:5.) The preshift exam had been completed between 12:05 p.m. and 2:15 p.m. (Tr. 67:3–21, 238:16–239:3; Ex. S–9.)

the rock dust, he did not see any equipment tracks. (Tr. 33:7–19, 66:14–19, 72:22–73:11, 158:1–15; Ex. S–1 at 19.) Bryant also observed cracks and loose rock in the mine roof. (Ex. S–1 at 12; Tr. 21:20–22:7, 25:12–17, 33:22–34:2.)

As Bryant continued his inspection through the remaining entries, he identified thirteen additional damaged bolts. First, he observed one bent bolt with a damaged bolt plate in Entry No. 5 with a one-inch separation between the draw rock above and the bolt itself.⁸ (Tr. 43:19–44:13; Ex. S–1 at 13; Ex. S–2.) He also identified four bent bolts in Entry No. 4, as well as a broken bolt in Entry No. 3 surrounded by loose draw rock.⁹ (Tr. 45:12–46:16, 129:18–130:6; Ex. S–1 at 14–15.) Further, he identified two damaged bolts at the intersection between Entry No. 2 and the new crosscut Mill Branch was driving to connect to Entry No. 1. (Tr. 52:10–15; Ex. S–1 at 17; Ex. S–2.) These two bolts had dust and gob on the threads of the bolts. (Tr. 52:20–23; Ex. S–1 at 17.) Finally, he observed five damaged bolts in Entry No. 1. (Tr. 57:9–58:6, 139:5–10; Ex. S–1 at 18; Ex. S–2.) One of the bolts in Entry No. 1 had been broken and rusted.¹⁰ (Ex. S–1 at 18; *see* Tr. 57:19–20.) Two other bolts had been broken off even with the nut, while another was loose. (Tr. 57:12–24; Ex. S–1 at 18.) On cross-examination, Bryant admitted either he was unsure when the area had been cut or that it was *possible* that the bolts in question had been damaged after Gilliam completed his preshift examination. (Tr. 125:21–126:2, 128:8–129:6, 130:12–133:7, 138:16–24, 140:25–141:10.)

Bryant did not see any of these conditions recorded in the preshift examination report for the evening shift on March 4, 2013. (Tr. 67:3–17; Ex. S–9.) Based on his observations, Bryant cited Mill Branch for two violations. First, Bryant issued Citation No. 8180209, which generally matches his testimony on Respondent’s failure to comply with the January 30 Plan. Bryant indicated:

The operator failed to follow his approved Roof Control Plan on the active 001/002 working section. When checked, in the #6 entry 1 break outby the last open crosscut in the middle of the intersection 1 bolt had been broken off even with the mine roof and 3 other bolts were damaged leaving an area 11 feet long x 7 feet wide of unsupported roof. 3 bolts were damaged in the crosscut to the left of the intersection and 3 more in the entry going toward the

⁸ Foreman Chad Lane attempted to pull the rock down and was unable to do so. (Tr. 147:14–24, 195:8–196:7, 261:10–20; *see* Ex. S–1 at 13.)

⁹ When Respondent replaced this bolt, Foreman Lane pulled down the rock. (Tr. 46:16–47:1, 131:10–12; Ex. S–1 at 15.) Bryant measured the largest piece, which was 22 inches long by 16 inches wide by 2 inches thick. (Tr. 46:16–47:1, 132:3–16; Ex. S–1 at 16.) Smaller pieces measured 1 foot long by 6 inches wide by 2 inches thick. (Ex. S–1 at 16.)

¹⁰ Bryant explained that he could tell the difference between a bolt that had been struck recently and one that had not. (Tr. 43:3–6.) Freshly damaged roof bolts do not have any rock dust above them. (Tr. 43:6–8.) Further, recently damaged bolts will not show any rust spots; rust appears after a day. (Tr. 43:9–12.)

last open crosscut. When checked, the #6 heading had 3 damaged roof bolts[.] [M]ining height in this area is 6 [feet.] 1 damaged bolt was in the #5 entry[.] 20 feet outby the last open crosscut with loose draw rock with a 1 inch separation from the mine roof. 4 damaged bolts were in the #4 entry outby the last open crosscut, [and] 1 damaged roof bolt was in the #3 heading where the 3 left crosscut was turned with loose draw rock above the bolt, mining height was 8 feet and the rock measured 22 inches long x 16 inches wide x 2 inches thick after being pulled[.] 4 smaller pieces were pulled measuring 1 foot long x 6 inches wide x 2 inches thick[.] #2 heading had 2 damaged bolts where the 2 left crosscut was turned and the #1 heading had 5 damaged bolts with 1 bolt loose from the mine roof with a mining height of 8 ½ feet. In the #1 return entry at SS#2178 break from where they butted the mains section off a roof bolt has been broken off leaving an area of roof 7 feet x 7 feet with 1/2 inch separation in the mine roof with rock dust visible above the crack. All measurements were made with a standard rule[r]. These conditions expose miners to hazards of crushing injures while traveling and working under damaged and unsupported roof. This mine was put on notice on 2/20/13, Citation #8201859 to maintain compliance with this regulation and future non-compliance with this standard would result in evaluations for increased enforcement. This violation is an unwarrantable failure to comply with a mandatory standard. The operator of this mine engaged in aggravated conduct constituting more than ordinary negligence in that[:.] #1.The condition has existed for a period of time. #2.The condition was obvious and extensive.#3.The operator was making exams of these areas 3 times per day.

Standard 75.220(a)(1) was cited 8 times in two years at mine 4407150 (8 to the operator, 0 to a contractor).

(Ex. S-3.) Bryant designated the citation as an S&S violation that was reasonably likely to result in fatal injuries affecting one person. (Ex. S-3; Tr. 63:9-65:1.) He also characterized Mill Branch's level of negligence as high. (Ex. S-3; Tr. 65:2-12, 78:11-18.)

Inspector Bryant also issued Order No. 8180210 for failing to perform an adequate preshift exam for the evening shift. (Tr. 69:13-18.). He noted:

The preshift examiners conducting the examinations of the 001/002 active section did not recognize the obvious and extensive hazards that were visible to the most casual observer. A prudent mine examiner would have observed the hazardous conditions and taken action to correct them. The hazard exists of miners traveling through the area without any knowledge of a hazardous condition and being seriously injured. The mine operator engaged in

aggravated conduct constituting more than ordinary negligence in that an adequate preshift exam was not done of the 001/002 active section and the obvious and extensive conditions were not reported and corrected. This violation is an unwarrantable failure to comply with a mandatory standard.

(Ex. S-5.) Again, Bryant marked the order as an S&S violation that was reasonably likely to result in fatal injuries to one miner. (Ex. S-5; Tr. 76:10-77:19.) Likewise, Bryant characterized Respondent's negligence as high. (Ex. S-5; Tr. 77:20-78:18.) He terminated both the citation and order after his safety talk with the miners, and Respondent replaced bolts, installed timbers as necessary, and completed an adequate examination. (Tr. 58:8-11; Ex. S-1 at 22-23; Ex. S-3; Ex. S-5.)

At 6:30 a.m. the following day, Osaka Mine Superintendent Barnett visited the 2 Southeast Panel to examine the bolts Inspector Bryant cited and the condition of the roof. (Tr. 254:7-15.) In Entry No. 6, Barnett testified that he did not see any problems with the roof conditions, but he admitted that one of those bolts might have required replacement. (Tr. 260:19-261:9; *see* Tr. 267:5-15.) He also testified that he did not see any other bolts in the other entries that needed to be replaced nor did he observe any adverse roof conditions. (Tr. 261:21-262:11, 263:3-264:8.)

2. Number and Duration of Damaged Bolts

a. Number of Damaged Bolts

Mill Branch repeatedly disputes Inspector Bryant's "theory of a 'damaged' bolt." (Resp't Br. at 4; *see* Resp't Br. at 12, 16-21, Resp't Reply at 1, 3-4, 7.) The crux of Respondent's argument is that Inspector Barnett misunderstood the type of bolts Mill Branch employed on the 2 Southeast Panel. (*See, e.g.*, Resp't Reply at 1 ("[T]he Secretary and his only witness rely on their mistaken belief that the Mine used 'torque tension bolts[,] . . . [t]hus, the Secretary's analysis of what constitutes a 'damaged' roof bolt is flawed and there is no evidence of damage to the type of bolts actually used in the [m]ine.")) Mill Branch suggests that it did not employ "pure" torque tension bolts, but rather "bolts [that] function as fully grouted glue bolts." (*Id.*) In fact, Mill Branch claims "the entire purpose of using fully grouted glue bolts is that the bolt head can be hit without affecting the integrity of the roof or roof support." (*Id.* at 2.) Respondent also avers that its bolts "are first torqued to ensure they are tight until the glue seals . . . and then the bolts function as glue bolts." (*Id.* (emphasis removed).) Mill Branch describes the fully-grouted torque tension bolt as a belt and suspenders approach, meaning it is an added level of safety.¹¹ (*Id.*)

¹¹ Looking at the January 28 Plan, no torque test is required on previously installed roof bolts. (Ex. S-4 at 6.) Thus, Superintendent Barnett inferred that torque tension no longer served any purpose once the glue had hardened. (Tr. 285:8-15; *see* 286:8-288:9.) However, testimony from Respondent's other witnesses supports Inspector Bryant's theory that torque tension continued to play a role in the function of the bolt. (Tr. 189:20-190:3, 224:5-13.) Given this testimony, it appears that tension—and maintaining a roof bolt plate tight to the mine roof—

(continued...)

Yet Respondent's premise—that Bryant misunderstood the type of bolts in use in the area—is flawed. At the hearing Bryant specifically testified that Respondent fully grouted its torque tension bolts. (Tr. 35:9–18.) Bryant also differentiated fully grouted torque tension bolts from *normal* fully grouted resin bolts, which do not have a nut on the end. (Tr. 136:15–18.) Although Bryant acknowledged that a bolt could be struck without losing tension on the bolt plate in a fully grouted torque tension bolt (Tr. 115:10–17), he explained that the threads on the torque tension bolts make them easy to bend and crack. (Tr. 136:19–25.) Because these bolts have threads, the bolt head breaks off easily, particularly when five or six inches of draw rock weigh on the head. (Tr. 37:9–12, 136:19–137:18.) More importantly, he explained that when he referred to “damaged” bolts, he meant they had either been bent over or broken. (Tr. 36:22–37:7.)

In view of the above evidence, I reject Respondent's argument that Inspector Bryant misunderstood the types of bolts used on the 2 Southeast Panel or how to determine whether those bolts were damaged. Bryant is an experienced inspector and accurately described the bolts Mill Branch employed. Because Bryant characterized each of these bolts as bent, broken or sheared off, missing a bolt plate, or otherwise damaged, I find that each of the twenty-six bolts on the 2 Southeast Panel did not comply with the January 30 Plan and required replacement.

b. *Duration of Damaged Bolts*

Mill Branch also disputes Inspector Bryant's claim that these conditions existed for a significant period of time. (Resp't Br. at 13–15; Resp't Reply Br. at 6–7.) Respondent emphasizes the *possibility* that each of the twenty-six bolts in question was struck *after* Foreman Gilliam completed his preshift examination, and I recognize Bryant's admission that any of these bolts could have been damaged after Gilliam passed through the area. But acknowledging that any *individual* condition may have developed after Gilliam passed through an area does not necessarily imply that *every* condition developed in that timeframe. For Respondent's theory to be viable, Mill Branch would have mined from 6:00 a.m. until 12:00 p.m. without damaging a bolt, but then damaged twenty-six bolts in a pattern precisely tracing Gilliam's path. (See Sec'y Br. at 14.)

Given the volume of damaged bolts, Respondent's theory is implausible. Further, Respondent provided no unifying theory as to how this damage, as widespread as it was, could have occurred within the time period. As Gilliam acknowledged: “It's not likely that, what is it, 20-some bolts are going to get damaged after I [completed my preshift examination]” (Tr. 242:7–10.) Considering Inspector Bryant's admission that each condition *may* have arisen after Gilliam completed his examination, I cannot determine that *each* condition existed before Gilliam examined the area. Nevertheless, the number of damaged bolts and compressed timeframe allow me to infer that these conditions did not all develop in the three hours after Gilliam started his preshift examination.

¹¹ (...continued)

remains important, even after the glue in the fully grouted bolt has set. Barnett's inference therefore does not appear sound. To borrow Respondent's belt and suspenders analogy, it is simply unclear why Mill Branch would throw away its belt once it attached its suspenders.

Specifically, the evidence also demonstrates that the five bolts located near Survey Station No. 2153 in Entry No. 6 and the three bolts near the recently constructed brattice line had existed for at least one shift. Although Mill Branch had mined the face of Entry No. 6 on March 4, 2013, the face was located on the far side of the last open crosscut from the intersection in question. (Tr. 124:15–125:13; Ex. S–2.) I recognize Bryant did not know what time the face had been cut (Tr. 127:2–4), and I have considered Respondent’s contention that a continuous miner may have been backed down Entry No. 6 to straighten its power cord. (Resp’t Br. at 12; Resp’t Reply at 7.) However, it is uncontroverted that Mill Branch completed its machine dusting during the overnight shift. (Tr. 74:12–18.) Bryant also repeatedly testified that the area near the intersection with the second to last crosscut had been well rock dusted and that he did not see any equipment tracks in the dust. Notwithstanding the normal mining cycle of “cut, bolt, clean, dust,” it is unclear how or why additional dusting would have taken place in the intersection area of Entry No. 6, meaning that the dust in question had existed since at least the previous overnight shift. Thus, I infer that no equipment had moved in that portion of Entry No. 6, and these eight damaged roof bolts had existed since at least the previous shift.¹²

The evidence also demonstrates that the rusted bolt in Entry No. 1 existed prior to Foreman Gilliam’s preshift examination. I understand that Bryant admitted it was possible that bolts in Entry No. 1 had been damaged after Gilliam examined the area. (Tr. 139:1–141:10.) Yet Bryant also credibly testified—and Respondent’s witnesses did not dispute—that bolts do not rust quickly enough for this bolt to have been damaged on the day shift. Accordingly, I find that this bolt had existed since at least the previous shift.

B. Analysis and Conclusions of Law — Citation No. 8180209 – Roof Control Plan

1. Fact of Violation

Section 75.220(a)(1) requires operators to develop and follow an approved roof control plan that is suitable to the prevailing geological conditions and the mining system in place at the mine and to take additional measures to protect persons if unusual hazards are encountered. 30 C.F.R. § 75.220(a)(1). An operator violates section 75.220(a)(1) when it does not comply with the terms of its roof control plan. *See Harlan Cumberland Coal Co.*, 20 FMSHRC 1275, 1280–82 (Dec. 1998) (explaining how the Secretary must prove violations of roof control plans).

The January 30 Plan requires that bolt plates be secured firmly to the roof. (Ex. S–4 at 4.) It also requires Mill Branch to address adverse roof and rib conditions. (*Id.* at 2.) Finally, it requires Mill Branch to install its roof bolts in specific patterns. (*See, e.g., id.* at 25.) It is uncontroverted that the roof bolt in Entry No. 6 that had been sheared off needed to be replaced. Moreover, I have found as a matter of fact that the roof bolts Inspector Bryant identified in Citation No. 8180209 constituted roof bolts that needed to be replaced. *See discussion supra* Part

¹² In contrast, I cannot make a similar finding regarding the two damaged bolts in Entry No. 2. Although they were covered in dust and gob, Inspector Bryant admitted he did not know when Respondent had last mined in Entry No. 2. (Tr. 138:9–19.) Unlike Entry No. 6, Bryant did not characterize the area as well rock dusted, and I therefore cannot infer that the rock dust on the bolts had been placed there by the machine dusting on the overnight shift.

V.A.2.a. Given my factual findings, I conclude that the Secretary has met his burden of proving that Mill Branch violated 30 C.F.R. § 75.220(a)(1).

2. S&S

Respondent's violation of section 75.220(a)(1) establishes the first element of an S&S violation. However, Mill Branch claims the Secretary has neither demonstrated a discrete safety hazard nor shown that any alleged hazard was reasonably likely to result in reasonably serious injuries. (Resp't Br. at 10–11.) Specifically, Mill Branch claims the Secretary has not proven that the cited conditions affected the structural integrity of the mine.¹³ (*Id.* at 11.) However, the operator provides no case law supporting the proposition that the Secretary must meet such an elevated burden. The Secretary might not be able to demonstrate that the missing bolts affected the “structural integrity” of the mine even with a battery of expert testimony and geological study. But that is not the standard that *Mathies* requires. Instead, it requires the Secretary to demonstrate that the damaged roof bolts in question more likely than not contributed to a discrete safety hazard that is reasonably likely to result in reasonably serious injury.

Respondent's curious arguments notwithstanding, the facts demonstrate that the conditions at issue contributed to a discrete safety hazard. Inspector Bryant described the damaged roof bolts as contributing to the hazard of rocks falling and striking miners working on the section. (Tr. 63:14–23.) Bryant also explained that damaged bolts do not provide the support that is intended under the approved plan. (Tr. 63:4–8.) In addition, he explained that striking and loosening these torque tension bolts would make it more likely that a roof fall would occur. (Tr. 49:6–19.) He also identified draw rock and cracks in the roof on the 2 Southeast Panel.¹⁴ Finally, during Bryant's previous inspections that quarter he identified two roof falls in other parts of the mine, as well as many areas where bolts had broken off under the weight of the mine roof. (Tr. 50:19–51:23.) Considering Bryant's credible testimony, I determine that *Mathies*' second element has been satisfied.

Likewise, this falling rock hazard was reasonably likely to result in reasonably serious injuries. It is uncontroverted that Respondent's miners worked in every one of the entries in which Bryant identified damaged roof bolts. In the course of normal mining operations, miners would have continued to work beneath the damaged bolts on the section. Considering Barnett's assertion that Mill Branch selected these type of bolts because they could be struck without requiring replacement, additional bolts would be damaged and never addressed. Draw rock—including large chunks like the piece pulled down from Entry No. 3—would have continued to develop. In this context, it is reasonably likely that falling rock would cause serious or fatal injuries. Indeed, a roof fall caused a fatality at the Osaka Mine just a few years earlier. (Tr. 64:3–

¹³ Respondent suggests “the one potential hazard observed—the draw rock in [Entry No. 5]—was not hazardous” because it could not be pulled down. (Resp't Br at 11.) Yet, this argument ignores the large piece of rock Foreman Lane *did* pull down in Entry No. 3.

¹⁴ Although Superintendent Barnett claimed he did not see any adverse roof conditions when he examined the 2 Southeast Panel, he did not examine the section until the next day—after Respondent had abated the conditions. Thus, I accord little weight to this testimony.

10, 149:2–150:4.) Thus, I determine that elements three and four of the *Mathies* test have been satisfied.

Based on the above, the Secretary has demonstrated each of the four elements of *Mathies*. I conclude that Citation No. 8180209 was appropriately designated as S&S.

3. Unwarrantable Failure and Negligence

The Secretary charges Mill Branch with an unwarrantable failure to comply with a mandatory health or safety standard and contends that the operator acted with a high degree of negligence. As I noted, the unwarrantable failure analysis is a totality of the circumstances analysis focusing on seven different factors. *See* discussion *supra* Part IV.B. Yet given the number of bolts Inspector Bryant cited and the differing factual determinations I have reached, weighing Respondent’s conduct with regard to several of these factors is akin to finding the center of a Venn Diagram: identifying how many bolts were both damaged enough to be readily apparent *and* existed long enough that Respondent’s examiner would have had an opportunity to observe the obvious condition.

At the hearing, Bryant ably demonstrated that he understood the types of bolts in use and the damage they might sustain, and I have determined that all twenty-six of the cited bolts were damaged for the purpose of finding a violation. *See* discussion *supra* Part V.A.2.b. and Part V.B.1. In addition, I have determined that nine of the twenty-six damaged bolts existed since at least the previous shift. *See* discussion *supra* Part V.A.2.a–b. Nevertheless, a careful consideration of the record reveals the varying level of detail Bryant presented about each bolt—details that are critical to determining the obviousness of the cited bolts, as well as their extent and Respondent’s knowledge of conditions at issue.

For example, Bryant indicated that one of the bolts he found near Survey Station No. 2153 in Entry No. 6 had been “sheared off.” Similarly, the bolt in Entry No. 5 had a damaged plate, while the shank had been broken off of the bolt in Entry No. 3. Three of the bolts in Entry No. 1 had been broken off. These six conditions were missing parts of the bolt itself, and they should have been apparent to a foreman carefully examining the area.

In contrast, Inspector Bryant described the other four bolts in the intersection of Entry No. 6 as merely “damaged” and “bent.” When questioned about these bolts specifically, Bryant admitted he was unsure whether they were cracked. He presented neither an indication about how badly they had been bent, nor explained in what direction they were bent. Bryant’s description of the three bolts he identified near the brattice line were also brief, as were his characterizations of the three bolts near the last open crosscut and the two bolts near the face, the four bolts he identified in Entry No. 4, the two bolts he noted in Entry No. 2, and two of the bolts in Entry No. 1. Without at least some description beyond the conclusory terms “damaged” or “bent,” I cannot infer that this second group of damaged bolts would have been readily apparent to a foreman passing through the area.¹⁵

¹⁵ If the Secretary had elicited testimony or presented evidence demonstrating that the damage to these twenty bolts was as plain as the six bolts I described in the previous paragraph, (continued...)

Considering Barnett's testimony that missing bolt heads require replacement, Mill Branch could not have held an objectively reasonable belief that any of the six bolts with readily apparent damage complied with its roof control plan. But given the many thousands of bolts installed on the 2 Southeast Panel, six demonstrably damaged bolts spread across four different entries separated by hundreds of feet is not an extensive condition. (*See* Ex. S-2 (providing map scale).) Moreover, I also note that five of these six bolts may not have been obvious. In light of the six-foot mining height in Entry Nos. 5 and 6, I understand how a stooped-over miner might miss an isolated bolt when he passed through the area. Moreover, it is unclear when the conditions in Entry No. 5 and Entry No. 3 arose. *See* discussion *supra* Part V.A.2.b. Thus, it appears only *one* bolt that existed for longer than a shift—the rusted bolt in Entry No. 1—should have also been obvious to Foreman Gilliam when he completed his preshift exam. Although Mill Branch reasonably should have known about this bolt, overlooking one obvious bolt for the period of one shift does not imply aggravated conduct. Instead, duration, extent, obviousness, and knowledge all suggest that Mill Branch's negligence in this case was ordinary.

The three remaining unwarrantable failure factors likewise point to ordinary negligence. As the Secretary admits, "there was not much testimony" regarding notice to Mill Branch that greater efforts were necessary to comply with the January 30 Plan.¹⁶ (Sec'y Br. at 17.) It also seems Mill Branch made no previous efforts to abate the conditions specifically at issue, but I note that Mill Branch regularly examined the area in previous shifts and had installed supplementary roof bolts on the section. (Ex. R-8.) Respondent's past examinations and supplementary bolts are inapposite to my S&S analysis, *see* discussion *supra* Part V.B.2, and I recognize that these conditions exposed Respondent's miners to serious dangers from a collapsing roof. However, these past examinations and supplementary bolts *are* pertinent to my negligence analysis because it appears Mill Branch took at least *some* care to protect miner safety. Those steps proved inadequate, but Respondent's past efforts suggest an ordinary level of negligence rather than the purposeful misconduct, indifference, recklessness, or serious lack of reasonable care that are the hallmarks of unwarrantable failure.

Based on the above, I understand the Secretary's concerns in this case. *Twenty-six* roof bolts required replacement, and nine of them required replacement since at least the previous

¹⁵ (...continued)

Respondent's failure to address them might have been more troubling. I recognize that the opinion of an experienced inspector is entitled to significant weight, and I understand that this second set of damaged bolts *may* well have been equally apparent to a section foreman. But the Secretary has the burden of proving the facts underlying his allegations, including his contention that these conditions were obvious and extensive.

¹⁶ Instead, the Secretary notes that Mill Branch was "on notice of the amount of cover they were under and the requirements of the roof plan" and claims that the two roof falls Inspector Bryant identified put Mill Branch "on notice that they were mining under bad roof." (Sec'y Br. at 17.) Yet it is unclear why the Secretary believes this would put Mill Branch on notice that it needed to take additional steps to replace damaged bolts. In fact, Inspector Bryant admitted on cross-examination that he did not know whether any of the bolts had been damaged before the roof fall. (Tr. 148:6-16.)

shift. Six bolts had sustained damage that was readily apparent. Moreover, the damaged bolts exposed miners to serious dangers, and Mill Branch reasonably should have known about at least one of the cited bolts. In addition, abatement was relatively simple. From this perspective, I conclude that Respondent's level of negligence was high. However, I recognize that only one of the cited bolts was both obvious and existed for more than a shift. Respondent made some previous efforts to protect its miners. Accordingly, I conclude that the Secretary has not met his burden of proving this violation to be the result of aggravated conduct, and the unwarrantable failure designation is removed.

C. Analysis and Conclusions of Law — Order No. 8180210 – Inadequate Preshift

1. Fact of Violation

Section 75.360(b)(3) requires that mine operators conduct “an examination for hazardous conditions at the mine” *McCoy Elkhorn Coal Corp.*, 36 FMSHRC 1987, 2000 (Aug. 2014). The adequacy of a preshift examination is based on whether a reasonably prudent person, familiar with the mining industry and the protective purpose of the safety standard, would have recognized that the hazard needed to be recorded in the preshift examination book. *Emerald Coal Res. LP*, 34 FMSHRC 482, 495 (Feb. 2012) (ALJ) (citing *Utah Power & Light Co.*, 12 FMSHRC 965, 968 (May 1990), *aff'd* 951 F.2d 292 (10th Cir. 1991)).

In this case, the Secretary contends that Foreman Gilliam performed an inadequate preshift examination when he failed to identify twenty-six damaged roof bolts across the 2 Southeast Panel. Based on my factual determinations above, *see* discussion *supra* Part V.A.2.b, nine of these bolts existed for at least a shift. In addition, one of those bolts—the rusted bolt in Entry No. 1—should have been readily apparent to a careful examiner. Given Superintendent Barnett's admission that bolts missing their bolt nuts or plates need to be replaced, I determine that a reasonably prudent miner would have recorded this bolt in his preshift examination records so that appropriate steps would be taken to replace the bolt and protect Respondent's miners. I therefore conclude that the Secretary has proven a violation of 30 C.F.R. § 75.360(b)(3).

2. S&S

The Secretary claims that Order No. 8180120 was properly designated as S&S for the same reasons as Citation No. 8180209. (Sec'y Br. at 14.) Mill Branch again disputes Bryant's characterization of damaged bolts and notes that preshift examinations are not *per se* S&S. (Resp't Br. at 17–18; Resp't Reply at 1–3.) Rather than reiterate my analysis for Citation No. 8180209 in detail, I will succinctly address each of the *Mathies* elements. First, Respondent's failure to note the damaged bolts satisfies the first element. Second, Inspector Bryant's testimony and the roof conditions on the 2 Southeast Panel demonstrate that this violation contributed to a discrete safety hazard of falling rock striking miners beneath. Thus, *Mathies*' second element has been satisfied. Finally, in continued normal mining operations Respondent's miners would have continued to travel in the active working section as draw rock developed and roof conditions deteriorated. Thus, the hazard was reasonably likely to cause injuries. When large pieces of falling rock—like the draw rock pulled down in Entry No. 3—struck Respondent's miners, it is reasonably likely that those injuries would be serious. Accordingly, the Secretary has satisfied

the third and fourth elements of the *Mathies* test. I therefore conclude that Order No. 8180210 was appropriately designated as S&S.

3. Unwarrantable Failure and Negligence

Neither party meaningfully differentiates their arguments regarding unwarrantable failure and negligence, as they apply to Order No. 8180210, from similar arguments they made regarding Citation No. 8180209. (*See* Sec’y Br. at 14–19; Sec’y Reply at 1–5; Resp’t Br. at 18–21; Resp’t Reply at 4–7.) Here, nine of the twenty-six damaged bolts existed for at least one shift prior to Gilliam’s preshift examination, but only one of those bolts was obvious. In light of the thousands of bolts on the section and the relatively simple fix of installing a relatively small number of additional bolts, the conditions underlying the preshift examination violation were not extensive. The Secretary also introduced no evidence that Respondent was on notice that greater efforts were necessary to comply with the standard. I also recognize that Superintendent Barnett’s opinion regarding what constitutes a damaged bolt is based on his conversations with the roof bolt manufacturer. An objectively reasonable miner might therefore conclude that many of these bolts were not damaged. Each of these factors suggests that Gilliam’s failure to note the underlying condition in his preshift examination did not constitute intentional misconduct, indifference, or a reckless disregard for the safety of miners. Again, it appears Mill Branch made no previous efforts to abate the *specific* conditions at issue, but I note that Respondent had made some previous efforts examine the area and install supplemental roof bolts.

On the other hand, the remaining unwarrantable failure factors highlight Inspector Bryant’s serious concerns with Respondent’s conduct. The conditions underlying this violation presented a serious danger to miners. Although the Secretary has only proven that one bolt was both present at the time of the preshift examination *and* obvious, Gilliam should have identified the bolt. Mill Branch reasonably should have known about the violative condition.

In view of the above, I again conclude that Respondent’s negligence in this case was high. However, the Secretary has not proven that Gilliam’s failure to record these conditions constituted aggravated conduct. Accordingly, I conclude that Order No. 8180210 was not an unwarrantable failure to comply with a mandatory standard, and the designation is removed.

VI. FURTHER FINDINGS OF FACT, ANALYSIS, AND CONCLUSIONS OF LAW — NON-PERMISSIBLE EQUIPMENT ORDERS — MARCH 15 & 19, 2013

A. Further Findings of Fact — Inspector Bryant’s Inspection — March 15, 2013

On March 15, 2013, Inspector Bryant returned to the Osaka Mine to perform an electrical inspection of pumps, belt lines, and carbon monoxide monitors as part of his quarterly inspection. (Tr. 79:5–80:16, 99:20–22; Ex. S–12 at 1–10.) Quarterly inspections require MSHA inspectors to examine every piece of equipment at the mine. (Tr. 99:23–100:1.)

That day, Inspector Bryant traveled along with Electrician Fields and Foreman Mullins. (Tr. 79:5–80:16, 170:3–7, 268:25–269:1; Ex. S–12 at 1, 10.) During the inspection, Bryant examined two water pumps in a sump hole outside of one of the seals Mill Branch had installed

to seal off an old working area that was located approximately two miles from the active mining area. (Tr. 80:17–23, 81:16–25, 92:3–9, 94:18–95:1, 97:7–15, 177:1–8, 180:2–10, 306:16–307:11.) Seals are built to help maintain stable methane and oxygen levels in the mine. (Tr. 97:7–15.) Nevertheless, seals will sometimes either outgas—pushing air from the sealed area back into the active mine—or ingas—sucking air out of the active mine and behind the seal. (Tr. 97:16–25.) Without proper ventilation, outgassing seals will allow methane to accumulate into the explosive range. (Tr. 98:2–99:4.) Bryant did not find any problems with the seals leaking at the time. (Tr. 110:20–111:4.)

One of the water pumps was a primary pump, and the other was a backup.¹⁷ (Tr. 270:9–271:4.) The backup pump only operated when the water level in the sump hole rose too high. (Tr. 270:9–18.) When Bryant inspected the backup pump, he followed the power connection from the pump toward the power center that provided the pumps’ electricity. (Tr. 81:16–19, 270:11–271:4.) A power cord ran from the 13-horsepower water pump to a line starter box attached to the left rib approximately 150 feet away and four feet off the ground, which then connected to the power center through another power cord. (Tr. 80:19–81:8, 81:19–25, 82:6–10, 95:24–96:4, 96:10–21, 109:19–22, 177:9–178:23, 270:9–18, 281:9–11.) The line starter was gray in color and measured approximately 1 foot by 1 foot. (Tr. 170:14–171:4, 269:17–25; Ex. R–15–A; Ex. R–15–B.) The box enabled Mill Branch to run the connected pump intermittently. (Tr. 82:2–5, 170:8–13, 270:9–18.) When water in the sump hole rose too high, the pump sent a signal back to the line starter box. (Tr. 82:2–5, 94:10–17, 95:8–23, 170:8–13, 177:22–178:3.) The line starter box could then send the power it received from the power center back to the pump. (Tr. 82:2–5, 170:8–13, 177:22–178:3.)

When Mill Branch initially installed the line starter box, it was an acceptable piece of equipment because it was located in a neutral air entry separated from other air courses using a brattice line constructed of gray concrete blocks. (Tr. 82:12–23, 91:13–25, 171:5–25, 275:13–22.) However, on March 6, 2012, Mill Branch removed the brattice line and changed the ventilation of the area to ventilate seals approximately four crosscuts away that were outgassing methane. (Tr. 98:2–14, 101:3–9, 103:21–104:6, 272:6–274:5, 284:9–11; Ex. R–12 at 8 (March 19 Inspection Notes); Ex. R–14–A; Ex. R–14–B.) After the ventilation change, the line starter box was now located in a return air entry. (Tr. 82:17–23, 173:4–6, 272:6–274:5; Ex. R–12 at 8 (March 19 Inspection Notes); Ex. R–14–A; Ex. R–14–B; *see* Tr. 172:5–11.) The box at issue was non-permissible and thus provided an ignition source.

Although Mill Branch replaced its other non-permissible equipment in the area, it never replaced the line starter box at issue for a permissible piece of equipment. (Tr. 82:17–23, 174:3–16, 278:15–279:11.) Mill Branch also did not remove roughly 100 old brattice blocks—which were the same color as the line starter box—from the crosscut. (Tr. 82:6–14, 171:18–25, 274:23–275:9.) Several old water lines and cables were also in the area. (*See, e.g.*, Tr. 92:3–9.)

¹⁷ Inspector Bryant initially claimed that the line starter box was connected to the primary pump. (Tr. 94:10–95:8.) In Bryant’s rebuttal testimony, he admitted that he was unsure whether the box was connected to the primary pump or the backup pump. (Tr. 306:3–307:11.) Accordingly, I credit Supervisor Barnett’s testimony that the line starter box was connected to the backup pump, which had never been activated prior to March 15, 2013. (Tr. 270:19–272:5.)

During his inspection, Bryant found just 0.05 percent methane at the non-permissible box, but he did not test for methane near the seals that day. (Tr. 92:13–15, 108:9–109:9.) At the time, approximately 50,000 to 55,000 cubic feet per minute (“C.F.M.”) of air traveled out of the mine through the return entry. (Tr. 276:24–277:5.) Based on his observations, Bryant issued Order No. 8180213, alleging:

The 13 HP. Flyght Pump SN#MO7-0711 being used in the Return air course at the #17 Prescott Seal in the sump hole is not being maintained. When checked a non[-]permissible box measuring 1[]foot x 1 foot containing a #2 line starter, overloads and fuses is being used through a float switch to provide 440 volts of power to the pump. This condition exposes miners to the hazards of a methane ignition by the arcing of the contactor tips when they are energized. This mine is on a 15 day I spot inspection for liberation of methane.

(Ex. S–13 at 1.) Although Inspector Bryant designated the violation as S&S and reasonably likely to result in injuries of lost workdays or restricted duty to one miner, he initially characterized Mill Branch’s negligence as moderate and issued *Citation* No. 8180213 pursuant to section 104(a) of the Mine Act. (*Id.*) However, after discussing the conditions with his supervisor, on March 19, 2013, Bryant modified the citation to a section 104(d)(1) *order* charging Mill Branch with an unwarrantable failure to comply with a mandatory safety standard and increased the level of negligence to high. (Ex. S–13 at 2; Tr. 86:7–87:4, 93:7–21, 104:25–107:16, 155:5–6.) He claimed he would cite the violation as an unwarrantable failure if he saw it today. (Tr. 154:15–155:4.) To abate the violation, Mill Branch removed the box. (Tr. 154:1–5.)

On March 19, Bryant also issued Order No. 8180214, alleging:

The operator failed to do an adequate exam of the #2, 13 Horsepower Flyght pump SN#MO-0711 located in the left return air course across from the #17 Prescott Seal. When checked[,] a non[-]permissible line starter box was being used to control the float switch for the pump. All electric equipment shall be frequently examined, tested, and properly maintained by a qualified person to assure safe operating conditions. This condition has existed since 3/6/12, a prudent examiner would have recognized the hazardous condition and taken action to correct the condition. The mine operator engaged in aggravated conduct constituting more than ordinary negligence by not doing an adequate exam of the pump and allowing this obvious and extensive condition to exist for an extended period of time. This mine is on a 15 day I spot inspection for excessive liberations of methane. Standard 75.512 was cited 5 times in two years at mine 4407150 (5 to the operator, 0 to a contractor). This violation is an unwarrantable failure to comply with a mandatory standard.

(Ex. S-14 at 1-2.) Bryant designated the order as an S&S violation that was reasonably likely to result in injuries of lost workdays or restricted duty to one person. (*Id.* at 1.) In addition, he characterized Respondent's level of negligence as high. (*Id.*)

No MSHA inspector identified the non-permissible box in any of their quarterly or spot inspections of the Osaka Mine between March 6, 2012, and Inspector Bryant's quarterly inspection on March 15, 2013. (Tr. 104:7-14.) Similarly, no state inspectors identified the non-permissible box during their roughly three or four inspections during that time period. (Tr. 276:3-13.)

B. Conclusions of Law — Citation No. 8180213 – Non-Permissible Equipment

1. Fact of Violation

To prove a violation of section 75.507, the Secretary must show that (1) non-permissible power connection points (2) that were further away from the working face than the last open crosscut were also located (3) in a non-intake air course. *See* 30 C.F.R. § 75.507; *Zeigler Coal Co.*, 15 FMSHRC 949, 950-51 (June 1993). The Commission has noted that “[t]he purpose of [section 75.507] is to prevent methane gas explosions. In the presence of methane gas, a source of ignition, such as arcing from power connections, can cause an explosion.” *Zeigler Coal Co.*, 15 FMSHRC at 951 (quoting *Eastover Mining Co.*, 4 FMSHRC 123, 123 (Feb. 1982).)

The facts of this case are not in dispute. Respondent's line starter box was located in a return entry. Despite weekly examinations of the area for approximately one year, Mill Branch did not identify or remove the non-permissible box. (*See* Ex. S-15.) In fact, Electrician Fields agreed that Order 8180213 was a violation (Tr. 172:1-4), but explained that the concrete blocks in the area obscured the line starter box from view. (Tr. 173:2-10, 179:2-5, 181:15-22.) Given Respondent's failure to remove and replace the non-permissible line starter box, I conclude that the Secretary has proven a violation of 30 C.F.R. § 75.507.

2. S&S

Respondent's violation of 30 C.F.R. § 75.507 satisfies the first element of *Mathies*. Inspector Bryant also credibly testified that the non-permissible line starter box provided an ignition source for a methane explosion. (*See* Tr. 84:18-85:5.) Although the line starter box connected to the secondary pump, this non-permissible piece of equipment provided an ignition source that would not have otherwise been present. Regardless of its actual use, it provided a measure of danger to safety because it made a methane ignition more likely. Thus, Respondent's violation contributed to a methane explosion hazard. Indeed, Mill Branch essentially concedes this point as it made no counterargument in its post-hearing briefs. I therefore determine that *Mathies'* second element has been satisfied.

The Secretary also argues that this hazard is reasonably likely to result in reasonably serious injuries¹⁸ because sparks from the non-permissible box could ignite methane in the area.

¹⁸ The Secretary relies on Bryant's testimony that Order No. 8180213 would result in
(continued...)

(Sec’y Br. at 22–23.) In contrast, Mill Branch claims that the Secretary has not proven that an injury was reasonably likely to result in reasonably serious injuries. (Resp’t Br. at 23–24; Resp’t Reply at 9.) In particular, Respondent notes the low level of methane Bryant found at the line starter box, his failure to test for methane near the seals in question, the volume of air movement at the time of the inspection, and the absence of defects on the pumps themselves. (Resp’t Br. at 23–24; Resp’t Reply at 9.) Mill Branch also argues that Bryant did not testify that he had any reason to expect methane levels to rise in the future. (Resp’t Br. at 24.) Moreover, Mill Branch contends that an injury producing event was unlikely because the non-permissible box was approximately two miles away from the active working area of the Osaka Mine. (Resp’t Br. at 23–24; Resp’t Reply at 9.)

Yet Respondent’s arguments fundamentally misunderstand the pertinent timeframe for an S&S analysis under *Mathies*. The Commission has long made clear that S&S determinations are made considering the length of time the condition existed and in the context of continued mining operations. *U.S. Steel Mining Co.*, 7 FMSHRC at 1130. Rather than examining a mere snapshot of conditions that existed at the time of the inspection, the Commission instead asks whether a reasonably serious injury is reasonably likely to occur if normal mining were to continue. See, e.g., *Knox Creek Coal Corp.*, 36 FMSHRC 1128, 1132 (May 2014) (indicating that a Judge erred when he took a “‘snapshot’ approach” to the S&S analysis), *appeal pending*, 4th Cir. 14-2313. Notwithstanding the relatively low-level of methane Bryant measured at the line starter box and high volume of ventilating air at the time of his inspection, it is uncontroverted that Respondent’s examiner did not identify this non-permissible box for over a year—or more than *fifty-two* examinations. Despite Fields’ claim that Mill Branch was “working” on cleaning up the concrete blocks that obscured the non-permissible box (Tr. 179:7–9; see Tr. 173:4–10, 175:4–5, 179:17–19, 181:15–22), Mill Branch had not moved those blocks for more than a year. Thus, I infer that the non-permissible box would have simply remained in place in the return entry if Bryant had not identified it during his inspection. In view of this extraordinary duration, the Respondent’s myopic focus on the level of methane and airflow at the precise moment of Bryant’s inspection is misplaced. Considering Commission precedent, the relevant time period includes both the year the condition had already existed as well as continued mining operations.

It is also uncontroverted that Osaka Mine is a “gassy” mine that releases a significant volume of methane every day. Further, Inspector Bryant credibly testified that eight to ten percent of methane would outgas from the seals. (Tr. 98:2–14.) The seals were located just four crosscuts away from the non-permissible box. (Tr. 98:13–14; Ex. R–14–A; Ex R–14–B.) Over

¹⁸ (...continued)

“lost workday or restricted duty injuries.” (Sec’y Br. at 23.) I note that the Secretary did not elicit any specific testimony about the types of injuries a methane ignition would cause. Instead, he stands on Inspector Bryant’s conclusory statement that injuries would result in lost workdays and restricted duty. Although specific testimony would be helpful for my analysis, I reasonably infer from the Secretary’s methane ignition theory that those injuries would be smoke inhalation and burns. The Commission has routinely considered smoke inhalation and burns to constitute reasonably serious injuries for the purpose of a *Mathies* analysis. See, e.g., *Big Ridge, Inc.*, 35 FMSHRC 1525, 1528–29 (June 2013) (affirming Judge’s S&S determination where smoke inhalation and burn injuries were reasonably likely).

the course of a year, a disruption of ventilation would allow methane from this significant source to accumulate in proximity to the non-permissible line starter box. Moreover, this non-permissible box was located *in a return entry*. By design, return entries carry contaminants—including methane—out of the mine. Thus, the non-permissible box would come into contact with any methane accumulations being swept out of the mine. Indeed, the Commission concluded in *Ziegler Coal Co.* that these are the types of exposures section 75.507 is designed to avoid. 15 FMSHRC at 951. Although the likelihood of any one of these events might vary in a short timeframe, it bears repeating that this violation existed for *more than a year* and would have continued in normal operations if Inspector Bryant had not identified the non-permissible box. In that context, it is reasonably likely that a methane accumulation would have been present with an active ignition source. Given this confluence of factors, I determine that a methane ignition and explosion was reasonably likely to occur.

Respondent's reliance on the distance from the working face to the non-permissible box is similarly misplaced. I recognize that relatively few miners might travel in this return at any given time; in fact, it might only be the weekly examiner. However, Mill Branch again overlooks extreme duration of this hazardous condition. A weekly examiner traveled the area more than *fifty-two* times. Although no injury-producing event occurred, I have determined a methane ignition was reasonably likely to occur. Considering the length of time this methane explosion hazard existed and the continued normal operations of the mine, I give no weight to Respondent's past good fortune in avoiding injuries. *U.S. Steel Mining Co.*, 18 FMSHRC 862, 867 (June 1996) ("The fact that injury has been avoided in the past or in connection with a particular violation may be 'fortunate but not determinative.'") (quoting *Ozark-Mahoning Co.*, 8 FMSHRC 190, 192 (Feb. 1986)). Thus, I determine that the Secretary has demonstrated that the methane explosion hazard was reasonably likely to result in reasonably serious injuries, and he has therefore satisfied the third and fourth elements of *Mathies*.

Given the above, I therefore conclude that Order No. 8180213 was appropriately designated as S&S.

3. Unwarrantable Failure and Negligence

The facts of this case are not in dispute. In March 2012, Mill Branch removed a brattice line as part of a change in ventilation. As a result, a formerly neutral air course became a return entry. Although Mill Branch removed other non-permissible equipment from the new return, it inadvertently failed to remove the non-permissible line starter box that connected the power center to a secondary pump located near a mine seal. In addition, Mill Branch did not remove the brattice blocks—which were the same general size, shape, and color of the non-permissible block—from the area. More than a year and more than fifty weekly electrical examinations later, the non-permissible box and brattice blocks remained in place. No federal or state inspector found the box until March 2013.

Not surprisingly, the Secretary and Mill Branch interpret those facts very differently. In the Secretary's post-hearing brief, he argues that each factor pertinent to an unwarrantable failure analysis supports his determination that Respondent's failure to comply with 30 C.F.R. § 75.507

constituted aggravated conduct that is more than ordinary negligence.¹⁹ (Sec’y Br. at 24–27.) For its part, Mill Branch contends that the Secretary has not proven Order No. 8180213 to have been an unwarrantable failure because MSHA and state mine inspectors failed to identify the box during their inspections of the Osaka Mine. (Resp’t Br. at 24–27; Resp’t Reply at 9–10.) According to Mill Branch, the failure of federal and state inspectors to identify the non-permissible box mitigates the duration of the violative condition, implies that Respondent had no notice that additional efforts were necessary to comply with the cited regulation, and demonstrates that the condition was not obvious. (Resp’t Br. at 24–27; Resp’t Reply at 9–10.)

Federal and state mine inspectors take their jobs seriously, and I have no doubt that their previous inspections were diligent. In some sense, that diligence suggests that the non-permissible box may not have been immediately obvious to observers in the area. I also understand that Mill Branch removed *other* non-permissible equipment from the return entry, which suggests the condition was not extensive. Instead, the violation was limited to a single non-permissible line starter box connected to a secondary pump. Looked at in isolation, these facts might support a determination that Mill Branch acted with ordinary negligence when it failed to remove the line starter box.

Nevertheless, Mill Branch ignores its *yearlong* failure to satisfy its own duties under the Mine Act. Federal and state inspectors are not charged with the primary responsibility to maintain safe working conditions in mines. Mine operators are. 30 U.S.C. § 801(e). Inspectors are not required to make weekly inspections. Mine operators are. 30 C.F.R. § 75.512. Although the federal and state mine inspectors seemingly overlooked the non-permissible box, those inspectors had *considerably fewer* opportunities to detect the violation than Mill Branch. Indeed, the extraordinary duration of the violation in this case is egregious, and it weighs heavily in favor of determining Respondent’s failure to be aggravated conduct constituting more than ordinary negligence. Regardless of whether the federal and state inspectors identified the non-permissible box, Mill Branch had a continuing obligation to remove the box and protect its miners. It failed to do so despite more than fifty examinations. As a result, Respondent’s failure repeatedly exposed miners to significant mine ignition and explosion dangers.

Turning to the remaining unwarrantable failure factors, I note that Respondent appears to have been aware of its duty to remove the non-permissible box from the return entry. In fact, it did remove other non-permissible equipment from the area when it made the ventilation change. It also had more than a year to clean up the brattice blocks in the area and identify the non-permissible box. Although Mill Branch may not have had any notice that additional steps were necessary to comply with 30 C.F.R. § 75.507, Respondent therefore reasonably should have known about the violation.

Reduced to their core, Respondent’s arguments simply confuse an explanation for an excuse. Mill Branch believes its conduct cannot be considered aggravated when federal and state

¹⁹ The Secretary’s reply brief claims that the matter before me is analogous to the facts of the Commission’s recent decision in *Excel Mining, LLC*, 37 FMSHRC 459 (Mar. 2015). (Sec’y Reply at 5–7.) Given my determination in this case, I need not engage in a point-by-point comparison of the facts.

mine inspectors also failed to identify the violative condition. I understand that the nearby brattice blocks apparently obscured the non-permissible box from view. If this were an isolated or relatively recent event, I *might* agree with the Respondent. But here, Mill Branch glosses over the number times of it failed to protect its miners. Thus, the reason for Respondent's on-going failure might be explainable, but it is not excusable as ordinary negligence. In light of the danger the violation presented and Mill Branch's repeated opportunity to identify and remove the box, Respondent's failure to do so constitutes a serious lack of reasonable care. I therefore conclude that Mill Branch acted with a high level of negligence when it failed to remove the non-permissible box from the return entry for more than a year. Likewise, I conclude that Respondent's conduct constituted an unwarrantable failure to comply with a mandatory health or safety standard.

C. Conclusions of Law — Order No. 8180214 – Inadequate Electrical Examination

1. Fact of Violation

Section 75.512 requires mine operators to “frequently” examine, test, and maintain all electrical equipment, remove any equipment where a potentially dangerous condition is found, and maintain records of those examinations. *See* 30 C.F.R. § 75.512. Section 75.512-2 defines “frequently” for the purposes of section 75.512 to mean “at least weekly.” 30 C.F.R. § 75.512-2. Thus, the operator must complete a weekly examination of its electrical equipment. *See, e.g., Manalapan Mining Co.*, 36 FMSHRC 53, 92–93 (Jan. 2014) (ALJ).

Respondent's failure to perform adequate electrical examinations is uncontroverted. Despite the concrete brattice blocks nearby that partially obscured the line starter box, it is also uncontroverted that a proper electrical examination would have traced the power cable between the power center and the backup pump. A reasonably prudent miner familiar with the protective purposes of the act would have performed a thorough examination and identified non-permissible box. Thus, Respondent's conduct violated 30 C.F.R. § 75.512.

2. S&S

The parties see this inadequate examination violation as linked to Respondent's failure to remove the non-permissible box in the first place. (Sec'y Br. at 24–27; Sec'y Reply at 5–7; Resp't Br. at 27–28; Resp't Reply 9–10.) Given the parties' inclination to treat these two violations together, I need not address their arguments in detail. The Secretary has proven a violation and a discrete safety hazard in satisfaction of the first two elements of the *Mathies* test. In addition, he has shown that the methane ignition hazard is reasonably likely to result in reasonably serious injuries, which satisfies the third and fourth *Mathies* elements. *See* discussion *supra* Part VI.B.2. Thus, I conclude that Order No. 8180214 is S&S.

3. Unwarrantable Failure and Negligence

The Secretary and Respondent also each treat the unwarrantable failure designation for Order No. 8180214 in concert with Order No. 8180213. (Sec'y Br. at 24–27; Sec'y Reply at 5–7; Resp't Br. at 27–28; Resp't Reply at 9.) Because the parties again view these orders as linked, I

again see little reason to discuss the matter in great detail. Given the number of inadequate examinations Mill Branch performed, Respondent should have known about the violative condition. This violation exposed miners to methane ignition and explosion dangers, and the condition persisted for over a year. Nevertheless, it appears that Respondent took no additional steps to ensure it was performing adequate electrical examinations. On the other hand I recognize that the Secretary presented no evidence demonstrating Mill Branch was on notice that greater efforts were necessary to comply with 30 C.F.R. § 75.512. Moreover, it appears that MSHA and state inspectors did not identify the non-permissible box in their own inspections. Thus, it seems the underlying condition was neither obvious nor extensive.

Considering all of the above, I conclude that Respondent's negligence was appropriately designated as high. In addition, I determine that Respondent's failure to conduct adequate weekly examinations for more than one year constituted aggravated conduct. Accordingly, I conclude that the unwarrantable failure designation is valid.

VII. PENALTIES

Turning to the six penalty factors specified in section 110(i) of the Mine Act, I note that Mill Branch has stipulated that the proposed penalty would not affect its ability to remain in business. (Joint Ex. 1. at 2.) Moreover, nothing in the record suggests the proposed penalties are inappropriate for the size of the mine, and I also note that Respondent promptly abated each violation in good faith. Although I have affirmed the Secretary's allegations regarding S&S and Respondent's level of high negligence, I have modified both Citation No. 8180209 and Order No. 8180210 to remove the unwarrantable failure designation. In addition, I have affirmed the Secretary's allegations of S&S, high negligence, and unwarrantable failure for Order Nos. 8180213 and 8180214. Finally, the Secretary's Assessed Violation History Report lists 1 final citation within the previous fifteen months at the Osaka Mine that involved 30 C.F.R. § 75.220(a)(1). (Ex. S-16.) That citation was not designated as S&S. (*Id.*) In addition, the Secretary's Assessed Violation History report lists zero final citations or orders within the previous fifteen months at the Osaka Mine involving 30 C.F.R. § 75.360(b), 30 C.F.R. § 75.507, or 30 C.F.R. § 75.512. (*Id.*)

I recognize that the Secretary has proposed penalties of \$3,996.00, \$4,440.00, \$2,000.00, and \$4,500.00, respectively, for Citation No. 8180209 and Order Nos. 8180210, 8180213, and 8180214. However, the Secretary's proposed penalties are not binding upon me. Given the limited history of violations at this mine in conjunction with the other factors, I therefore determine that a penalty of \$1,000.00 each is appropriate for Citation No. 8180209 and Order 8180210. Based on the six section 110(i) factors, and particularly the significant danger presented by a yearlong violation, I also conclude that penalties of \$2,500.00 and \$5,000.00 are appropriate for Order Nos. 8180213 and 8180214.

VIII. ORDER

In light of the forgoing, it is hereby **ORDERED** that Citation No. 8180209 and Order No. 8180210 are **AFFIRMED** as S&S and as the result of Respondent's high negligence and are

MODIFIED to remove the unwarrantable failure designation from each. By operation of law, both violations are also **MODIFIED** to citations under section 104(a) of the Mine Act.

It is also **ORDERED** that Order Nos. 8180213 and 8180214 are **AFFIRMED** as written. Because Citation No. 8180209 was the predicate section 104(d)(1) citation for both orders, Order No. 8180213 is **MODIFIED** to a citation under section 104(d)(1) of the Mine Act by operation of law. Order No. 8180214 remains a section 104(d)(1) order.

FURTHERMORE, Mill Branch is **ORDERED** to **PAY** a civil penalty of \$9,500.00 within 40 days of this decision.

/s/ Alan G. Paez
Alan G. Paez
Administrative Law Judge

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July 2, 2015

SECRETARY OF LABOR
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
on behalf of RICHARD B. HARRISON,
Complainant,

v.

CONSOLIDATION COAL CO.¹,
Respondent.

TEMPORARY REINSTATEMENT
PROCEEDING

Docket No. WEVA 2015-811-D
MSHA Case No.: MORG-CD 2015-20

Mine: Loveridge #22
Mine ID: 46-01433

DECISION AND ORDER
REINSTATING RICHARD B. HARRISON

Appearances: Jordana L. Greenwald, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, PA, Representing the Secretary of Labor

Philip K. Kontul, Esq. & Michael D. Glass, Esq., Ogletree, Deakins, Smoak, Nash & Stewart P.C., Pittsburgh, PA, Representing Respondent

Before: Judge Harner

On June 9, 2015, pursuant to section 105(c)(2) of the Federal Mine Safety and Health Act of 1977 (AAct@), 30 U.S.C. ' 801, *et. seq.*, and 29 C.F.R. ' 2700.45, the Secretary of Labor (ASecretary@) filed an Application for Temporary Reinstatement of miner Richard B. Harrison ("Harrison" or "Complainant") to his former position with Consolidation Coal Co., (AConsolidation@ or ARespondent@) at Loveridge #22 Mine pending final hearing and disposition of the case.

The application followed a Discrimination Complaint filed by Harrison on May 6, 2015, that alleged, in effect, that his termination was motivated by his protected activity. The Secretary represents that this Complaint was not frivolously brought and requests an Order directing Respondent to reinstate Harrison to his former position as a beltman.

¹ Respondent may be in the process of changing its name to "Murray American Energy Inc." and/or "Marion County Coal Co." and changing the name of the mine to "Marion Mine."

Respondent filed a timely motion requesting a hearing regarding this application on June 22, 2015, wherein it summarized its position. A hearing was held in Pittsburgh, PA on June 26, 2015.² The Secretary presented the testimony of the Complainant. Respondent had the opportunity to cross-examine the Complainant and present testimony and documentary evidence in support of its position. 29 C.F.R. ' 2700.45(d).

For the reasons set forth below, I grant the application and order Consolidation Coal and/or its successors to temporarily reinstate Harrison.

Discussion of Relevant Law

Section 105(c) of the Mine Act prohibits discrimination against miners for exercising any protected right under the Mine Act. The purpose of the protection is to encourage miners to play an active part in the enforcement of the [Mine Act] recognizing that, if miners are to be encouraged to be active in matters of safety and health, they must be protected against any possible discrimination which they might suffer as a result of their participation. S. Rep. No. 181, 95th Cong., 1st Sess. 35 (1977), *reprinted in* Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2nd Sess., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 623 (1978).

Congress created the temporary reinstatement as “an essential protection for complaining miners who may not be in the financial position to suffer even a short period of unemployment or reduced income pending the resolution of the discrimination complaint.” S. Rep. No. 181, 95th Cong., 1st Sess. 36-37 (1977), *reprinted in* Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong. 2nd Sess., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 624-25 (1978).

Temporary Reinstatement is a preliminary proceeding, and narrow in scope. As such, neither the judge nor the Commission is to resolve conflicts in testimony at this stage of the case. *Secretary of Labor on behalf of Albu v. Chicopee Coal Co.*, 21 FMSHRC 717, 719 (July 1999). The substantial evidence standard applies.³ *Secretary of Labor on behalf of Peters v. Thunder Basin Coal Co.*, 15 FMSHRC 2425, 2426 (Dec. 1993). A temporary reinstatement hearing is held for the purpose of determining whether the evidence mustered by the miners to date established that their complaints are non-frivolous, not whether there is sufficient evidence of discrimination to justify permanent reinstatement. *Jim Walter Resources*, 920 F.2d 738, 744 (11th Cir. 1990).

² Under Commission Rule 45, a Temporary Reinstatement hearing must be held within 10 calendar days of an operator’s request. 29 C.F.R. §2700.45(c).

³ Substantial evidence means such relevant evidence as a reliable mind might accept as adequate to support [the judge’s] conclusion. *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2163 (Nov. 1989) (quoting *Consolidated Edison Co. V. NLRB*, 305 U.S. 197, 229 (1938)).

In adopting section 105(c), Congress indicated that a complaint is not frivolously brought if it appears to have merit. @ S. Rep. No. 181, 95th Cong., 1st Sess. 36-37 (1977), *reprinted in* Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong. 2nd Sess., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 624-25 (1978). In addition to Congress= appears to have merit@ standard, the Commission and the courts have also equated Anot frivolously brought” to Areasonable cause to believe” and Anot insubstantial.” *Sec’y of Labor on behalf of Price v. Jim Walter Res., Inc.*, 9 FMSHRC 1305, 1306 (Aug. 1987), *aff’d*, 920 F.2d 738, 747 & n.9 (11th Cir. 1990). “Courts have recognized that establishing ‘reasonable cause to believe’ that a violation of the statute has occurred is a ‘relatively insubstantial’ burden.” *Sec’y of Labor on behalf of Ward v. Argus Energy WV, LLC*, 2012 WL 4026641, *3 (Aug. 2012) citing *Schaub v. West Michigan Plumbing & Heating, Inc.*, 250 F.3d 962, 969 (6th Cir. 2001

In order to establish a *prima facie* case of discrimination under section 105(c) of the Act, a complaining miner must establish (1) that he engaged in protected activity and (2) that the adverse action complained of was motivated in any part by that activity. *Sec’y of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786 (Oct. 1980), *rev’d on other grounds sub nom. Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3rd Cir. 1981); *Sec’y of Labor on behalf of Robinette v. United Castile Coal Co.*, 3 FMSHRC 803 (April 1981).

In the instant matter, the Secretary and Harrison need not prove a *prima facie* case of discrimination with all of the elements required at the higher evidentiary standard needed for a decision on the merits. Rather, the same analytical framework is followed within the “reasonable cause to believe” standard. Thus, there must be “substantial evidence” of both the applicant=s protected activity and a nexus between the protected activity and the alleged discrimination. To establish the nexus, the Commission has identified these indications of discriminatory intent: (1) hostility or animus toward the protected activity; (2) knowledge of the protected activity; and (3) coincidence in time between the protected activity and the adverse action. *Sec’y of Labor on behalf of Lige Williamson v. CAM Mining, LLC*, 31 FMSHRC 1085, 1089 (Oct. 2009). The Commission has acknowledged that it is often difficult to establish a Amotivational nexus between protected activity and the adverse action that is the subject of the complaint. @ *Sec’y of Labor on behalf of Baier v. Durango Gravel*, 21 FMSHRC 953, 957 (Sept. 1999). The Commission has further considered disparate treatment of the miner in analyzing the nexus requirement. *Secretary of Labor on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2510 (Nov. 1981), *rev’d on other grounds*, 709 F.2d 86 (D.C. Cir. 1983).

The Petition for Temporary Reinstatement

On May 6, 2015, Harrison executed a Summary of Discriminatory Action, which was filed with his Discrimination Complaint. In this statement he alleged the following:

I am a miner who feels that I have been wrongfully terminated based upon a previous 105(c) that was filed on my behalf, which I withdrew due to a settlement being reached. In the settlement an agreement was made that these records were

going to be removed from my file. Recently these records were used against me in an arbitration. I believe this was a form of retaliation.

Application for Temporary Reinstatement at Exhibit B, p. 2.

The Secretary also submitted with the Application the June 8, 2015 Declaration of Jeffrey C. Maxwell, a Special Investigator employed by the Mine Safety and Health Administration (“MSHA”). Maxwell made the following findings and conclusions:

- 2) As part of my responsibilities, I investigate claims of discrimination by miners filed under Section 105(c) of the Mine Act. In this capacity, I have reviewed and gathered information as part of an ongoing investigation of the discrimination claim of Richard B. Harrison filed against Consolidation Coal Company (“CCC”). My review of the information gathered in this investigation disclosed the following:
 - a) Mr. Harrison was employed as a beltman at CCC’s Loveridge #22 Mine.
 - b) Mr. Harrison filed a Section 105(c) complaint in 2008 concerning an “unsafe act” slip placed in his personnel file at that time. Mr. Harrison withdrew his 2008 complaint as part of the resolution of his grievance concerning the same “unsafe act” slip. CCC agreed, as part of the resolution of the grievance, to remove the “unsafe act” slip from Mr. Harrison’s record.
 - c) Mr. Harrison raised concerns with management about the safety-related impacts of a bonus plan proposed and implemented by management in January 2015.
 - d) Mr. Harrison further objected to the bonus plan by voiding and later returning his check to CCC. Mr. Harrison was angry about the company’s decision to implement the plan and about the impact that he believed the plan would have on safety. In addition to writing “VOID VOID” on the check he received on February 6, 2015, he also wrote “KISS MY ASS, BOB.”
 - e) The company took no action at the time Mr. Harrison returned his check. Mr. Harrison heard nothing further until March 7, 2015.
 - f) The company learned of Mr. Harrison’s check only because they reviewed all returned checks on March 6 or 7, 2015, after discovering that another employee wrote a message on a returned check.
 - g) On March 13, 2015, Mr. Harrison was suspended with intent to discharge for allegedly violating Employee Rule of Conduct No. 4, which provides that

In order to minimize the occasions for discipline or discharge, each employee should avoid conduct which violates reasonable standards of an employer-employee relationship including:

...

4. Insubordination (refusal or failure to perform work assigned or to comply with supervisory direction) or use of profane, obscene, abusive, or threatening language or conduct toward subordinates, fellow employees, or officials of the company.

- h) Mr. Harrison alleges that Employee Rule of Conduct No. 4 is not consistently enforced at the Mine.
 - i) Mr. Harrison, who was represented by the UMWA in his dealings with CCC management, grieved his termination and requested an arbitration hearing.
 - j) During the arbitration hearing held on April 3, 2015, CCC management presented the 2008 “unsafe act” slip as part of Mr. Harrison’s disciplinary history in support of his termination.
 - k) On April 27, 2015, the arbitrator issued a decision upholding Mr. Harrison’s termination. The decision relied, at least in part, on Mr. Harrison’s disciplinary record.
- 3) Based upon the information available as the result of the special investigation being conducted in these matters, I have concluded that there is reasonable cause to believe that Mr. Harrison was discharged from his employment with CCC because he filed a prior Section 105(c) complaint and because he protested the implementation of the bonus plan. There is, therefore, reasonable cause to believe that Mr. Harrison’s termination violated Section 105(c) of the Mine Act, and the complaint filed by Mr. Harrison was not frivolous.

Application for Temporary Reinstatement at Exhibit A, p. 1-3. The Secretary cited this declaration as a basis for the formal request for temporary reinstatement. *Application for Temporary Reinstatement* at 4.

Joint Stipulations:

At hearing, the parties orally submitted the following Joint Stipulations:

- 1) At all relevant times, Consolidation Coal Company was the operator of Loveridge #22 Mine near Marion County, West Virginia.
- 2) Loveridge #22 Mine is a mine as that term is defined in Section 3(h) of the Mine Act, 30 U.S.C. Section 802(h).

- 3) At all relevant times, products of Loveridge #22 Mine enter commerce or the operations or products thereof affected commerce within the meaning and scope of Section 4 of the Mine Act, 30 U.S.C. Section 803.
- 4) Consolidation Coal Company is an operator as that term is defined in Section 3(d) of the Mine Act, 30 U.S.C. Section 802(d).
- 5) Richard B. Harrison worked at Loveridge #22 Mine and is a miner within the meaning of Section 3(g) of the Mine Act, 30 U.S.C. 802(g).
- 6) Consolidation Coal Company is subject to the jurisdiction of the Federal Mine Safety and Health Review Commission.
- 7) The presiding administrative law judge has authority to hear this case and issue a decision regarding this case.
- 8) Marion County Coal Company is a successor in interest to Consolidation Coal Company.

Tr. 6-7.⁴

Summary of Testimony⁵

Richard B. Harrison was a general inside worker at the Marion County Coal Mine⁶ at the Sugar Run Portal on A shift before he was terminated. Tr. 17. He had worked in this position for approximately three years. Tr. 17. Prior to this position, he worked at the mine as a regular bolter, on belt crew, and as a precision mason, for a total of 10 years. Tr. 18. Prior to working at Loveridge #22 Mine, Harrison worked at Sago Mine as a general contractor for one year. Tr. 18.

Murray Energy purchased the instant mine from Consol Energy Inc. in December 2013. Tr. 21. Harrison and the other miners at Loveridge #22 were represented by the United Mine Workers of America (“UMWA”) prior to the purchase, and the UMWA has continued to represent the miners at the mine. Tr. 21.

Harrison has served as the union walk-around for 9 years, and was previously on the union safety committee for six months. Tr. 19. As a walk-around, Harrison would accompany inspectors on inspections. Tr. 19. As a result of this position, Harrison testified as a witness for MSHA in two court proceedings, one in 2006 and one in 2009. Tr. 19-20.

After Murray Energy purchased the mine, CEO Bob Murray had an initial meeting for every shift where he informed the miners that he reviewed previous violations that ended up in

⁴ Hereinafter, the transcript of the proceeding shall be referred to as “Tr.” The Secretary’s exhibits shall be referred to as “GX” followed by the number. The Respondent’s exhibits shall be referred to as “RX” followed by the number.

⁵ As Respondent did not call any witnesses, the only testimonial evidence presented at hearing was that of the discriminatee.

⁶ This is apparently what the Respondent currently calls the Loveridge #22 Mine.

court, and knew how much those violations cost the company and who served as witnesses. Tr. 22-23. Harrison understood these statements to mean that Murray and other mine management were aware of his court appearances on behalf of MSHA, and that he had cost the company money. Tr. 22-23.

In January 2015, the mine instituted a new production-based bonus program, wherein miners' bonus checks would be tied to the amount of coal extracted. Tr. 26-27. This was after UMWA Local 9909 came to an agreement with management that it would hold a vote on the bonus plan to determine if its members approved of the Respondent's proposed plan. Tr. 24-25. The vote was held in January, and the members voted to turn down the bonus plan. Tr. 25.

Respondent nevertheless proceeded with implementation of the new bonus plan, and miners were told that if they did not agree with the bonus plan, they had the option to opt out by writing "void" on the first bonus check and returning it. Tr. 24-26, 30-31. Harrison was not aware of any other means of opting out of the plan. Tr. 26. Shortly before the checks were issued, Harrison explained his safety concerns about the bonus plan to the Sugar Run Portal superintendent John Larry and the portal safety director Wayne Conaway. Tr. 46-48. They responded to Harrison's safety concerns, saying, "Why would you complain about free money? Take the money and run." Tr. 48.

Harrison received his bonus check dated February 6, 2015 in early February. Tr. 23-24. The check was for \$11.58, and was signed by Robert E. Murray. GX-1. Harrison wrote "VOID VOID KISS MY ASS BOB," and returned the check to Sonya Singleton in the payroll office the day after he received it. Tr. 24, 31, 33; GX-1.

Harrison opted out of the bonus plan because he felt that the way the program was set up placed the miners' "safety for sale because...the more coal you got, the bigger the bonus." Tr. 26. Harrison testified that he had discussions with other miners and many agreed with him. Tr. 27. Other miners returned their bonus checks.⁷ Tr. 68, 72. Harrison knew that another miner named Jesse Stolzenfels wrote on his check, "Eat Shit, Bob," and was subsequently terminated. Tr. 68-69, 104.

Harrison testified that he wrote the statement on the check because he had recently experienced various serious health and family issues, which led to a great deal of stress. Tr. 28-29. Harrison and others believed that the bonus checks constituted a safety issue, and testified that he felt "Mr. Murray felt it was okay to go ahead and override our vote." Tr. 28-29. Harrison believed that the company would know that his returned check was a safety complaint because he had spoken with several company bosses about the safety implications of the bonus plan. Tr. 67.

Harrison testified that safety at the mine has "dropped tremendously." Tr. 29. He described increased citations, especially for problems in rock dusting. Tr. 29-30. Harrison

⁷ According to Respondent's counsel, dozens of other miners returned their bonus checks. Tr. 68, 72.

explained that he believed that the production-based bonus program would make matters worse, leading miners to conclude “why take the time to rock dust. You’re taking my money away from me. We need to get in the coal.” Tr. 29-30. Harrison explained that the safety implications of the bonus plan upset him. Tr. 103. “It all comes back to the safety issue. If you don’t have safety, you’re dead in the coal mine. That’s all there is to it.” Tr. 103.

Harrison posted a picture of his check with the written statement on UMWA Local 9909’s Facebook page. Tr. 69, 98. The Local’s Facebook page was private and used by miners to talk about work matters. Tr. 99. As part of an ongoing discussion about the bonus plan on the Facebook page, other miners were posting photos of their voided checks to show their disagreement with the bonus plan. Tr. 69, 99-100.

On March 6, management first confronted Harrison about his voided check. Tr. 33-34. At that time, Harrison did not admit to management that he wrote “Kiss My Ass Bob” on the check because he was scared of losing his job and health insurance.⁸ Tr. 34, 73-75. He believed that by fighting for miners’ safety, his job was at risk. Tr. 34. Mine management did an investigation to find out who wrote on the check. Tr. 35.

Respondent brought Harrison back for another meeting on March 13 with Mr. Hudson and Pam Layton from Human Resources, and a union representative. Tr. 35-36, 41. They explained that they could not find the person who wrote on the check, and that he was going to be terminated. Tr. 35-36, 39. The only matter discussed during this meeting was the check. Tr. 40-41. On that date, Harrison was issued a letter explaining the suspension with intent to discharge. Tr. 39, 40; RX-3. The letter stated that the reason for the action was Harrison’s writing “Kiss My Ass Bob” in violation of Conduct Rule No. 4, which defines insubordination and mentions the use of profane language. RX-3.

On the following day, on March 14, Harrison had his 24-48 hour meeting.⁹ At this meeting on March 14, Harrison again denied writing on the check. Tr. 75. At this meeting, it came out that a fellow miner named Tim Cox would corroborate that Harrison did not write the phrase on the check. Tr. 76-77. During this meeting, Respondent officials asked Harrison why he posted the check on Facebook, and he responded that he thought it was funny. Tr. 69.

A day or two after the 24-48 hour meeting, Harrison admitted to the union representative that he had written “Kiss My Ass Bob” on the check. Tr. 78-79. He and the union representative then went to the portal to meet with Mr. Hudson from the company and Harrison admitted to Hudson that he wrote the statement on the check, explained why he did so, why he originally denied it, and apologized for lying. Tr. 36-41, 46, 78-80. He explained that “after ten years being on the walk-around, being in the hole, seeing the violations that they’re getting, they were

⁸ There was some inconsistency regarding the dates of the March meetings. The first meeting took place on a date between March 6-8. Tr. 33-34, 73-75. The next meeting took place on either March 12 or 13. Tr. 35-36, 73-75.

⁹ According to the contract, a terminated employee has the right to a meeting within 24 hours of a termination. This meeting is referred to as the “24-48 hour meeting.” Tr. 37.

basically putting our safety for sale.” Tr. 46. Hudson told Harrison that his admission will count in his favor. Tr. 80.

Harrison requested arbitration. Tr. 41. At the arbitration hearing, Respondent presented into evidence the unsafe work act slip from 2008. Tr. 42. Harrison was surprised because the grievance settlement agreement required the company to remove the unsafe work slip from Harrison’s file in exchange for Harrison withdrawing his 105(c) complaint. Tr. 42; GX-2. Prior to seeing the slip at the arbitration, Harrison was not aware that it was still in his file. Tr. 43.

Pam Layton had filled out the grievance settlement in 2008, which stated “the unsafe slip will be removed from the file for the employee.” Tr. 45; GX-2. At the arbitration, Layton said she did not know about the 105(c) and the agreement to remove the slip from his file. Tr. 49-50. Layton took a leading role in Harrison’s termination. Tr. 45. She was present in all the meetings and was involved in the decision to terminate Harrison. Tr. 45-46.

The arbitrator’s award notes that Harrison does not have a spotless record, but it does not mention the 2008 incident explicitly. Tr. 54-55; GX-3, 7. Other than the unsafe act slip, the company mentioned Harrison’s participation in the absentee plan for his kidney problems. Tr. 55. They also mentioned a grievance he filed concerning the company’s denial of Harrison’s request to have a union representative present during a drug test. Tr. 57. There was no other evidence submitted at the arbitration about disciplinary action, and Harrison received no other disciplinary action at the mine that the arbitrator could have been referencing. Tr. 55-58.

Contentions of the Parties

The Secretary argued at hearing that Harrison engaged in at least three types of protected activities: (1) Harrison filed a Section 105(c) complaint in 2008 for an unsafe act allegation that was made and placed in his personnel file. As part of a settlement, Harrison withdrew his 105(c) complaint and the company agreed to remove the slip from his personnel file. Tr. 10-11; (2) Harrison has served as a walk-around with inspectors, and has testified in two Federal Mine Safety & Health Review Commission (“FMSHRC”) proceedings concerning safety issues; and (3) Harrison returned a bonus check and wrote a message that included a profane term on it, because he believed the bonus plan put miners’ safety at risk. Tr. 12. The Secretary argued that the return of the bonus check was part of an ongoing series of concerns that were voiced by both Harrison and the union to management about the bonus plan. Tr. 12.

The Respondent did not contest that an adverse employment action had occurred, but rather argued that Harrison’s statement on the check, as well as his subsequent denials, constituted a legitimate reason for his termination. Tr. 14. Furthermore, the Respondent argued that the arbitration decision did not cite to the 2008 safety issue. Tr. 16.

Findings and conclusions

Protected Activity and Adverse Employment Action

Harrison was fired on March 14, 2015, and none of the parties argued that this does not constitute an adverse employment action. According to the Act and well-settled Commission precedent, suffering a discharge or a demotion is an adverse employment action. 30 USC § 815(c)(1); *see also Moses v. Whitley Dev. Corp.*, 4 FMSHRC 1475, 1478 (Aug. 1982), *aff'd*, 770 F.2d 168 (6th Cir. 1985). Therefore, the main issues in this case involve whether Harrison engaged in protected activities, and whether a nexus exists between his protected activities and the termination of his employment.

As discussed *supra*, to obtain a temporary reinstatement a miner must raise a **non-frivolous claim** that he engaged in protected activity with a connection, or nexus, to an adverse employment action.

Under the Act, protected activity includes filing or making a complaint of an alleged danger, or safety or health violation, instituting any proceeding under the Act, testifying in any such proceeding, or exercising any statutory right afforded by the Act. *See* 30 U.S.C. § 815(c)(1); *See also Sec=y of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786 (Oct. 1980), *rev=d on other grounds sub nom. Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3rd Cir. 1981). According to the legislative history:

The Committee intends that the scope of the protected activities be broadly interpreted by the Secretary, and intends it to include not only the filing of complaints seeking inspection... or the participation in mine inspections... but also the refusal to work in conditions which are believed to be unsafe or unhealthful and the refusal to comply with orders which are violative of the Act or any standard promulgated thereunder, or the participation by a miner or his representative in any administrative and judicial proceeding under the Act.

(S. Rep. No. 181, 95th Cong., 1st Sess. 35-36 (1977), *reprinted in* Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong. 2nd Sess., *Legislative History of the Federal Mine Safety and Health Act of 1977* (1978). Further, “the listing of protected rights contained in section [105(c)(1)] is intended to be illustrative and not exclusive.” *Id.*

In the instant case, the Secretary argues that Harrison engaged in at least three types of protected activities: filing a 105(c) complaint in 2008, testifying at FMSHRC proceedings on behalf of MSHA in 2006 and 2009, and making safety complaints concerning the bonus plan in 2015. With respect to protected activity, the Respondent argued that Harrison’s writing “Kiss My Ass Bob” on the bonus check was not protected and provided legitimate cause for his termination.

Harrison’s 2008 filing of a 105(c) complaint, as well as his participation at FMSHRC proceedings in 2006 and 2009, are clearly protected activities. Indeed, these activities are specifically enumerated in the Act as protected activities. *See* 30 U.S.C. § 815(c)(1).

Safety complaints made by Harrison concerning the company's bonus plan also constitute protected activity. Harrison made clear in his testimony that his objections to the bonus plan were based on the safety implications of the program. Tr. 26-29, 46-48. Prior to the implementation of the plan, Harrison spoke with various company bosses about his safety concerns with the plan. Tr. 67. Harrison testified that he voted against the bonus plan because he feared that it would diminish safety at the mine. Tr. 24-25. Then, right before the checks were issued, Harrison had conversations with the portal superintendent, John Larry, and the portal safety director, Wayne Conway, explaining his safety concerns with Respondent's bonus plan. Tr. 48.

When the checks were issued in spite of Harrison's and other miners' serious safety concerns, Harrison protested by way of the only means available to him. The miners were told that if they wanted to opt out of the bonus program, they were to write "void" on the check and return it to the company. Tr. 24-26, 30-31. This was precisely what Harrison did. Tr. 24. Harrison's further written statement, "Kiss My Ass Bob," does not transform Harrison's protected activity in voicing a safety concern into unprotected activity because of the use of a swear word. Indeed, his statement on the check appears to emphasize his frustration with the bonus program that was implemented despite the fact that the union voted against the plan.

It should first be noted that though Harrison did not explicitly reference his safety objections to the bonus plan on the check, his previously voiced safety concerns would have made the reasons for his actions immediately apparent to Respondent. Harrison's writing and return of the check was part of an ongoing conversation about the safety implications of the bonus program. Indeed, to paraphrase Harrison's supervisors, why else would anyone turn down free money? The answer, as Harrison made clear, is that the money was not in fact free. The bonus program was production-based, and Harrison felt that the program was "basically putting our safety for sale." Tr. 46.

Though Harrison's writing "Void Void Kiss My Ass Bob" may not have been the most articulate means of making a safety complaint, the use of a swear word does not change the nature of Harrison's action. The Commission has repeatedly held that the use of profanity does not remove protected activity from coverage under the Mine Act. *See Sec'y obo Bernardyn v. Reading Anthracite Co.*, 23 FMSHRC 924 (Sept. 19, 2001); *Amos Hicks v. Cobra Mining, Inc.*, *Jerry K. Lester, and Carter Messer*, 13 FMSHRC 523 (Apr. 1, 1991); *Sec'y obo Cooley v. Ottawa Silica Co.*, 6 FMSHRC 516 (Mar. 30, 1984). One must consider the context in which the comment was made—this is a mine, not a nursery—and whether the company strictly enforced a policy prohibiting profanity. In this record, there is scant evidence of a policy, as only an out of context sentence fragment entitled "Conduct Rule No. 4" quoted in the termination letter (RX-3) and an arbitrator's decision (GX-3), has been introduced into evidence. On cross examination, although the Respondent's attorney asked Harrison about Stolzenfels writing "Eat Shit, Bob" on his check and his subsequent termination, Harrison knew little about the details of Stolzenfels's situation. Tr. 68-69, 104.

The Commission is not alone in concluding that the use of profanity does not make an act *per se* unprotected. The National Labor Relations Board, which Commission decisions often

look to for guidance in discrimination cases,¹⁰ has similarly held that one must consider the context, and balance the employee's rights against the employer's need to maintain order. For example, in *Plaza Auto Center, Inc. and Nick Aguirre*, the Board stated:

The *Atlantic Steel* balancing test presupposes that “not every impropriety committed during [otherwise protected] activity places the employee beyond the protective shield of the [A]ct.” *NLRB v. Thor Power Tool Co.*, 351 F.2d 584, 587 (7th Cir. 1965). This is so because “[t]he protections [that] Section 7 affords would be meaningless were [the Board] not to take into account the realities of industrial life and the fact that disputes over wages, hours, and working conditions are among the disputes most likely to engender ill feelings and strong responses” (*Consumers Power Co.*, 282 NLRB 130, 132 (1986)), and that the language of the workplace “‘is not the language of ‘polite society’.” *D*” *Stanford Hotel*, 344 NLRB 558, 564 (2005) (citation omitted). Thus, the employee's right to engage in concerted activity permits “some leeway for impulsive behavior.” *NLRB v. Thor Power Tool Co.*, 351 F.2d at 587. Still, the right to engage in concerted activity is not absolute and must be balanced against the employer's need to maintain order and respect in its establishment. See *Thor Power Tool Co.*, 148 NLRB 1379, 1389 (1964), *enfd.* 351 F.2d 584, 587; *Caterpillar, Inc.* 322 NLRB 674, 677 (1996).

360 NLRB No. 117 at 10 (May 28, 2014). This reasoning applies as strongly to the instant case, where one must take into consideration the realities of the mine and the fact that disputes about health and safety are “likely to engender ill feelings and strong responses.”

Furthermore, the Respondent's argument must fail if it is found that Harrison was provoked into writing a profanity on the check. The Commission has held “that an employer cannot provoke an employee into an indiscretion and then rely on that indiscretion as grounds for discipline.” *Sec'y obo Bernardyn v. Reading Anthracite Co.*, 22 FMSHRC 298, 305-306 (Mar. 16, 2000). Whether an employee's behavior was excusable is a fact intensive inquiry that must look at the particular facts and circumstances of the case. *Id.* at 306. Based on the record in the instant case, it is not clear whether Harrison was indeed provoked. The union was given the option to vote on the bonus plan, and Harrison and a majority of members voted against the plan. Harrison testified that when he found the bonus check, he felt that the company was ignoring the union members' safety concerns and unilaterally proceeding with an unauthorized bonus plan. Tr. 28-29. It was only at that point that Harrison wrote “VOID VOID KISS MY ASS BOB” on the check and returned it to the Respondent.

Based on the evidence in the record, I find non-frivolous Harrison's claim that he engaged in protected activity when he wrote “Void Void Kiss My Ass Bob” on the bonus check and returned it as a protest against a program he believed would serve as a safety hazard.

¹⁰ See *eg*, *Sec'y obo Bernardyn v. Reading Anthracite Co.*, 22 FMSHRC 298 (Mar. 16, 2000).

Nexus between the protected activity and the alleged discrimination

Having concluded that Harrison engaged in protected activities and suffered an adverse employment action, the examination now turns to whether that activity has a connection, or nexus, to the subsequent adverse action, namely the March 14, 2015 termination. The Commission recognizes that direct proof of discriminatory intent is often not available and that the nexus between protected activity and the alleged discrimination must often be drawn by inference from circumstantial evidence rather than from direct evidence. *Phelps Dodge Corp.*, 3 FMSHRC at 2510. The Commission has identified several circumstantial indicia of discriminatory intent, including: (1) hostility or animus toward the protected activity; (2) knowledge of the protected activity; (3) coincidence in time between the protected activity and the adverse action; and (4) disparate treatment of the complainant. *See, e.g., CAM Mining, LLC*, 31 FMSHRC at 1089; *see also, Phelps Dodge Corp.*, 3 FMSHRC at 2510.

Knowledge of the protected activity

According to the Commission, “the Secretary need not prove that the operator has knowledge of the complainant’s activity in a temporary reinstatement proceeding, only that there is a non-frivolous issue as to knowledge.” *CAM Mining, LLC*, 31 FMSHRC at 1090 *citing Chicopee Coal Co.*, 21 FMSHRC at 719. In fact, evidence is sufficient to support a finding of knowledge if an operator erroneously suspects a miner made safety complaints, even if no complaint was made. *See Moses v. Whitley*, 4 FMSHRC at 1478.

In the instant matter there is sufficient evidence of knowledge of the various protected activities to meet the evidentiary threshold. With regard to the 105(c) complaint filed in 2008, Pam Layton, the Human Resource representative, filled out the grievance settlement that required the employer to remove the slip from Harrison’s file. Tr. 45; GX-2. Layton continued to work in human resources at the mine and had a role in Harrison’s ultimate termination. Tr. 45-46. Layton’s participation in the 2008 complaint and ultimate settlement, combined with her participation in the 2015 termination is sufficient to show that the company had knowledge of Harrison’s 2008 complaint when he was terminated.

The company similarly had knowledge of Harrison’s 2006 and 2009 participation in FMSHRC proceedings on behalf of MSHA. In addition to the fact that the company would have known about Harrison’s testimony when he testified, after Murray Energy purchased the mine Bob Murray told the miners that he had reviewed past violations and court proceedings, and knew who served as a witness. Tr. 22-23. This statement by Murray is evidence that the Respondent had knowledge of Harrison’s protected activity of participating in a FMSHRC hearing.

Lastly, the Respondent had knowledge of Harrison’s protected activity of making safety complaints concerning the bonus program implemented in February 2015. Harrison engaged in various conversations with mine management over his safety concerns about the program. Tr. 46-48. Based on Respondent’s cross-examination of Harrison, it appeared that the Respondent was arguing that there was no way for it to conclude from the words on the check that Harrison was making a safety complaint. Tr. 67. However, based on the totality of the circumstances,

including previous conversations with mine management, it is clear that the Secretary has met its burden in showing that Respondent should have known that Harrison's writing and returning the check was in reference to his safety concerns.

Coincidence in time between the protected activity and the adverse action

The Commission has accepted substantial gaps between the last protected activity and the adverse employment action. See e.g. *CAM Mining, LLC*, 31 FMSHRC at 1090 (three weeks) and *Secretary of Labor on behalf of Hyles v. All American Asphalt*, 21 FMSHRC 34 (Jan. 1999) (a 16-month gap existed between the miners' contact with MSHA and the operator's failure to recall miners from a lay-off; however, only one month separated MSHA's issuance of a penalty resulting from the miners' notification of a violation and that recall failure). The Commission has stated "We 'appl[y] no hard and fast criteria in determining coincidence in time between protected activity and subsequent adverse action when assessing an illegal motive. Surrounding factors and circumstances may influence the effect to be given to such coincidence in time.'" *All American Asphalt*, 21 FMSHRC 34 at 47 (quoting *Hicks v. Cobra Mining, Inc.*, 13 FMSHRC 523, 531 (Apr. 1991)).

In the instant matter, two of the protected activities—the 2008 discrimination complaint and the 2006 and 2009 participation in FMSHRC proceedings—occurred several years before Harrison's termination. If these acts alone served as the basis of Harrison's instant discrimination complaint, then the Secretary would have had a harder time showing that a coincidence in time existed.¹¹ However, the third protected activity, which concerned Harrison's complaints about the bonus plan and which culminated in the return of his bonus check, occurred less than five weeks from Harrison's termination, with Harrison returning the check on February 7 and being suspended with intent to discharge on March 13. Tr. 23-24, 33-39. As a result, I find that the time span between the protected activities and the adverse action is sufficient to establish a nexus.

Hostility or animus towards the protected activity

The Commission has held, "[h]ostility towards protected activity--sometimes referred to as 'animus'--is another circumstantial factor pointing to discriminatory motivation. The more such animus is specifically directed towards the alleged discriminatee's protected activity, the more probative weight it carries." *Secretary of Labor on behalf of Chacon v. Phelps Dodge Corporation*, 3 FMSHRC 2508, 2511 (Nov. 1981) (citations omitted).

In the instant case, there are a host of actions that could constitute animus towards Harrison's protected activities. First, Bob Murray's speech to miners, where he stated that he has reviewed past violations and litigation and knew who served as witnesses and how much it cost the company represented animus towards Harrison's testifying on behalf of MSHA. Tr. 22-23.

¹¹ This is not to say that a six or seven year span from the protected activity to the adverse employment action is *per se* too long. The Secretary would simply have to make a strong showing that a strong nexus existed using the other factors in the Commission's test.

Second, the Respondent's introduction at the arbitration hearing of the 2008 safety slip as evidence of past impropriety also represented animus towards Harrison's 2008 Section 105(c) discrimination complaint. Tr. 42. According to the terms of the settlement between the company and Harrison, the company was required to remove this slip from the Harrison's file. Tr. 42; GX-2. The act of not removing the slip, the ongoing act of retaining the slip, and the act of using the slip at arbitration to show past misconduct, all represent animus toward Harrison's protected activity.

Third, the response by John Larry and Wayne Conaway to Harrison's safety concerns over the bonus program, that he should "take the money and run," showed that they were not taking his safety concerns seriously. Tr. 46-48. Their glib response represented hostility to Harrison's protected activity of bringing a serious safety concern to management attention.

Lastly, the suspension with intent to discharge as a response to Harrison's protected activity of writing on the check and returning it, illustrated animus towards the act. Though the Respondent appeared to offer shifting reasons for the termination, suggesting at times that it was due to Harrison's lying about the check or his posting a photo of the check on Facebook, the returned check with the markings was the only matter mentioned in meetings with mine management and in the termination letter. Tr. 40-41; RX-3. Having found these repeated instances of animus towards Harrison's protected activities, I find sufficient animus to meet the evidentiary bar at issue here.

Disparate Treatment

"Typical forms of disparate treatment are encountered where employees guilty of the same, or more serious, offenses than the alleged discriminatee escape the disciplinary fate which befalls the latter." *Secretary of Labor on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2512 (Nov. 1981). The Commission has previously held that evidence of disparate treatment is not necessary to prove a *prima facie* claim of discrimination when the other indicia of discriminatory intent are present. *Id.* at 2510-2513.

In the instant matter, the record is sparse with regards to disparate treatment. There is some evidence that another miner, Jesse Stolzenfels, wrote "Eat Shit, Bob" on his returned check and was subsequently fired. Tr. 68-69, 104. However, there was no evidence presented as to whether his use of profanity on the check and his termination were connected.

In the *Cooley* case cited above, as well as other Commission precedent regarding swearing, the Commission laid out a several factor test to determine whether a terminated complainant was disparately treated for using offensive language. This test looks at "whether the operator had prior difficulties with the complainant's profanity, whether the operator had a policy prohibiting swearing, and how the operator treated other miners who had cursed." *Sec'y obo Bernardyn v. Reading Anthracite* 23 FMSHRC 924, 929-30 (Sept. 2001) (*citing Cooley v. Ottawa Silica*, 6 FMSHRC at 521, and *Hicks v. Cobra Mining*, 13 FMSHRC 532-33.) As discussed *supra*, there is little in the record about a company policy regarding swearing, nothing about prior issues with Harrison swearing, and little about how the operator treated other miners

who used profanity. Without this additional evidence, it is impossible to conclude that Harrison was or was not disparately treated.

Conclusion

In concluding that Harrison's complaint herein was not frivolously brought, I find that there is reason to believe that Harrison engaged in a variety of protected activity, including his 2008 discrimination complaint, his 2006 and 2009 participation in FMSHRC proceedings, and his 2015 complaints about the bonus plan. I further conclude that the Secretary has met its burden in showing that there was a nexus between Harrison's protected activities and his March 2015 termination.

ORDER

For the reasons set forth above, it is **ORDERED** that Complainant Richard B. Harrison be immediately reinstated by Respondent and/or its successors to his former position, or the equivalent, at the same rate of pay, hours worked, and with all other benefits he was receiving at the time of his discharge, effective the date of this decision.

The court retains jurisdiction over this temporary reinstatement proceeding. 29 C.F.R. § 2700.45(e)(4). The Secretary shall complete the investigation of the underlying discrimination complaint *as soon as possible*. Immediately upon completion of the investigation, the Secretary shall notify counsel for Respondent and this court, in writing, whether a violation of Section 105(c) of the Mine Act has occurred. *Id.*

/s/ Janet G. Harner
Janet G. Harner
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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July 7, 2015

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

v.

NORTHERN ILLINOIS SERVICE
COMPANY,
Respondent.

CIVIL PENALTY PROCEEDINGS

Docket No. LAKE 2012-0871-M
A.C. No. 11-03104-297716

Docket No. LAKE 2013-0173-M
A.C. No. 11-03104-306429

Mine: Portable # 2

Docket No. LAKE 2012-0746-M
A.C. No. 11-02963-291992

Mine: Portable # 1

DECISION AND ORDER

Appearances: James M. Peck, Conference and Litigation Representative, U.S.
Department of Labor, Mine Safety and Health Administration, Duluth,
MN, for Petitioner;

Peter DeBruyne, Esq., Law Offices of Peter DeBruyne, Rockford, IL, for
Respondent.

Before: Judge L. Zane Gill

This proceeding under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) (“Mine Act” or “Act”), involves eight section 104(a) citations, 30 U.S.C. § 814(a), issued by the Department of Labor’s Mine Safety and Health Administration (“MSHA”) to Northern Illinois Service Company (“NISC” or “Respondent”) at its Portable Mines # 1 and 2. The parties presented testimony on December 3 and 4, 2013, in Rockford, Illinois.

In the final pre-hearing report, the Secretary informed the court that Citation Nos. **8661786** and **8669849**, originally at issue in the case, had been vacated. The Secretary’s discretion to vacate a citation or order is not subject to review. *RBK Constr. Inc.*, 15 FMSHRC 2099 (Oct. 1993). Therefore, the penalties proposed for Citation Nos. 8661786 and 8669849 are moot.

For Citation No. 8661787:

- NISC violated § 56.11027 of the Mine Act.
- NISC was moderately negligent.

- The injury was reasonably likely to result in lost workdays or restricted duty.
- The citation was properly designated as significant and substantial.
- I assess a penalty in the amount of \$112.00.

For Citation No. 8661788:

- NISC violated § 56.4501 of the Mine Act.
- NISC was moderately negligent.
- The injury was unlikely to result in lost workdays or restricted duty.
- I assess a penalty in the amount of \$112.00.

For Citation No. 8661789:

- NISC violated § 56.14207 of the Mine Act.
- NISC was highly negligent.
- The injury was unlikely to result in lost workdays or restricted duty.
- I assess a penalty in the amount of \$100.00.

For Citation No. 8661790:

- NISC violated § 56.12028 of the Mine Act.
- NISC was moderately negligent.
- The injury was unlikely to result in lost workdays or restricted duty.
- I assess a penalty in the amount of \$112.00.

For Citation No. 8669850:

- NISC violated § 56.4501 of the Mine Act.
- NISC was highly negligent.
- The injury was unlikely to result in lost workdays or restricted duty.
- I assess a penalty in the amount of \$100.00.

For Citation No. 8669851:

- NISC violated § 56.4501 of the Mine Act.
- NISC was highly negligent.
- The injury was unlikely to result in lost workdays or restricted duty.
- I assess a penalty in the amount of \$100.00.

For Citation No. 8669852:

- NISC violated § 56.4501 of the Mine Act.
- NISC was highly negligent.
- The injury was unlikely to result in lost workdays or restricted duty.
- I assess a penalty in the amount of \$100.00.

For Citation No. 8669853:

- NISC did not violate § 56.14100(b) of the Mine Act.
- The citation is vacated.

Stipulations

Parties agreed to the following stipulations:

1. NISC is engaged in mining operations in the United States, and its mining operations affect interstate commerce. NISC is the operator of the mines Portable Mine #1 and Portable #2; MSHA I.D. Nos. 11-02963 and 11-03104.
2. NISC is an “operator” as defined in Section 802(d) of the Federal Mine Safety and Health Act of 1977, as amended (Mine Act), 30 U.S.C. 802(d).
3. NISC is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et. seq.
4. The Administrative Law Judge has jurisdiction in this matter.
5. The subject citations were properly served by a duly authorized representative of the Secretary upon an agent of NISC on the dates and places stated therein, and may admitted into evidence for the purpose of establishing their issuance.
6. The exhibits to be offered by NISC and the Secretary are stipulated to be authentic but no stipulation is made as to their relevance or the truth of the matters asserted therein.
7. The assessed penalties, if affirmed, will not impair NISC’s ability to remain in business.
8. MSHA Inspector Robert D. Stalder was acting in his official capacity and as authorized representative of the Secretary of Labor when aforesaid citations were issued.

Joint Prehearing Report at 2-3, MSHA v. Northern Illinois Service Company, (No. LAKE 11-03104-297716)

Basic Legal Principles

Significant and Substantial

The Secretary designated one of the citations as significant and substantial (“S&S”). An S&S designation is applied to violations which are hazardous to health. Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 814(d) (1994). S&S determinations are made based on the specific facts of the case. *See Cumberland Coal Res., LP*, 33 FMSHRC 2357, 2369 (Oct. 2011) (citing *Rushton Mining Co.*, 11 FMSHRC 1432, 1436 (Aug. 1989)). To establish a citation as S&S, 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).

The Commission has provided guidance for applying the *Mathies* test. In reference to the “hazard” in the second element, an S&S violation must contribute to a specific danger. *Id.* This requirement prohibits S&S citations for non-dangerous infractions. *U.S. Steel Mining Co, Inc.*, 6 FMSHRC 1834, 1836, (Aug. 1984) (citing *National Gypsum Co.*, 3 FMSHRC 822, 827 (Apr. 1981)). However, a hazard unlikely to reach fruition can still be S&S. *Musser Eng’g, Inc., and PBS Coals, Inc.*, 32 FMSHRC 1257, 1280 (Oct. 2010). Hazards are assessed according to mine conditions at time of citation, and as they would have progressed during normal operations. *U.S. Steel Mining Co., Inc.*, 7 FMSHRC 1125, 1130 (Aug. 1985). Non-violation conditions at the mine are irrelevant in terms of S&S. *MSHA v. FMSHRC*, 111 F.3d 913, 917 (D.C. Cir. 1997).

The third *Mathies* element examines if the hazard is “reasonably likely to result in injury.” *Peabody Midwest Min., LLC v. FMSHRC*, 762 F.3d 611, 616, (7th Cir. 2014). The hazard, rather than the specific violation, is the measure of S&S. *Musser*, 32 FMSHRC at 1281. If the hazard is unlikely to result in injury, then the violation is not S&S. *See Texasgulf Inc.*, 10 FMSHRC 498, 503 (Apr. 1988). It may be appropriate to predict how the danger would impact a disaster situation, for instance if the hazard is related to emergency equipment. *Cumberland Coal Res., LP*, 33 FMSHRC 2357, 2366 (Oct. 2011) (citing *Florence Mining Co.*, 11 FMSHRC 747, 756 (May 1989)).

The fourth element focuses on the likely gravity of an accident. *See Elk Run Coal Co, Inc.*, 27 FMSHRC 899, 907 (Dec. 2005) (citation omitted). Numerous types of injuries, including “muscle strains, sprained ligaments, and fractured bones” meet the reasonably serious requirement. *S&S Dredging Co.*, 35 FMSHRC 1979, 1982 (July 2013) (citations omitted). It is not required that a similar type of accident have actually happened. *See Elk Run Coal Co.*, 27 FMSHRC at 906. The Secretary must prove all the S&S elements by the preponderance of the evidence. *Keystone Coal Mining Corp.*, 17 FMSHRC 1819, 1838 (Nov. 1995) (citing *Garden Creek Pocahontas Co.*, 11 FMSHRC 2148, 2152 (Nov. 1989)).

Negligence

The Mine Act is a strict liability statute, so negligence plays no role in citation issuance. 30 U.S.C. § 814(a). Inspectors must issue citations, regardless of operator negligence, whenever a mandatory safety standard is violated. *Musser Eng’g, Inc., and PBS Coals, Inc.*, 32 FMSHRC 1257, 1272 (Oct. 2010) (citing *Spartan Mining Co.*, 30 FMSHRC 699, 706 (Aug. 2008)). But negligence does factor into the assessment of civil penalties. *Asarco, Inc.*, 8 FMSHRC 1632, 1636 (Nov. 1986), *aff’d*, 868 F.2d 1195 (10th Cir. 1989).

Negligence is “conduct, either by commission or omission, which falls below a standard of care established under the Mine Act to protect miners against the risks of harm.” 30 C.F.R.

§ 100.3(d). Mine operators are “required to be on the alert for conditions and practices in the mine that affect the safety or health of miners and to take steps necessary to correct or prevent hazardous conditions or practices.” *Id.* No negligence exists when “[t]he operator exercised diligence and could not have known of the violative condition or practice.” *Id.* Low negligence means “[t]he operator knew or should have known of the violative condition or practice, but there are considerable mitigating circumstances.” *Id.* The moderate negligence categorization is appropriate if operators “knew or should have known of the violative condition or practice, but there are mitigating circumstances.” *Id.* High negligence indicates “[t]he operator knew or should have known of the violative condition or practice, and there are no mitigating circumstances.” *Id.* Lastly, reckless disregard requires that “[t]he operator displayed conduct which exhibits the absence of the slightest degree of care.” *Id.*

Factors used to determine negligence include the “foreseeability of the miner's conduct, the risks involved, and the operator's supervising, training, and disciplining of its employees to prevent violations of the standard in issue.” *A. H. Smith Stone Co.*, 5 FMSHRC 13, 15 (Jan. 1983) (citations omitted). In addition, mitigating circumstances such as “actions taken by the operator to prevent or correct hazardous conditions or practices” are also weighed. 30 C.F.R. § 100.3(d).

Mitigation is something the operator does affirmatively, with knowledge of the potential hazard being mitigated, that tends to reduce the likelihood of an injury to a miner. This includes actions taken by the operator to prevent or correct hazardous conditions.

Gravity

FMSHRC is obligated to consider “the gravity of the violation” in assessing civil penalties. 30 U.S.C. § 820(i). This is usually “viewed in terms of the seriousness of the violation.” *Consolidation Coal Co.*, 18 FMSHRC 1541, 1549 (Sept. 1996) (citing *Sellersburg Stone Co.*, 5 FMSHRC 287, 294-95 (Mar. 1983), *aff'd*, 736 F.2d 1147 (7th Cir. 1984); and *Youghioghney & Ohio Coal Co.*, 9 FMSHRC 673, 681 (Apr. 1987). The Commission specified the standard is the seriousness of “the effect of the hazard if it occurs.” *Id.* at 1550 (citing *Quinland Coals, Inc.*, 9 FMSHRC 1614, 1622 n.11 (Sept. 1987)). Important factors include the importance of the violated standard, and case specific circumstances like mine operator defiance. *See Harlan Cumberland Coal Co.*, 12 FMSHRC 134, 140-1 (Jan. 1990)(ALJ Fauver). All considerations are encompassed within the overriding goal of encouraging compliance with the Mine Act and protecting Miners. *Id.* The gravity analysis focuses on factors such as the likelihood of an injury, the severity of an injury, and the number of miners potentially injured. The likelihood of injury is calculated assuming continuation of normal mining operations without the violation’s abatement. *U.S. Steel Mining Co.*, 7 FMSHRC at 1130.

Penalty

Commission judges have authority to set civil penalties, so long as they remain within the boundaries of their statutory obligations and advance the Mine Act’s deterrent goals. *Cantera Greene*, 22 FMSHRC 616, 620 (May 2000) (citations omitted). The Commission is not bound by the Secretary’s penalty proposal, all determinations on a *de novo* basis. *Sellersburg Stone Co.*,

736 F.2d 1147, 1151 (7th Cir. 1984). Judges are obligated to provide an explanation if the assigned penalty differs substantially from the Secretary's proposal. *Sellersburg Stone Co.*, 5 FMSHRC 287, 293 (Mar. 1983).

The Mine Act sets out six criteria for judges to weigh in civil penalty assessment: (1) the operator's history of previous violations; (2) the appropriateness of such penalty to the size of the business of the operator charged; (3) whether the operator was negligent; (4) the effect on the operator's ability to continue in business; (5) the gravity of the violation; and (6) the demonstrated good faith in abatement of the violative condition. 30 U.S.C. § 820(i). The Secretary uses the same criteria in proposing penalties, which is embodied in MSHA's penalty point scoring system. *Sellersburg*, 736 F.2d at 1151. All six criteria must be addressed in a judge's decision. *Sellersburg*, 5 FMSHRC at 293.

While judges must consider all of the statutory criteria, there is no requirement that each criterion receive equal weight. *Thunder Basin Coal Co.*, 19 FMSHRC 1495, 1503 (Sept. 1997) (citations omitted). Judges are free to give greater importance to considerations of the operator's negligence and the violation's gravity. *Lopke Quarries, Inc.*, 23 FMSHRC 705, 713 (July 2001). Furthermore, it is "appropriate for a judge to raise a penalty "significantly" based on his findings of extreme gravity and unwarrantable failure." *Musser Eng'g, Inc., and PBS Coals, Inc.*, 32 FMSHRC 1257, 1289 (Oct. 2010) (citing *Spartan Mining Co. Inc.*, 30 FMSHRC 699, 725 (Aug. 2008)).

Judges must weigh the record, make findings, and explain the reasoning behind the final penalty order. *Hubb Corp.*, 22 FMSHRC 606, 612 (May, 2000) (citing *Mid-Continent Res., Inc.*, 16 FMSHRC 1218, 1222 (June 1994)). This serves the dual purposes of giving notice and explanation to the mining community while creating a record for further review by the Commission. *Id.* Lastly, as the Commission held in *Sellersburg Stone Co.*:

[I]t behooves the Commission and its judges to provide a sufficient explanation of the bases underlying the penalties assessed by the Commission. If a sufficient explanation for the divergence is not provided, the credibility of the administrative scheme providing for the increase or lowering of penalties after contest may be jeopardized by an appearance of arbitrariness.

5 FMSHRC at 293.

Citation No. 8661787

On April 25, 2012, at 11:30 a.m., MSHA Inspector Robert D. Stalder¹ ("Stalder" or "Inspector Stalder") issued Citation No. 8661787 to NISC's Mine #1, alleging a violation of 30

¹ Inspector Stalder's mining career began in 1981, working in an underground coal mine in Colorado. (Tr. 11:14-7) From 1994 through 2006, Stalder was employed as a safety director and safety supervisor at a number of private mining companies including, U.S. Silica and Vulcan Materials. (Tr. 11:18-12:2) In 2006 he joined MSHA, where he works as a safety inspector. *Id.*

(continued...)

C.F.R. § 56.11027, pursuant to Section 104(a) of the Mine Act. The regulation requires that “[s]caffolds and working platforms shall be of substantial construction and provided with handrails and maintained in good condition.” 30 C.F.R. § 56.11027. Section 56.11027 is a mandatory safety standard. The citation alleges:

An opening of 24 inches exists on the deck of the Secondary Crusher deck where the ladder access is. There are no chains to cover the opening when miners must be on the crushers deck. This exposes miners to a potential fall of 78 inches to the ground. Should a miner fall it could result in fractures and sprains leading to lost work days. Miners are on this deck to start and stop the engine that runs the crusher and when making adjustments and repairs on the crusher. The opening is on the side in direct line where work is done. Other raised decks on site have chains that act as rail for when miners are required to work on the deck. There was no indication that chains had ever been on these rails.

Ex. S-1-A.

The Secretary’s Interpretation of Section 56.11027 is Entitled to Deference

Respondent argued Section 56.11027 does not mandate handrails across work platform entrances. (Tr. 54:22–55:1) This view is based on the regulation not explicitly requiring handrails to “completely enclose a working platform.” *Id.* Inspector Stalder countered that totally surrounding the work platform’s perimeter is necessary to fulfill Section 56.11027 purpose in mitigating falling hazards. (Tr. 55:4-6)

The Commission has found that when interpreting the Secretary’s Regulations:

Where the language of a regulatory provision is clear, the terms of that provision must be enforced as they are written unless the regulator clearly intended the words to have a different meaning or unless a meaning would lead to absurd results. *See Dyer v. United States*, 832 F.2d 1062, 1066 (9th Cir. 1987); *Utah Power & Light Co.*, 11 FMSHRC 1926, 1930 (Oct. 1989). If, however, a standard is ambiguous, courts have deferred to the Secretary’s reasonable interpretation of the regulation. *See Energy West Mining Co. v. FMSHRC*, 40 F.3d 457, 463 (D.C. Cir. 1990); *accord Sec’y of Labor v. Western Fuels-Utah, Inc.*, 900 F.2d 318, 321 (D.C. Cir. 1990) (“agency’s interpretation of its own regulation is of ‘controlling weight unless it is plainly erroneous or inconsistent with the regulation.’”) (quoting *Bowles v. Seminole Rock & Sand*

¹ (...continued)

Stalder is a member of the National Mine Rescue Group and has served on the coal mine examiner boards in both Colorado and Wyoming. (Tr. 13:21-4; Tr. 14:12-6) At the time of hearing, Stalder had worked at MSHA for seven years. (Tr. 11:12)

Co., 325 U.S. 410, 414 (1945)). The Secretary's interpretation of her regulations is reasonable where it is "logically consistent with the language of the regulation[s] and ... serves a permissible regulatory function." *General Elec. Co. v. EPA*, 53 F.3d 1324, 1327 (D.C. Cir. 1995) (citations omitted).

Lodestar Energy, Inc., 24 FMSHRC 689, 692 (July 2002); *Consolidation Coal Co.*, 18 FMSHRC 1541, 1545 (Sept. 1996). "It is only when the plain meaning is doubtful or ambiguous that the issue of deference to the Secretary's interpretation arises." *Pfizer Inc. v. Heckler*, 735 F.2d 1502, 1509 (D.C. Cir. 1984); *Bluestone Coal Corp.*, 19 FMSHRC 1025, 1028 (June 1997). Furthermore, "the statutory provision underlying the regulation, as well as any related statements accompanying the regulation's publication in the *Federal Register*, may illuminate the regulation's meaning." *Lehigh Southwest Cement*, 2011 WL 7463296, at *5 (Dec. 2011)(ALJ Paez) (quoting *Lodestar Energy*, 24 FMSHRC at 693). Additionally, "[i]n the absence of a statutory or regulatory definition of a term, or a technical usage, we look to the ordinary meaning of the terms used in a regulation." *Bluestone Coal Corp.*, 19 FMSHRC at 1029; *Peabody Coal Co.*, 18 FMSHRC 686, 690 (May 1996).

The Supreme Court established that when interpretation of regulatory language is challenged, the Secretary's interpretation of her own regulation is "controlling unless plainly erroneous or inconsistent with the regulation." *See Auer v. Robbins*, 519 U.S. 452, 461 (1997). However, "*Auer* deference is warranted only when the language of the regulation is ambiguous." *Christensen v. Harris Cnty.*, 529 U.S. 576, 588, (2000). Courts determine the plainness or ambiguity of a regulation by referring to "the language itself, the specific context in which that language is used, and the broader context as a whole." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997).

I find the Secretary's reading of Section 56.11027 that the entire work platform should be surrounded by hand rails, is the regulation's plain meaning. (Tr. 55:2-6) Nothing in Section 56.11027 indicates an exemption for work platforms entrances from the railing requirement. Even if it were possible to claim some ambiguity remains in the statute, I find the deference accorded to reasonable interpretations by the Secretary outweighs the Respondent's argument that only some of the work platform should be covered.

There is No Conflict Between Regulations

Respondent also argued placing chains across the platform entrance violated 30 C.F.R. § 56.4530. (Resp. Br. at 11) This regulation requires that "[b]uildings or structures in which persons work shall have a sufficient number of exits to permit prompt escape in case of fire." 30 C.F.R. § 56.4530. Respondent claims the act of unclipping the chains could so hinder escaping miners that it violates the prompt escape requirement. (Resp. Br. at 11; Tr. 57:5-11) This argument was culminated with a hypothetical emergency, in which a burning or scalded miner was trapped on the crusher deck, "pawing helplessly at the chained exit." (Resp. Reply Br. at 2) This scenario is difficult to credit, since in normal circumstances unclipping the chains only

takes 10 seconds. (Tr. 213:1-3) In his testimony, Brian Russell² (“Russell”) compared the chain’s attachment to a dog leash clip. (Tr. 212:16-22) I conclude an exit with a ten-second delay still permits prompt escape. Given the mechanism’s simplicity, and the speed with which it can be opened in normal circumstances, I find no conflict with Section 56.4530.

Even if I found a conflict between the two standards, the appropriate forum in which to make a diminution in safety claim is an MSHA modification proceeding. *Clinchfield Coal Co.*, 11 FMSHRC 2120, 2130 (Nov. 1989). If the proposed modification is granted, this is grounds for not issuing a civil penalty for the citation. *Sewell Coal Co.*, 5 FMSHRC 2026, 2029 (Dec. 1983). However, if these steps are not taken, then safety diminution claims are not a defense in enforcement proceedings. *Clinchfield*, 11 FMSHRC at 2130. I find no indication in the record that NISC petitioned for a modification from MSHA.

The Violation³

The citation alleges reasonably likely injury that could be reasonably expected to result in lost workdays or restricted duty, the violation was significant and substantial, one person could be affected, and the operator’s negligence was moderate. (Ex. S-1-A) The number of persons likely to be affected by an accident was not contested.

Inspector Stalder was conducting an E01 inspection at Mine #1. (Tr. 17:8-9; Tr. 18:5-7) The plant was not in operation at time of inspection, but customer trucks were being loaded on site. (Tr. 18:15-19) The secondary crusher platform was identified as a work platform because it is used to adjust crusher plate tension, maintain the engine, and grease the shaft and rotor bearings (Tr. 21:6-14; Tr. 207:2-4) Russell testified the platform is also used to start/stop the engine, and adjust the bolts on the crusher’s impactor. (Tr. 197:5-21) Based on this testimony, I find the secondary crusher’s deck is a work platform. Stalder issued Citation No. 8661787 as a violation of 30 C.F.R. § 56.11027, based on a 24 inch opening in the platform’s railing at the entrance. (Ex. S-1-A; Ex. S-2-A) A fall from the platform would be approximately 6.5 feet. *Id.*

This citation is placed in context by two relevant cases regarding Section 56.11027, both of which found the absence of railing around the whole work platform to be a violation. First, in

² Brian Russell is quarry superintendent at NISC, and at time of litigation had worked there for ten years. (Tr. 189:1-5)

³ The findings of fact here and below are based on the record as a whole and my careful observation of the witnesses during their testimony. In resolving any conflicts in the testimony, I have taken into account the interests of the witnesses, or lack thereof, and consistencies, or inconsistencies in each witness’s testimony and between the testimonies of other witnesses. In evaluating the testimony of each witness, I have also taken into account his or her demeanor. Any perceived failure to provide detail about any witness’s testimony is not a failure on my part to consider it. The fact that some evidence is not discussed does not mean it was not considered. *See Craig v. Apfel*, 212 F.3d 433, 436 (8th Cir. 2000) (administrative law judge is not required to discuss all evidence and failure to cite specific evidence does not mean it was not considered). I have also fully considered the contents of the official file, including the pre- and post-hearing submissions of the parties, and the exhibits admitted into evidence.

Granite Rock Co., failure to cover an eighteen inch gap over the platform entrance violated Section 56.11027. 32 FMSHRC 1792, 1794 (Nov. 2010)(ALJ Weisberger). Second, in *Palmer Coking Coal Co.* the violation was held not to be S&S because only a small percentage of the deck's perimeter remained open. 26 FMSHRC 504, 508 (June 2004)(ALJ Barbour). The MSHA inspector's S&S designation was wrong because the odds of injury were too remote to be considered "reasonably likely." *Id.* However, the omission was still viewed as serious. *Id.*

The record is clear that no railing covered the secondary crusher entrance. Therefore, the work platform was not provided with sufficient handrails around the whole perimeter to prevent falls. I find there was a violation of Section 56.11027.

Negligence

Inspector Stalder cited negligence as moderate because other onsite work platforms had chains across the entrances, indicating the operator knew about the requirement. (Tr. 26:13-21) Stalder noted two mitigating circumstances in favor of NISC. First, the manufacturer built the crusher without railing across the entrance. *Id.* This defense, which was also mentioned in regard to the other citations, is irrelevant because the manufacturer's omission does not excuse the mining company from maintaining its equipment according to MSHA regulations. Second, previous inspectors omitted to cite the violation, lowering operator culpability. (Tr. 27:7-9; Tr. 202:6-9)

Moderate negligence means the operator "knew or should have known of the violative condition or practice, but there are mitigating circumstances." 30 C.F.R. § 100.3(d). I find NISC should have known handrails must encompass work platforms, and thereby understood the secondary crusher's violative condition. However, because there is a mitigating circumstance, the violation was correctly cited as moderately negligence.

Gravity

The gravity analysis focuses on factors such as the likelihood of an injury, its severity, and the number of miners potentially injured. Inspector Stalder testified the probable injuries of a miner who fell through the gap could be reasonably expected to result in lost work days or restricted duty. (Tr. 24:18-24) Specifically, a 6.5 foot fall is likely to result in sprained, twisted, or fractured limbs. *Id.* However, falls from lesser heights are sometimes fatal. *Id.* Based on past experience, and the large number of falling incidents reported to MSHA, Stalder considered this type of serious accident to be reasonably likely. (Tr. 61:19-22) The citation alleges only one person would be affected, which is reasonable given NISC's small size. (Ex. S-1-A) I find an injury was reasonably likely and would be serious in nature, possibly resulting in lost work days or restricted duty.

Significant and Substantial

There was a mandatory safety standard violation. (Ex. S-1-A) This violation contributed to the discrete safety hazard of falling through the secondary crusher's entrance. (Tr. 20:16-20) It is reasonably likely a fall would result in an injury of a reasonably serious nature. (Tr. 24:18-24)

The remaining factor in an S&S designation, the third *Mathies* element, is whether there is a reasonable likelihood that the hazard contributed to will result in an injury.

Inspector Stalder testified an injury was reasonably likely because the opening was near the work area. (Tr. 21:17-23) Stalder had seen similar railing openings cause accidents. (Tr. 22:8-11) Lastly, variograms studied by Stalder indicated a work platform fall was likely. (Tr. 25:23–26:4) Russell testified the work platform was only used once in the previous year for crusher adjustment. (Tr. 198:23–199:2) But the platform is used in a variety of other tasks, including crusher plate tension adjustment, repairs, shaft and rotor bearing greasing, impacter bolt adjustment, and to start/stop the engine. (Tr. 21:11-14; Tr. 207:2-4; Tr. 197:5-21) Respondent also argued the entrance gap was relatively small in proportion to the platform's overall perimeter, two feet out of fifty feet. (Resp. Reply Br. at 2; Tr. 196:5-10) Lastly, Russell testified miner positioning while working on the platform would cause a slip to throw them into the railing. (Tr. 201:4-6)

Respondent cited ALJ Barbour's reasoning in *Palmer Coking Coal Co.*, to argue injury was not reasonably likely to result from the hazard. 26 FMSHRC 504, 508 (June 2004) (*See also* Resp. Reply Br. at 2). In this case, an even a smaller percentage of the perimeter was unguarded than in the *Palmer* work platform. *Id.* However, as detailed above, the platform is used in a number of routine tasks. At a minimum, the platform is used twice daily to turn the engine on and off. (Tr. 197:5-8) I find the platform's frequent usage during crusher operations creates a reasonable likelihood that the falling hazard would result in an injury. Furthermore, an MSHA "inspector's judgment is an important element in an S&S determination." *Harlan Cumberland Coal Co.*, 20 FMSHRC 1275, 1278-9 (Dec. 1998) (citations omitted). I credit Inspector Stalder's judgment that the violation was reasonably likely to result in injury. Since all the *Mathies* elements are proven, I find the violation is S&S.

Penalty

The Secretary assessed the penalty for Citation No. 8661787 at \$112.00. NISC is a small operator, owning and leasing five quarries in 2012. (Tr. 268:12-15) According to Stipulation No. 8, the respondent's business would not be significantly affected if the full penalty is imposed. The operator was moderately negligent and the violation is S&S. NISC did not promptly correct the violation, causing Order No. 8661798 to be issued twenty-one days after the mandated termination date. (Tr. 35:20–36:7; Ex. S-3-A) The reason NISC offered for this failure was that the pit had not been in use, and the operator's intent to install entrance chains before using the crusher. (Tr. 45:1-3) Russell did not recall whether he informed his employer of the violation's required completion date. (Tr. 215:4-9) Given the compliance delay, NISC did not engage in good faith abatement. I agree with the Secretary's calculus and assess a penalty of \$112.00.

Citation No. 8661788

On April 25, 2012 at 11:40 a.m., Inspector Stalder issued Citation No. 8661788 alleging a violation of 30 C.F.R. § 56.4501 pursuant to Section 104(a) of the Mine Act. The regulation requires that "[f]uel lines shall be equipped with valves capable of stopping the flow of fuel at the source and shall be located and maintained to minimize fire hazards. This standard does not

apply to fuel lines on self-propelled equipment.” 30 C.F.R. § 56.4501. Section 56.4501 is a mandatory safety standard. The citation alleges:

The secondary crusher did not have a fuel shutoff valve between the tank and the engine. Should a leak in the lines occur it could result in a fire exposing miners to burn and smoke inhalation type injuries. Since the tank is under the engine, fuel would go to the ground away from ignition sources. The crusher has been on site for a long time and the operator was unaware there was no fuel shut off.

Ex. S-5-A.

Section 56.4501 Applies to Fuel Tank Hoses

Respondent argued 30 C.F.R. § 56.4501 only applies to very large fuel lines, such as gas pipelines. (Tr. 91:18–92:3) The claim is that the regulation targets major fuel lines because leaks from them are more dangerous than spills from relatively small fuel tanks. (Tr. 90:19–91:6) Respondent’s interpretation contradicts the text of the regulation, which includes no exception for smaller fuel lines. 30 C.F.R. § 56.4501. Not applying Section 56.4501 to engine tank fuel lines would undermine the Mine Act’s goal of improving miner safety. Furthermore, this court has previously applied Section 56.4501 to engine tank fuel lines. *See Nelson Quarries, Inc.*, 30 FMSHRC 254, 278 (Apr. 2008)(ALJ Manning); *Nelson Quarries, Inc.*, 30 FMSHRC 443, 451 (May 2008)(ALJ Manning). For these reasons, I find Section 56.4501 was correctly cited.

The Violation

The citation alleges unlikely injury that could reasonably be expected to result in lost work days or restricted duty, one person could be affected, and the operator’s negligence was moderate. (Ex. S-5-A) It is uncontested that no fuel valve was installed on the secondary crusher at time of inspection. Neither party contests that the secondary crusher is not self-propelled mobile equipment. (Tr. 70:1-6) This classification is accurate because the crusher can only be moved if attached to another vehicle, such as a tractor. *Id.*

During Stalder’s inspection of the secondary crusher, he observed the fuel hoses connecting the two tanks to the engine were not equipped with shutoff valves. (Tr. 65:10-15; S-6-C) Each fuel tank holds approximately 100 gallons. (Tr. 221:17-19) Stalder wrote a citation for violation of 30 C.F.R. § 56.4501, which is a fire prevention regulation. (Tr. 65:21-23) In the event of a fuel hose leak, the shutoff valve can prevent additional fuel from escaping by keeping it in the tank. (Tr. 66:22–67:4) The hazard Stalder envisioned was that in the absence of a shutoff valve, fuel would continue to leak and form a highly flammable pool under the crusher. (Tr. 68:24–69:3) Spilled fuel can be ignited in numerous ways, including engine heat, maintenance activities such as welding, and sparks from electric cables. (Tr. 72:24–73:10) However, leaked fuel would tend to flow away from ignition sources. (Ex. S-5-A)

The absence of fuel shutoff valves on the engine hoses is uncontested in the record. I find there was a violation of Section 56.4501.

Safety Diminution Argument is Not a Valid Defense

Respondent argued against a violation of 30 C.F.R. § 56.4501, claiming the regulation diminishes miner safety by increasing the probability of leak formation. (Tr. 224:9–225:2; Resp. Br. at 17) The argument is that installing a fuel shutoff valve doubles the number of places where leaks are likely to develop. *Id.* Secondly, Respondent interpreted Section 56.4501 as a fire fighting, rather than fire prevention, regulation. (Tr. 84:6-9; Tr. 65:21-23) Stalder agreed attempting to fight a fire by shutting off the fuel valve would be unwise. (Tr. 89:17-21) Respondent views the shutoff valve as imperiling miners by encouraging them to enter “into a danger zone.” (Resp. Br. at 17) This is not a valid defense in this civil penalty proceeding.

As outlined by the Commission in *Sewell Coal Co.*, “where adherence to a standard would reduce miner safety -- logic dictates and Congress provided the modification procedures.” 5 FMSHRC 2026, 2028 (Dec. 1983). MSHA, rather than the Commission, is the body responsible for these modification procedures. *Id.* The determination whether the mandatory standard would be counterproductive is solely made by MSHA. *Id.* at 2029 (citing *Penn Allegh Coal Co. Inc.*, 3 FMSHRC 1392, 1398 (June 1981)). Mine operators should exhaust the mechanisms provided by MSHA in seeking modification of a citation they believe is harmful. *Id.* at 2030. Only after the Secretary recognizes the claim and grants a modification, is safety diminution a valid defense in FMSHRC enforcement proceedings. *Clinchfield Coal Co.*, 11 FMSHRC 2120, 2130 (Nov. 1989).

I find no evidence that NISC attempted to secure a modification from the Secretary based on the concern that implementing Section 56.4501 diminished miner safety. This argument is not relevant to this proceeding.

Negligence

Inspector Stalder cited NISC’s failure to equip the fuel hoses with shutoff valves as moderately negligent. (Ex. S-5-A) Other fuel lines onsite were outfitted with shutoff valves, indicating NISC understood the requirement. (Tr. 68:16-21) There was no history of previous injuries or citations related to missing fuel valves. (Tr. 218:11-18) Stalder viewed the Respondent’s unawareness of the shutoff valve’s absence as mitigating. (Tr. 68:16-21) I disagree, because a company’s ignorance of its own equipment is not an excuse. Stalder argued penalizing operators for high negligence is unjust when numerous MSHA inspections overlooked a violation, failing to bring it to the operator’s attention. (Tr. 164:13–165:23) Russell testified, in regard to this citation and the all others, about his evaluation that the equipment was reasonably safe without meeting the mandatory safety requirements. (Tr. 218:5-10) However, this belief has no effect in mitigating NISC’s negligence.

I find NISC was moderately negligent. The company “knew or should have known of the violative condition or practice, but there are mitigating circumstances.” 30 C.F.R. § 100.3(d). NISC should have known about Section 56.4501 because mine operators are held to a “high

standard of care,” and they ought to maintain their equipment according to MSHA regulations. 30 C.F.R. § 100.3(d). But the failure of previous inspectors to cite the infraction is somewhat mitigating. I uphold moderate negligence designation.

Gravity

Inspector Stalder cited the possibility for injury as unlikely. (Ex. S-5-A) First, it was improbable that maintenance activities would start a fire in the event of a leak. (Tr. 89:8-16) While there are potential ignition sources near the crusher, such as welders and cutting torches, NISC has never had a fuel leak. (Tr. 226:12-14; Tr. 228:10-20) Furthermore, miners do not smoke onsite, making dropped cigarettes a remote possibility. (Tr. 251:17-18) Second, any spilled fuel would flow away from potential ignition sources and thereby diminish the fire hazard. (Ex. S-5-A) Third, Respondent believes significant fuel leaks would be spotted, also supporting the estimate that the chance for injury was unlikely. (Tr. 221:20-23) I find the risk of injury was unlikely.

However, if a fire occurred it could result in serious injury causing lost days or restricted duty. Stalder considered smoke inhalation and burns the most likely injuries of an accidental fire. (Tr. 68:7-9) Given the operation’s small size, it is reasonable to estimate only one person would be affected. (Tr. 68:10-13) I find an injury from a fuel leak fire is serious in nature and could result in lost work days or restricted duty.

Penalty

The Secretary assessed the penalty for Citation No. 8661788 at \$112.00. NISC is a small operator, owning and leasing five quarries in 2012. (Tr. 268:12-14) According to Stipulation No. 8, the respondent’s business would not be significantly affected if the full penalty is imposed. The operator was moderately negligent and the violation, while potentially serious, was unlikely to cause injury. The operator did not comply with the order to install shutoff valves by May 9, 2012, causing Order No. 8661799 to be issued on May 16, 2012. (Tr. 73:18-22; Ex. S-7-A) The respondent’s defense was that the quarry had not been used, and NISC would install the fuel valves before resuming work. (Tr. 74:13-17) The delay in compliance shows NISC did not engage in good faith abatement. I assess a penalty of \$112.00.

Citation No. 8661789

On April 25, 2012, at 2:35 p.m., Inspector Stalder issued Citation No. 8661789 alleging a violation of 30 C.F.R. § 56.14207 pursuant to Section 104(a) of the Mine Act. The regulation requires that “[m]obile equipment shall not be left unattended unless the controls are placed in the park position and the parking brake, if provided, is set.” 30 C.F.R. § 56.14207. Section 56.14207 is a mandatory safety standard. The citation alleges:

The Dodge Ram Pickup truck (License Plate 4584 HS exp. 06-12) was left unattended without the parking brake set. This exposes miners to hazard of being struck by this pickup should another piece of equipment hit the vehicle and cause it to move. This area

has very little mobile equipment movement and little foot traffic. The truck was in the park position. The pickup had been parked for a long time and management was unaware the brake was not set.

Ex. S-9-A.

The Violation

The citation alleges unlikely injury that could reasonably be expected to result in lost work days or restricted duty, one person could be affected, and the operator's negligence was moderate. *Id.*

Inspector Stalder noticed the parking brake on the Dodge Ram pickup truck was not set. (Tr. 99:23–100:5; Ex. S-10-A) Failure to set the parking brake on unattended vehicles, in addition to breaking Section 56.14207, is a violation of the “Rules to Live By.” (Tr. 100:10-17) MSHA considers these rules to be especially important, and accordingly has increased efforts to educate miners about them. *Id.* The truck was situated in the mine's shop, on level ground, with gears set in the park position. (Tr. 101:3-8) Its battery cables were also disconnected. (Tr. 109:4-5) The truck was placed off to the side of the shop, and away from the areas trafficked by other vehicles stored there. (Tr. 234:10-16) The shop's dimensions are approximately 60 feet by 80 feet, and no other vehicles were in the building at time of inspection. (Tr. 110:4-17) Stalder considered the truck unattended because no miners were in the shop. (Tr. 102:12-15)

It is disputed whether the truck was tagged out of service during the inspection on April 25, 2012. The truck was tagged out by the following morning on April 26, 2012, when the documentary picture was taken, but there is no indication on the tag itself as to when it was placed. (Tr. 235:21-24; Ex. S-10-D) Russell testified the truck was first tagged out in 2010. (Tr. 230:15-17) The truck was later used in 2011, but due to battery problems was again decommissioned. (Tr. 230:18–231:3) Furthermore, Russell claimed to have disconnected the battery and chocked the wheels. (Tr. 231:16-18) However, Russell could not positively state in cross examination whether the tag was affixed during Stalder's inspection. (Tr. 235:16-20) In contrast, Inspector Stalder was certain the vehicle was not tagged out when the citation was issued on April 25, 2012. (Tr. 102:23–103: 8) Based on Inspector Stalder's confident testimony, and Russell's admitted uncertainty, I find the vehicle was not tagged out of service at the time of the inspection.

I find the Dodge Ram pickup truck's brakes were not set at time of citation, and that NISC violated 30 C.F.R. § 56.14207.

Negligence

Inspector Stalder cited NISC for moderate negligence. (Ex. S-9-A) Both miners and management understood the parking brake requirement from company training. (Tr. 101:23-102:11) It is possible management was unaware of the truck's violative condition, but this would not mitigate NISC's negligence. *Id.* Both Russell and Stalder agree the parking brake should have been set, even if the truck was tagged out of service. (Tr. 109:15-21; Tr. 237:14-20) Some

steps were taken to immobilize the truck, like unplugging the battery and choking the wheels. (Tr. 231:4-8; Tr. 232:9-17) Respondent argued these measures were the functional equivalent of setting the parking brake. (Resp. Reply Br. at 4) However, Russell admitted some uncertainty on whether the wheels were choked at time of inspection. (Tr. 236:16-18) I find the wheels were choked since no contrary evidence was presented.

I find NISC was highly negligent. The “operator knew or should have known of the violative condition or practice, and there are no mitigating circumstances.” 30 C.F.R. § 100.3(d). NISC understood the parking brake should be set, but neglected to do so in this instance. (Tr. 101:23–102:11) While some appropriate steps were taken to decommission the truck, no mitigating factors have been presented.

Gravity

It is undisputed an accident involving the pickup truck could cause serious injuries, resulting in lost work days or restricted duty. (Ex. S-9-A) However, accidents caused by failures to set brakes are sometimes fatal. (Tr. 100:10-17) Only one miner was estimated to be affected in an accident, which is reasonable given the operation’s small size. *Id.* Inspector Stalder rated the chance for injury as unlikely. *Id.* This is because for the truck could only move if hit into motion by another object. (Tr. 112:15-17) Other vehicles could be safely moved within the shop. (Tr. 112:5-8) Russell argued the truck’s placement made it very difficult to hit with the loading vehicles also stored in the area. (Tr. 234:2-9) Furthermore, the wheels were choked, decreasing the truck’s likely movement. (Tr. 231:4-8) I find that an injury was unlikely because the truck was placed off to the side, its wheels were choked, and the shop could be navigated safely. However, an injury involving the truck would be serious in nature and could result in lost work days or restricted duty.

Penalty

The Secretary assessed the penalty for Citation No. 8661789 at \$100.00, deducting \$12.00 for good faith abatement. NISC is a small operator, owning and leasing five quarries in 2012. (Tr. 268:12-14) According to Stipulation No. 8, the respondent’s business would not be significantly affected if the full penalty is imposed. The operator was highly negligent and the violation, while potentially serious, was unlikely to cause injury. Despite finding NISC’s negligence to be higher than assessed by the Secretary, a larger penalty is unwarranted because overall this is a minor violation. The operator demonstrated good faith abatement, terminating the violation by 7:30 am the following morning. (Tr. 105:15-20) I assess a penalty of \$100.00.

Citation No. 8661790

On May 2, 2012, at 8:00 a.m., Inspector Stalder issued Citation No. 8661790 alleging a violation of 30 C.F.R. § 56.12028 pursuant to Section 104(a) of the Mine Act. The regulation requires that “[c]ontinuity and resistance of grounding systems shall be tested immediately after installation, repair, and modification; and annually thereafter. A record of the resistance measured during the most recent tests shall be made available on a request by the Secretary or

his duly authorized representative.” 30 C.F.R. § 56.12028. Section 56.12028 is a mandatory safety standard. The citation alleges:

The operator did not do a continuity and resistance test on the ground rod next to the transformer and electrical control panel for the sump pump. The grounding rod attached conductor and all controls appeared in good condition. Failure to ensure proper grounding puts miners at risk of electrical related injuries. This rod has never been tested and the operator was unaware of the requirement to test it or the hazards related to it.

Ex. S-11-A

The Violation

The citation alleges unlikely injury that could reasonably be expected to result in lost workdays or restricted duty, one person could be affected, and the operator’s negligence was low. *Id.* Inspector Stalder discovered this violation while reviewing NISC’s test records. (Tr. 113:19–114:1) Respondent failed to conduct a continuity and resistance test on the cited grounding rod. *Id.* The test’s purpose is to check whether the grounding rod functions, and if miners are at risk of electrocution. (Tr. 118:7-17) One of the quarry’s sump pump control panels was attached to the grounding rod. (Tr. 120:1-6; Ex. S-12-A) The electricity running through the equipment was 110 volts, equivalent to standard household voltage. (Tr. 131:3-8)

I find no dispute in the record over NISC’s failure to perform a continuity and resistance test on the grounding rod. As such, I find NISC violated 30 C.F.R. § 56.12028.

Negligence

Inspector Stalder cited operator negligence as low, because previous inspections did not identify the violation. (Tr. 118:23–119:4) Stalder argued it can be unjust to penalize operators for high negligence when numerous MSHA inspections overlook a violation and fail to bring it to the operator’s attention. (Tr. 164:13–165:23) NISC appeared to be unaware of the testing requirement, despite being legally obligated to inform itself of MSHA regulations. (Tr. 119:3-11) However, a prior testing omission citation from Blacks quarry went to trial in 2011. (Tr. 239:7-20) This citation was very similar to the current violation, because it also dealt with a sump pump’s grounding system. *Id.*

Aside from NISC’s duty to inform itself of mandatory testing requirements, the prior citation provided notice and outweighs any omissions by prior MSHA inspections. High negligence means NISC “knew or should have known of the violative condition or practice, and there are no mitigating circumstances.” 30 C.F.R. § 100.3(d). The primary excuse offered by the company is that the testing requirement was forgotten, which is not a mitigating circumstance. Furthermore, the prior citation gave NISC notice about Section 56.12028. Based on the above, I find NISC was highly negligent.

Gravity

The violation's gravity is evaluated in light of the possibility that an untested grounding rod could be ineffective and expose miners to electrocution. (Tr. 117:2-12) Inspector Stalder, based on his holistic analysis of the electrical system, evaluated the potential injuries as lost work days or restricted duty. *Id.* However, the system contains sufficient voltage to cause a fatality. *Id.* The number of miners estimated to be affected by an accident was one, which is reasonable given the few miners employed by NISC. (Tr. 118:18-22) The injury probability was cited as unlikely, since there was a fair possibility that the grounding rod was safe. (Ex. S-11-A) Indeed, later testing confirmed the grounding rod worked effectively. (Tr. 123:21-24) I find that while an injury was unlikely, it would be serious in nature and could result in lost work days or restricted duty.

Penalty

The Secretary assessed the penalty for Citation No. 8661790 at \$112.00. NISC is a small operator, owning and leasing five quarries in 2012. (Tr. 268:12-14) According to Stipulation No. 8, the respondent's business would not be significantly affected if the full penalty is imposed. The operator was highly negligent, but the violation, while potentially serious, was unlikely to cause injury. Despite finding NISC's negligence to be higher than cited by the Secretary, a larger penalty is unwarranted because overall this is a minor violation. The operator did not comply with the order to perform the continuity and resistance test by May 16, 2012 causing Order No. 8669850 to be issued on May 17, 2012. (Tr. 73:18-22) Inspector Stalder recorded the test results several weeks later on June 11, 2012. (Tr. 74:13-17) The compliance delay shows NISC did not engage in good faith abatement. I assess a penalty of \$112.00.

Citation No. 8669850

On July 11, 2012, at 8:10 a.m., Inspector Stalder issued Citation No. 8669850 to Northern Illinois Service Company's Mine #2 alleging a violation of 30 C.F.R. § 56.4501 pursuant to Section 104(a) of the Mine Act. The regulation requires that "[f]uel lines shall be equipped with valves capable of stopping the flow of fuel at the source and shall be located and maintained to minimize fire hazards. This standard does not apply to fuel lines on self-propelled equipment." 30 C.F.R. § 56.4501. Section 56.4501 is a mandatory safety standard. The citation alleges:

There was no fuel shut off on the connecting hose between 2 fuel tanks located on the Inertia Crusher. This exposes miners to the hazards of a fire should a leak or break in the line develop. Miners fighting fires are exposed to burn and smoke inhalation type injuries. Miners are in loaders and are usually not near the crusher. A leak in the fuel line would likely flow onto the ground away from an ignition source. A similar citation was written previously to the operator at another mine site on the same type of equipment.

Ex. S-22-A

The Violation

The citation alleges unlikely injury that could reasonably be expected to result in lost workdays or restricted duty, one person could be affected, and the operator's negligence was high. *Id.*

Inspector Stalder discovered that the hose connecting two fuel tanks on the inertia crusher lacked a shutoff valve. (Tr. 134:21–135:2) The hose was positioned beneath both tanks, approximately 7.5 feet from the ground. (Ex. S-23-B; Ex. S-23-C; Tr. 241:19-21) If a leak developed, there was no way to prevent the fuel from both tanks from spilling onto the ground. *Id.* The machine is very similar to the inertia impactor crusher in Citation No. 8661788, which was issued on April 25, 2012. (Tr. 137:16-24) However, the fuel tanks' setup was different. (Tr. 138:1-4) Stalder estimated the tanks held about 200 gallons of fuel. (Tr. 138:5-8) The crusher is non-mobile equipment because it can only be moved by attachment to another piece of machinery. (Tr. 138:14-19)

In cross examination, Stalder admitted a person shorter than 5 feet and 11 inches, might not be able to reach the fuel valve. (Tr. 141:14-21) Respondent suggested a ladder would be needed to turn the valve off. (Tr. 142:2-12) Lastly, Respondent argued turning the valve would be unsafe, since it would necessitate removing at least one point of contact from the ladder. (Tr. 242:18–243:5) Stalder added in recross that at least one of the shutoff valves could be reached from the crusher's work platform. (Tr. 151:15-19) As noted above, a diminution in safety defense is only valid after the Secretary recognizes the claim and grants a modification. *Clinchfield Coal Co.*, 11 FMSHRC 2120, 2130 (Nov. 1989).

Respondent reiterated the argument that fuel shutoff valves increase the likelihood for leak formation. (Tr. 147:11–148:11) Furthermore, Respondent again argued in case of a fire, it would be unsafe to turn off the valve. (Tr. 150:8-14) As detailed above, these arguments are inappropriate and unwarranted here. Both parties referred to the potential ignition sources discussed in Citation No. 8661788 as well.

Based on the undisputed evidence that no fuel shutoff valve was installed on the hose connecting the crusher's fuel tanks, I find NISC violated Section 56.4501.

Negligence

Inspector Stalder cited NISC for high negligence, because the company was given notice through Citation No. 8661788 on April 25, 2012. (Ex. S-22-A; Tr. 135:18–136:8) NISC had over two months to install fuel valves before Citation No. 8669850's issuance on July 11, 2012. Both citations deal with fuel shutoff valves on inertia crushers, and the engine configurations were only slightly different. (Tr. 137:16-138:4) Respondent argued valve installation was unnecessary, since the crusher had not been operated since the initial April 25, 2012 citation. (Resp. Br. at 24-25) This is not a mitigating circumstance since MSHA inspections only occur several times per year. It would undermine the Mine Act's deterrent capability if operators could escape liability by claiming equipment was unused without taking any further steps to address the violation.

I find NISC was highly negligent. High negligence means “[t]he operator knew or should have known of the violative condition or practice, and there are no mitigating circumstances.” 30 C.F.R. § 100.3(d). The prior citation, No. 8661788, placed NISC on notice, and there are no mitigating circumstances.

Gravity

Stalder cited the probable injuries from a fuel leak fire as lost work days or restricted duty. (Tr. 135:7-13) The expected injury types include burns and smoke inhalation. *Id.* The injury risk would be especially severe if a miner chose to fight the fire. (Tr. 150:11-19) But, it is unlikely more than one miner would be injured. (Tr. 135:14-17) Respondent argued the accident probability was low because a large fuel leak would be easily visible. (Tr. 144:4-6) However, factors ranging from weather conditions to miner alertness might cause a spill to be undetected. (Tr. 145:12–146:1) Stalder evaluated the injury probability as unlikely, identical to the risk analysis in Citation No. 8661788. (Ex. S-22-A; Tr. 135:3-13) In the event of a leak, fuel would tend to flow away from potential ignition sources. *Id.* I find while an injury was unlikely, it would be serious in nature and could result in lost work days or restricted duty.

Penalty

The Secretary assessed the penalty for Citation No. 8669850 at \$100.00, deducting \$12.00 for good faith abatement. NISC is a small operator, owning and leasing five quarries in 2012. (Tr. 268:12-14) According to Stipulation No. 8, the respondent’s business would not be significantly affected if the full penalty is imposed. The operator was highly negligent, and in the unlikely event of an accident, it could lead to serious injury. NISC abated the violation in good faith. I assess a penalty of \$100.00.

Citation No. 8669851

On July 11, 2012, at 8:55 a.m., Inspector Stalder issued Citation No. 8669851 alleging a violation of 30 C.F.R. § 56.4501 pursuant to Section 104(a) of the Mine Act. The regulation requires that “[f]uel lines shall be equipped with valves capable of stopping the flow of fuel at the source and shall be located and maintained to minimize fire hazards. This standard does not apply to fuel lines on self-propelled equipment.” 30 C.F.R. § 56.4501. Section 56.4501 is a mandatory safety standard. The citation alleges:

There was no fuel shut off on the Secondary Crusher. This exposes miners to the hazards of a fire should a leak or break in the line develop. Miners fighting fires are exposed to burn and smoke inhalation type injuries. Miners are in loaders and are usually not near the crusher. A leak in the fuel line would likely flow onto the ground away from an ignition source. The operator was unaware this equipment did not have a fuel shut off on it.

Ex. S-24-A

The Violation

The citation alleges unlikely injury that could reasonably be expected to result in lost workdays or restricted duty, one person could be affected, and the operator's negligence was moderate. *Id.*

While inspecting a secondary crusher, Stalder noted fuel shutoff valves were not installed onto the hoses. (Tr. 153:15-20) These hoses, respectively a feed hose and return line, were attached to the tank's roof. *Id.* A greater chance for leakage existed because the hoses had deteriorated due to weathering. (Tr. 157:2-10; Ex. S-25-B) However, the area shown in the exhibit would spill little fuel if a leak developed. (Tr. 160:2-7) The secondary crusher is not a separate piece of mobile equipment. (Tr. 155:10-16) The fuel tank had capacity for a couple hundred gallons. (Tr. 160:8-13) Both parties referred back to the ignition sources discussed in Citation No. 8661788, and their comparative potentialities for starting a fire.

Respondent reiterates the arguments about fuel shutoff valve safety and effectiveness made in Citation No. 8661788. (Resp. Br. at 27) As I found above, these arguments are inappropriate here.

There is no dispute that a fuel shutoff valves were not installed onto the hoses. I find NISC violated 30 C.F.R. § 56.4501.

Negligence

Inspector Stalder cited NISC's negligence as moderate. (Ex. S-24-A) Stalder argued the negligence in this citation should be distinguished from that in No. 8669850. First, the hose configuration was different from those on the previously cited secondary crusher. (Tr. 154:18–155:1) Specifically, the fuel hose was attached to the roof of a single fuel tank. *Id.* Second, Stalder felt NISC did not have fair warning because previous MSHA inspections did not cite this particular machine. *Id.* However, this consideration would make high negligence inapplicable to most citations, since they often have not been previously cited.

I find NISC was highly negligent. High negligence means “[t]he operator knew or should have known of the violative condition or practice, and there are no mitigating circumstances.” 30 C.F.R. § 100.3(d). The prior citation, No. 8661788, placed NISC on notice that shutoff valves needed to be installed on all fuel lines. The difference in fuel line configuration is comparatively minor and is not a mitigating circumstance.

Gravity

The gravity assessment made is identical to that in Citation No. 8669850. (Tr. 154:13-15) Probable injuries were burns or smoke inhalation, and could reasonably be expected to result in lost work days or restricted duty. (Tr. 135:7-13) It is unlikely more than one miner would be injured in a fire. (Tr. 135:14-17) Friction from the conveyer belt rollers beneath the crusher increased the ignition chances, but they remained unlikely overall. (Tr. 161:16-19; Ex. S-24-A) Respondent supported this evaluation by testifying the hoses had never leaked. (Tr. 246:1-5)

Furthermore, no fuel would be siphoned from the hose if it broke above the bottom of the tank. (Tr. 245:20-23) I find an injury from a fuel leak fire was unlikely, but would be serious in nature and could result in lost work days or restricted duty.

Penalty

The Secretary assessed the penalty for Citation No. 8669851 at \$100.00, deducting \$12.00 for good faith abatement. NISC is a small operator, owning and leasing five quarries in 2012. (Tr. 268:12-14) According to Stipulation No. 8, the respondent's business would not be significantly affected if the full penalty is imposed. The operator was highly negligent but the violation, while potentially resulting in serious injury, was unlikely to materialize. The operator abated the violation in good faith. I assess a penalty of \$100.00.

Citation No. 8669852

On July 11, 2012, at 10:05 a.m., Inspector Stalder issued Citation No. 8669852 alleging a violation of 30 C.F.R. § 56.4501 pursuant to Section 104(a) of the Mine Act. The regulation requires that “[f]uel lines shall be equipped with valves capable of stopping the flow of fuel at the source and shall be located and maintained to minimize fire hazards. This standard does not apply to fuel lines on self-propelled equipment.” 30 C.F.R. § 56.4501. Section 56.4501 is a mandatory safety standard. The citation alleges:

There was no fuel shut off on the Main GenSet. This exposes miners to the hazards of a fire should a leak or break in the line develop. Miners fighting fires are exposed to burn and smoke inhalation type injuries. Miners are in loaders and are usually not near the GenSet. A leak in the fuel line would likely flow onto the ground away from an ignition source. The operator believed that since both lines went in the top of the fuel tank a shut off was not required and this condition has existed for a long time and had not been seen as a hazard or a violation.

Ex. S-26-A

The Violation

The citation alleges unlikely injury that could reasonably be expected to result in lost workdays or restricted duty, one person could be affected, and the operator's negligence was low. *Id.*

Stalder issued this citation while inspecting the GenSet's C-container, which is a metal enclosure similar to a semi-truck trailer. (Tr. 167:14-20; Tr. 174:21-22) Within the trailer, there was a fuel tank for the generator's diesel engine. (Tr. 163:4-9; Ex. S-27-A) No shutoff valve was installed on the hose connecting the tank and engine. *Id.* The fuel tank holds between 300-500 gallons and was placed adjacent to the double doors, near the back of the container. (Tr. 164:7-9; Tr. 247:20–248:1) The trailer's floor is composed of metal and wood with numerous, intentional, small holes. (Tr. 176:6-14) An electric control box lay on the C-container's floor. (Tr. 168:8-11)

Approximately a dozen other electrical boxes were also stored there. (Tr. 252:18-20) The setup is not a piece of self-propelled mobile equipment. (Tr. 168:19–169:2)

Respondent reiterates the arguments about fuel shutoff valve safety and effectiveness in Citation No. 8661788. (Resp. Br. at 28) As I found above, these arguments are inappropriate here.

There is no dispute in the record that the fuel line from the tank to the generator lacked a shutoff valve. I find NISC violated 30 C.F.R. § 56.4501.

Negligence

Inspector Stalder cited NISC's negligence as low. (Ex. S-26-A) Stalder justified this designation by arguing the number of years in which MSHA inspectors overlooked the infraction mitigated NISC's culpability. (Tr. 163:24–164:4) However, Stalder may have given a lower negligence rating simply because of fatigue. (Tr. 165:12-23) Stalder distinguished the negligence in this citation from the crusher violations, because the GenSet was in place longer and uncited for a greater time period. (Tr. 166:16–167:1)

I find NISC was highly negligent. This means “[t]he operator knew or should have known of the violative condition or practice, and there are no mitigating circumstances.” 30 C.F.R. § 100.3(d). NISC should have known about the violation, because Citation No. 8661788 gave the company notice and Section 56.4501 applies to fuel lines generally. NISC had sufficient time to install fuel valves on their equipment after the initial April 25, 2012 citation for this type of violation.

Gravity

Inspector Stalder's gravity assessment is identical to Citation No. 8669850. (Tr. 163:12-20) The probable injuries were burns or smoke inhalation, and found reasonably likely to result in lost work days or restricted duty. (Tr. 135:7-13) It is unlikely more than one miner would be injured in a fire. (Tr. 135:14-17) Arc flashes from the electric boxes and switches throughout the C-container are additional potential fire starters. (Tr. 252:18–253:4) The close proximity to the engine is another potential ignition source. (Tr. 167:21–168:4) But overall, the odds of an accident remain unlikely. (Ex. S-26-A) Stalder admitted a leak would probably be observable because of the holes in the C-container's floor. (Tr. 176:11-14) Respondent believes a fire would be trapped within in the C-container's confines, lowering potential for injury. (Res. Br. at 27-28) I find that injury from a fuel leak fire was unlikely, but serious in nature and could result in lost work days or restricted duty.

Penalty

The Secretary assessed the penalty for Citation No. 8669852 at \$100.00, deducting \$12.00 for good faith abatement. NISC is a small operator, owning and leasing five quarries in 2012. (Tr. 268:12-14) According to Stipulation No. 8, the respondent's business would not be significantly affected if the full penalty is imposed. The operator was highly negligent but an

accident, while capable of leading to serious injury, was unlikely to occur. Despite finding NISC's negligence was higher than cited by the Secretary, a larger penalty is unwarranted because overall this is a minor violation. The operator abated the violation in good faith. I assess a penalty of \$100.00.

Citation No. 8669853

On July 11, 2012, at 2:57 p.m., Inspector Stalder issued Citation No. 8669853 alleging a violation of 30 C.F.R. § 56.14100(b) pursuant to Section 104(a) of the Mine Act. The regulation requires that “[d]efects on any equipment, machinery, and tools that affect safety shall be corrected in a timely manner to prevent the creation of a hazard to persons.” 30 C.F.R. § 56.14100(b). Section 56.14100(b) is a mandatory safety standard. The citation alleges:

The brake lights on the Cat 980 Front End Loader failed to function when tested. Should another piece of equipment fail to see the loader is stopping and collide with it miners could receive jarring type of injuries. This equipment is only operated in daylight hours making an accident unlikely. The operator stated the brake lights were working when the pre-operational examination was conducted.

Ex. S-29-A

The Violation

The citation alleges unlikely injury that could reasonably be expected to result in lost workdays or restricted duty, one person could be affected, and the operator's negligence was low. *Id.*

While examining the Cat 980 front-end loader, Inspector Stalder noticed the brake lights were nonfunctional. (Tr. 178:16-19) Stalder could not estimate how long the brake lights had been broken. (Tr. 180:20–181:4) A fuse short out might have simultaneously rendered both lights inoperable. *Id.* But in Stalder's experience, both lights not working usually indicates the operator permitted both bulbs to go out over time and failed to replace them. (Tr. 187:15-23) At time of inspection, the CAT 980 was in operation and other vehicles were being driven in the area. (Tr. 181:5-10) Nothing on the Cat 980 pre-operational exam form suggests the brake light problem existed before Stalder's inspection. (Tr. 184:17-20)

Respondent challenges the citation, claiming to be in compliance by having corrected the defect in a “timely manner.” 30 C.F.R. § 56.14100(b). Russell testified NISC conducts daily pre-operational checks. (Tr. 255:12-18) The pre-operational exam records were dated, initialed, and kept in the scale house. (Tr. 255:23–256:14) However, Russell did not witness the exam on the day of inspection. (Tr. 258:22–259:2) Russell was unsure how the brake lights were checked, but could think of several ways in which one person might perform the test. (Tr. 258:10-13) Stalder agreed the malfunction would have been corrected in a timely manner if it was only discovered during his inspection, and was speedily corrected thereafter. (Tr. 185:7–186:7) Lastly, Stalder

did not challenge NISC's claim the brake lights worked during the pre-operational exam conducted that day before his inspection. (Tr. 186:8-11)

Whether a defect is repaired in a timely manner depends on "when the defect occurred and when the operator knew or should have known of its existence." *Lopke Quarries, Inc.*, 23 FMSHRC 705, 715 (July 2001). The Commission held that the Secretary failed to prove a violation of the timely manner requirement, because there was "no evidence in the record indicating when the device became defective." *Id.* The preponderance of the evidence standard requires the fact finder "to believe that the existence of a fact is more probable than its nonexistence before [he] may find in favor of the party who has the burden to persuade the [judge] of the fact's existence." *Keystone Coal Mining Corp.*, 17 FMSHRC 1819, 1838 (Nov. 1995) (citations omitted). The Secretary's inability to show when defects occurred has prevented the court from finding violations of Section 56.14100(b) in several cases. *E.g. Barrett Paving Materials, Inc.*, 15 FMSHRC 1999, 2008 (Sept. 1993)(ALJ Weisberger); *Good Constr.*, 22 FMSHRC 1081, 1088 (Sept. 2000)(ALJ Melick); *Martin Marietta Materials, Inc.*, 36 FMSHRC 411, 413 (Feb. 2014)(ALJ Rae); *N. Aggregate, Inc.*, 37 FMSHRC 562, 594 (Mar. 2015)(ALJ Rae).

I find the Secretary did not prove a violation of Section 56.14100(b) by the preponderance of the evidence. While the brake lights' malfunction is undisputed, the Secretary offered no evidence showing how long they were broken. As noted by Inspector Stalder, it is possible both brake lights were simultaneously rendered inoperable by a fuse short out. (Tr. 180:22-181:4) The Secretary presented insufficient evidence to prove the brake lights were not fixed in a timely manner as required by Section 56.14100(b). Thus, I vacate Citation No. 8669853.

WHEREFORE, it is **ORDERED** that Northern Illinois Service Company pay a penalty of \$736.00 within thirty (30) days of the filing of this decision.

It is further **ORDERED** that Citation No. 8669853 be **VACATED**.

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

Distribution: (*Certificate Return Receipt*)

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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July 13, 2015

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

v.

WM D. SCEPANIAC, INC.,
Respondent.

CIVIL PENALTY PROCEEDING

Docket No. LAKE 2015-138
A.C. No. 21-02760-364875

Mine: Plant 2

DECISION

Appearances: Emily Hays, United States Department of Labor, Office of the Solicitor,
Denver, Colorado, for Petitioner;

Aaron Dean, Moss & Barnett, Minneapolis, Minnesota, for Respondent.

Before: Judge Miller

This case is before me upon a petition for assessment of a civil penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d). This docket involves one 104(d)(1) citation with a total proposed penalty of \$2,000.00. The parties presented testimony and evidence regarding the single citation at a hearing held in Minneapolis, Minnesota.

I. FINDINGS OF FACT AND CONCLUSIONS OF LAW

Wm. D Scepaniak, Inc.'s Plant 2 is a surface sand and gravel operation located in Norman County, Minnesota. The parties have stipulated to the jurisdiction of MSHA and the Commission. Sec'y Prehearing Report 2; Respondent Prehearing Report 3.

Citation No. 8847805 was issued by Inspector Wilbert Wayne Koskiniemi on August 12, 2014 pursuant to section 104(d)(1) of the Act for an alleged violation of 30 C.F.R. § 56.9301. The citation alleges that two dump trucks were backing up to the edge of an overburden dump without berms, bumper blocks or other safety devices in place to stop the trucks from going over the edge and down the twenty foot drop to the pit below. Koskiniemi determined that the condition was reasonably likely to result in a fatal injury, affected one miner, was S&S, and was the result of the operator's high negligence and unwarrantable failure to comply with the mandatory standard. The Secretary has proposed a civil penalty in the amount of \$2,000.00 for the alleged violation.

For the reasons that follow, I affirm the citation, find that the violation was S&S, and find that the violation was a result of the operator's high negligence and unwarrantable failure to comply with the mandatory standard.

The Violation

On August 12, 2014 MSHA Inspector Wayne Koskiniemi was driving near Respondent's Plant 2 on his way to inspect another operation. While on the road near the plant, Koskiniemi observed two caterpillar dump trucks backing up in an area of loose, unconsolidated overburden material. The trucks were backing to the edge of an overburden dump and then dumping their loads down a twenty foot bank to the area below. There were no berms, bumpers or other safety devices in the area which would have prevented overtravel. Koskiniemi stopped his car, took a photo of one of the trucks dumping over the edge, Sec'y Ex. 6, Photo 1, and turned around to travel to Respondent's mine.

Wayne Koskiniemi has been a mine inspector for three years, and routinely inspects sixty sand and gravel operations each year. Prior to being trained as a mine inspector he worked in the mining industry and owned and operated an excavating company. He also worked as a police officer for 22 years, retired as a police chief, and spent time as a marshal.

When Koskiniemi entered the mine he observed two large haul trucks traveling from the load site in the work area to the overburden dump site, and dumping dirt and material while driving on the loose overburden material. He testified that he saw two trucks repeatedly back up to the edge of a twenty foot high bank, with no berm, bumper or other guard in place to prevent overtravel, and dump their load over the edge. Koskiniemi located a foreman, Eric Luethmers, waiting nearby in the cab of a front end loader. The inspector approached Luethmers and advised him that the trucks must stop dumping immediately and that an imminent danger order was being issued. Luethmers indicated that he had radio contact with the drivers and instructed them to stop dumping. At that point, one of the trucks pulled over to the edge and began dumping from the side of the truck. The truck, as observed by Koskiniemi, is pictured in Sec'y Ex. 6, Photo 3. In Koskiniemi's view, dumping from the side was even more dangerous than from the back since the side of the truck was raised shifting the weight in that direction, over the embankment. The dump truck was in the loose overburden material, directly next to the edge of the dumping area. Luethmers told the inspector that he was the on-site supervisor and he had instructed the drivers to dump as they were doing. Luethmers explained that the dozer, which usually moved the overburden from the dump location to the edge and over, also normally created a berm to prevent the trucks from backing too close to the edge. On the day of the inspection the dozer was down for repairs, and had been down since the previous week. Luethmers explained to the inspector that it was too difficult to move the dirt with the front end loader and, instead, he was watching the drivers and calling them by radio if he observed them drive too close to the edge or saw that they were sinking into the soft ground.

After speaking with Luethmers and one of the angry mine owners by telephone, Koskiniemi spoke to each of the dump truck drivers. Both of the drivers had less than one year mining experience, and their experience was not as truck drivers, but primarily as welders in the shop. Each driver had been task trained to drive a dump truck about one week prior to this

incident, and their experience was limited to driving on the pit floor, not dumping in overburden above a twenty foot bank. The drivers indicated to Koskiniemi that, as they backed up, they were looking into the sun and often had to put their head out the window of the cab to see. At hearing both drivers testified on behalf of the mine operator and offered a bit more, but slightly different version of facts. At hearing, each driver stated that they were instructed to back up to within 7-8 feet of the dump, and not go right up to the edge. They said they were told to drive as close to the edge as they felt comfortable and that Luethmers would call on the radio if he saw them drive too close to the edge or start to sink in the soft material. The overburden pile on which they were driving was not compacted so the trucks often got stuck in deep ruts that were one to two feet deep, causing the drivers to have to move forward in an attempt to maneuver the trucks out of the ruts in order to get closer to the edge to dump.

The drivers believed the wheels of each truck stayed eight feet from the edge, but agreed that the bed of the truck may have been closer to the edge when dumping the material. They both indicated there was a "slight" berm where they were dumping the overburden each time. However, because they were told to stay out of the ruts, they dumped at different locations along the edge with each pass. Both drivers had been working at this task from the beginning of the shift, and each had completed approximately ten dumps prior to the arrival of the inspector. Based upon his conversation with Luethmers, the inspector believed the mine had been dumping material in a similar manner on previous days, but the two drivers confirmed that this was their first day dumping overburden, and the first working day that the dozer was not on site to push the overburden. While Luethmers told the inspector that he was using the front end loader to level out the driving area and clean up the ruts, he did not suggest that he was using it to create berms or push the overburden over the edge. Rather, he told the inspector that it was difficult to push the material with the front end loader.

Koskiniemi explained that the trucks traveling near the edge as he observed, were certain to go over, slip or slide in the loose material, or overturn. In either instance, the driver would be killed. Based on his observations, Koskiniemi issued Citation No. 8847805 for a violation of section 56.9301 which requires that berms, bumper blocks, safety hooks or other impeding devices be provided at dumping locations where there is a hazard of overtravel. 30 C.F.R. § 56.9301. An imminent danger order was issued at the same time, but the operator did not contest that order.

The Secretary argues that, based upon the inspector's observations, and as demonstrated in the photographs, the violation was obvious. There is no question that berms or bumpers were not present and that a truck could easily overtravel, or even slide in the loose material as it got close to the edge. The Secretary argues that the mine was going to continue operating the trucks in this manner and that it was highly likely that a truck would overtravel or overturn while backing over the loose material to get close to the edge to dump. The operator argues that there was no violation because there was no hazard of overtravel and, therefore, there was no need for a berm or bumper block to prevent the trucks from backing over the edge as they dumped. Further, the front end loader, and not the trucks, was moving dirt to the edge and, as result, there was no possibility of overtravel. The mine also argues that the dumps made by each truck sometimes created a "berm," that the trucks were not as close to the edge as the inspector

suggested and that sinking into the loose dirt created a kind of rut, or bumper, that would protect the trucks from backing up too close to the edge.

I find that a violation of the standard occurred. While the mine argues that there were some berms present, I credit the inspector's testimony that there were no berms or spoil piles that were high enough to be considered berms. Further, there were no bumper blocks, hooks or other devices in the area to prevent overtravel. I find no argument made by the operator to be persuasive. Moreover, I find the inspector to be credible, and his photographs clearly show the dump trucks dangerously close to the edge. I find that there is a clear danger of overtravel and that berms at the correct height, or other devices to prevent overtravel, were required in this area. I find that there were no such protections in place. I do not accept the mine's argument that the trucks sinking into the soil up to a depth of two feet created a block or bumper to prevent overtravel. That argument by the mine owner is clearly contrary to the testimony of the dump truck drivers who agreed that they tried to maneuver the trucks out of the deep ruts in order to back up closer to the edge to dump. In addition, I reject the mine's argument that the photographs show that tracked equipment, not trucks, were close to the edge of the dump. The photo referred to shows only one portion of the dump area, and, even if the tracks nearest the edge were made by a tracked piece of equipment there were tire tracks immediately next to those and dangerously close to the edge of the bank. Given the photos and the inspector's observations, I find that the trucks were close to the edge, that there was a very real hazard of overtravel, and no berms, bumper blocks, safety hooks or other impeding devices were present. Therefore, I affirm the violation.

S&S and Gravity

Scepaniak argues that there is no evidence that there was a hazard of overtravel or of the truck overturning while dumping and, consequently, there is no evidence that the violation was S&S. The Secretary argues that, because the large dump trucks were traveling in unconsolidated material, and backing very close to the edge to dump their loads, without any means to prevent overtravel, they were very likely to back over the edge, and any fall off of the twenty foot high ledge in a large dump truck would have resulted in injury or death to the driver. I agree that it is likely that, if the trucks continued to operate as observed by the inspector, one would back over the edge, resulting in death or serious injury to the miner. Accordingly, I find that the violation is significant and substantial.

A "significant and substantial" violation is described in section 104(d)(1) of the Mine Act as a violation "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." 30 U.S.C. § 814(d)(1). A violation is properly designated significant and substantial "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 Division, National Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981).

In *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984), the Commission explained its interpretation of the term “significant and substantial” to be:

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.

The difficulty with finding a violation S&S normally comes with the third element of the *Mathies* formula, in which the Secretary must establish that there is a reasonable likelihood that the hazard will result in an injury. The Commission has explained that the third element of the formula “requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury.” *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1834, 1836 (Aug. 1984). The Commission discussed the third element of the *Mathies* test in *Musser Engineering, Inc. and PBS Coals, Inc.*, 32 FMSHRC 1257 (Oct. 2010) (affirming an S&S violation for using an inaccurate mine map). The Commission clarified that the “Secretary need not prove a reasonable likelihood that the violation itself will cause injury” but that the hazard created would cause an injury. *Id.* at 1280-81. The Commission reaffirmed its position in *Cumberland River Coal*, 33 FMSHRC 2357, 2365 (Oct. 2011) where it “emphasized the well-established precedent that ‘the absence of an injury-producing event when a cited practice has occurred does not preclude a determination of S&S.’” (citing *Elk Run Coal Co.*, 27 FMSHRC 899, 906 (Dec. 2005); and *Blue Bayou Sand & Gravel, Inc.*, 18 FMSHRC 853, 857 (June 1996)).

The overwhelming weight of the evidence shows that an accident was highly likely to occur. Koskiniemi testified that the trucks backing up in the loose soil, to within feet of the edge, would at any time travel over the edge. There was no berm or other safety device in place to prevent overtravel, and, if a truck went over the edge, it would result in a serious accident. Koskiniemi testified that the drivers were both new to driving a large dump truck. They had been task trained to do the job on the level floor of the pit just the week prior, and this was the first instance they worked at this task of dumping atop the spoil pile. The drivers had difficulty using their mirrors, were looking out the side windows of the truck, and were looking into the sun. I find that drivers in these circumstances could easily misjudge the distance, or come close enough to be caught in the loose soil and slide or fall over the edge. As the truck dumped, the weight of the load shifted toward the edge of the pile. The two drivers were told to drive about 7-8 feet to the edge, or to a distance that was comfortable. It is clear from the photos taken by the inspector that the wheels were dangerously close to the edge and, when the bed of the truck was raised to dump, the bed was right at the edge. The inspector observed one truck dumping to the back and then another, dumping its load to the side directly at the edge. He also observed tire tracks near the edge of the dump site. There were no berms in place to keep the trucks from backing too far, or from going over the edge as they dumped their loads. The work of dumping had been going on since the start of the shift and would have continued had the inspector not observed the actions of the mine as he drove by. Under these circumstances, I find it highly likely that one of

the trucks would have overtraveled the area, or would have slid with the loose material at the edge as it dumped. The hazard associated with overtravel of the large trucks is falling over the edge, landing in some fashion at the bottom, thereby causing serious injury or death to the driver.

The Commission has recognized the serious nature of trucks backing to the edge without berms to prevent overtravel. In *Buffalo Crushed Stone, Inc.*, 16 FMSHRC 2043 (Oct. 1994), the Commission, in overturning a judge's finding that a violation was non-S&S, found that the lack of adequate berms near the edge of a stockpile, combined with the shift in weight that trucks experience as they dump their loads at the edge of a stockpile, made it reasonably likely that an injury producing event would occur. While in *Buffalo Crushed Stone* berms of inadequate height were present, here, there were no berms in place.

Koskiniemi testified that he is aware of at least two similar situations where a truck backed to the edge and went over the side, killing the driver. One incident occurred shortly after the citation was issued. In that incident, the truck driver, who had more than ten years of experience, was killed when he backed a haul truck to the edge of the overburden dump site and started to raise the truck's bed. The bank failed and the truck overturned and fell thirty feet below. Sec'y Ex. 8. A similar accident occurred several years before the citation at issue when a driver backed his truck to the edge of a stockpile to dump, went over the crest, and fell 30 feet below, killing the driver. Sec'y Ex. 10.

Respondent did not contest the imminent danger order that was issued alongside this citation. While the Commission has explained that the failure to contest an imminent danger order does not, by itself, establish the validity or S&S designation of a related citation, *see e.g., Wyoming Fuel Co.*, 16 FMSHRC 1618, 1625-26 (Aug. 1994), it has held that what constitutes an imminent danger involves an element of impending danger that does not necessarily need to exist to sustain an S&S designation for a violation, *Eastern Associated Coal Corp.*, 13 FMSHRC 178 (Feb. 1991), and that the conditions necessary to establish a S&S finding are "very distinct from, and far less dangerous than, those" which are necessary to find an imminent danger. *Consolidation Coal Co.*, 35 FMSHRC 2326, 2340 (Aug. 2013). Accordingly, here, while the mine's acceptance of the imminent danger order does not establish the S&S nature of the citation, it does carry some weight with regard to the mine's acknowledgement regarding the seriousness of the cited condition.

I have found that a violation of a mandatory standard occurred and that the violation would result in a dump truck traveling over the edge of a twenty foot drop. The inspector explained that a large dump truck dropping to the bottom would be violent and would undoubtedly result in death to the driver. Therefore, I find that the violation was significant and substantial.

Unwarrantable Failure and Negligence

Koskiniemi observed the trucks from the road, and immediately saw that they were backing up dangerously close to the edge of the dump site. The trucks were driving on loose, unconsolidated material. He learned that the mine management, who had purportedly tasked trained the two drivers just days before, was aware of the way the dumping was progressing. The

inspector spoke with the immediate supervisor, who was in a front end loader watching the trucks dump. The supervisor told the inspector that he had instructed the trucks how and where to dump. The drivers had been instructed to back the trucks to the edge of the dump to unload and, therefore, the inspector believed this conduct to be aggravated. There were no berms, bumpers, or other measures in place to prevent the trucks from overtraveling the area and falling into the water below. Based on his observations and the information he learned from the supervisor, Koskiniemi designated the citation as high negligence and an unwarrantable failure to comply with the mandatory standard.

The unwarrantable failure terminology is taken from section 104(d) of the Act, 30 U.S.C. § 814(d), and refers to more serious conduct by an operator in connection with a violation. In *Emery Mining Corp.*, 9 FMSHRC 1997 (Dec. 1987), the Commission determined that unwarrantable failure is aggravated conduct constituting more than ordinary negligence. *Id.* at 2001. Unwarrantable failure is characterized by conduct described as “reckless disregard,” “intentional misconduct,” “indifference,” or a “serious lack of reasonable care.” *Id.* at 2003-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194 (Feb. 1991); *see also Buck Creek Coal, Inc.*, 52 F.3d at 136 (approving Commission’s unwarrantable failure test). The Commission has explained that whether a citation is an “unwarrantable failure” is a question that should be evaluated based on the facts and circumstances in each case, and in light of each of the following factors: 1) the length of time that the violation has existed; 2) the extent of the violative condition; 3) whether the operator has been placed on notice that greater efforts were necessary for compliance; 4) the operator’s efforts in abating the violative condition; 5) whether the violation was obvious or posed a high degree of danger; and 6) the operator’s knowledge of the existence of the violation. *See Consolidation Coal Co.*, 22 FMSHRC 340 (Mar. 2000); *IO Coal Co.*, 31 FMSHRC 1346 (Dec. 2009). All of the relevant facts and circumstances of each case must be examined to determine if an actor’s conduct is aggravated, or whether mitigating circumstances exist. *Consol*, 22 FMSHRC at 353. Because supervisors are held to a high standard of care, another important factor supporting an unwarrantable failure determination is the involvement of a supervisor in the violation. *REB Enters., Inc.*, 20 FMSHRC 203, 225 (Mar. 1998) (Commissioner Marks, concurring in part and dissenting in part).

Based on the following analysis of the factors outlined by the Commission, I find the violation was a result of the mine’s high negligence and unwarrantable failure to comply with the mandatory standard.

Length of time that the violation has existed. In *IO Coal Co.*, 31 FMSHRC 1346 (Dec. 2009) the Commission emphasized that the duration of time that the violative condition existed is a “necessary element” of the unwarrantable failure analysis. There, the Commission noted that the presiding judge had failed to address the duration of the violative condition as a factor in his unwarrantable failure analysis. The Commission, in remanding the case, instructed the judge to address the duration of the violative roof condition, which was found to have existed for multiple shifts and days, and determine if that duration qualified as an aggravating factor. However, the Commission explained that the court, in conducting its analysis of the duration factor could be affected by the operator’s reasonable “good faith” belief that the violative condition, in that case kettle bottoms, did not exist. In *Coal River Mining, LLC*, 32 FMSHRC 82 (Feb. 2010), the Commission further explained that, even where the record of a case does not allow a judge to

make a determinative finding with regard to how long a violative condition existed, the judge must analyze the element and “even imperfect evidence of duration in the record should be taken into account[.]” While the Commission has found that a duration of a “matter of seconds” may weigh against an unwarrantable failure finding, it has also held that even a duration of a few minutes may support an unwarrantable failure finding. *Compare Dawes Rigging & Crane Rental*, 36 FMSHRC ___, slip op. 5 (Dec. 10, 2014) (noting that a miner who traveled under a suspended boom was only exposed for a “matter of seconds,” which in turn weighed against a finding of unwarrantable failure), *with Midwest Material Co.*, 19 FMSHRC 30 (Jan. 1997) (Finding that a judge erred in relying upon the brief duration of the violation when vacating the unwarrantable failure designation. Noting that the only reason the duration of the violation ended was because a crane boom crushed and killed a miner who should not have been working under the boom).

Here, the inspector initially believed that the violative condition, backing up the dump trucks without a berm in place, had been ongoing for several days. However, the testimony elicited at hearing demonstrated that the activity had been ongoing for only the day of the violation. The dozer, which normally moved the overburden from the dump location to the edge, and created the berms, had been down since the previous week. However, the mine was not engaged in removing overburden at this pit for several days. Therefore, the condition existed for just one day. Nonetheless, each truck driver had made at least ten hauls and dumps prior to the inspector’s arrival. Given that each dump created a hazard, the length of time is significant. Additionally, the dumping procedure would have continued for the remainder of the day had the inspector not arrived. Given the circumstances here, I find that the amount of time the condition existed is significant and a relevant factor to the unwarrantable determination.

Extent of the violative condition. In *IO Coal Co.*, 31 FMSHRC 1346 (Dec. 2009), the Commission explained that the “extent of the violative condition is an important element in the unwarrantable failure analysis.” The Commission has explained that the purpose of this element is to “account for the magnitude or scope of the violation[.]” and the judge may analyze it by looking at, among other things, the “extent of the affected area as it existed at the time the citation was issued[.]” the number of persons affected, and the time and resources required to correct the condition. *Dawes Rigging & Crane Rental*, 36 FMSHRC ___, slip op. 5 (Dec. 10, 2014) (citing *E. Associated Coal Corp.*, 32 FMSHRC 1189, 1195 (Oct. 2010) and *Watkins Eng'rs & Constructors*, 24 FMSHRC 669, 681 (July 2002)); *Consolidation Coal Co.*, 35 FMSHRC 2326, 2331 (Aug. 2013).

I find that this violation was extensive. Even though only two miners were involved, they constituted two-thirds of the workers in the area. The other worker, who was watching and directing the activity, was a supervisor. The entire overburden area, which is shown in the photographs, was involved, and the edge the drivers were exposed to was some distance in length. The drivers explained that they dumped the length of the overburden bank in an effort to avoid the ruts made by previous dumps, therefore using the entire area while engaging in the activity. The dumping was not isolated to one area but engaged the entire overburden area and the twenty foot drop below.

Whether the operator has been placed on notice that greater efforts were necessary for compliance. The Commission has explained that repeated similar violations, even if those prior violations were not a result of an unwarrantable failure, and past discussions with MSHA about a problem at the mine may serve to put an operator on notice that increased efforts to comply are necessary. *IO Coal Co.*, 31 FMSHRC 1346, 1353-1354 (Dec. 2009). Prior violations need to have involved precisely the same activity, cited standard, or area of the mine. *Id.*; *Black Beauty Coal Co. v. FMSHRC*, 703 F.3d 553, 561 (D.C. Cir. 2012); *Consolidation Coal Co.*, 35 FMSHRC 2326, 2344 (Aug. 2013). A court may consider an operator's argument that it had a reasonable good faith belief that the cited condition was not violative and weigh that against this and other factors in the unwarrantable failure analysis. *IO Coal Co.*, 31 FMSHRC 1346, 1353-1354 (Dec. 2009); *Sierra Rock Products*, 37 FMSHRC ___ (Jan. 13, 2015).

The Secretary did not present any evidence as to this element, except the violation history for the past 15 months, which shows no violation of this standard. Therefore, for purposes of this unwarrantable analysis, I do not find any repeated similar violations.

Operator's efforts in abating the violative condition. In evaluating the operator's efforts in abating the violative condition the judge should examine those abatement efforts made prior to the issuance of the citation or order. *Consolidation Coal Co.*, 35 FMSHRC 2326, 2342 (Aug. 2013) (citing *IO Coal Co.*, 31 FMSHRC 1346, 1356 (Dec. 2009) and *Warwick Mining Co.* 18 FMSHRC 1568, 1574 (Sept. 1996)). In *Consolidation* the Commission, in affirming the unwarrantable failure designation, noted the judge's finding that management did not make efforts to remedy the type of condition cited despite being aware of a similar condition having been previously brought to their attention through the issuance of a citation.

Here, there was no evidence that the mine operator made any effort to abate the violation. Instead, the mine operator encouraged and directed the violation. One of the owners of the company indicated that he had assisted in task training the drivers a few days prior to the incident, but there is nothing to indicate that he gave them adequate information about safe driving. In fact, the owner made excuses and attempted to argue that sinking into the ground, causing ruts, prevented the trucks from backing too far and, therefore, there was no violation. Of the three employees working in the overburden area on the day of the inspection, one was a supervisor who was directing the workforce and had directed the truck drivers to back up as close to the edge as they could, within 7-8 feet and then dump. No efforts were made to keep the trucks back from the edge or to provide a berm to prevent overtravel. I find that the mine made no effort to abate the condition.

Whether the violation posed a high degree of danger. The Commission has found the high degree of danger posed by a violation to be an aggravating factor in support of an unwarrantable failure finding. *IO Coal Co.*, 31 FMSHRC 1346, 1355-1356 (Dec. 2009). The Commission has acknowledged that, conceivably, the degree of danger could be "so severe that, by itself, it warrants a finding of unwarrantable failure." *Manalapan Mining Co.*, 35 FMSHRC 289, 294 (Feb. 2013). When a mine operator ignores a chronic problem, the degree of danger and likelihood of something going wrong increases. *Consolidation Coal Co.*, 35 FMSHRC 2326, 2343 (Aug. 2013). In *IO Coal* the Commission, in remanding the case to the judge, noted that, while the judge had made findings about the dangerousness of the condition in his analysis of

whether a S&S violation existed, he failed to incorporate those findings into his unwarrantable failure analysis. 31 FMSHRC 1346, 1355-1356 (Dec. 2009).

In *Virginia Slate Co.*, 24 FMSHRC 507 (June 2002) the Commission remanded a judge's finding that a violation of section 56.9301 was not unwarrantable and instructed him to consider all of the aggravating factors, including the degree of danger posed by the violations, the operator's knowledge of the violations, and any abatement efforts. There, a mine operator was found to have violated the standard when it failed to provide berms, bumper-blocks, safety hooks, or another device for the front-end loader that loaded the hopper of the crusher. The Commission, in remanding the unwarrantable failure issue to the judge, noted that the judge needed to consider whether the violation posed a high degree of danger, especially given the court's finding that there was a danger of the load overturning due the lack of berms.

In this case, the high degree of danger is one of the most significant factors in the finding of unwarrantable failure. The mine had two drivers who normally worked in the shop and had been task trained to drive the trucks at the bottom of the pit. These two miners, one of whom had worked at the mine only a few weeks, were instructed to haul overburden and back up as close to the edge as they felt comfortable to dump the overburden near the twenty foot drop. The new miners had little to no experience, and were looking behind them into the sun. The material the miners were driving on had just been dumped and consisted of loose unconsolidated material that would allow them to sink, and could easily shift and move down the hill. There were no berms in place, and driving near the edge could have easily resulted in a slide of material, which would have caused the truck to overturn. Moreover, the risk of one, or both, of the trucks traveling over the edge was an ever-present serious danger. The violation clearly posed 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 Co.*, 31 FMSHRC 1346, 1356 (Dec. 2009). Moreover, where an operator's conduct causes a violative condition to not be obvious, the operator cannot assert that the lack of obviousness is a mitigating factor in the unwarrantable failure analysis. *Consolidation Coal Co.*, 35 FMSHRC 2326, 2343 (Aug. 2013) (citing *Eastern Assoc. Coal Corp.*, 32 FMSHRC 1189, 1200-01 (Oct. 2010)) (upholding judge's unwarrantable failure finding where the operator deliberately ignored air velocity requirements in the mine's ventilation plan).

Along with the extreme danger of the dumping activity, the obviousness of the violation is a major factor in the unwarrantable finding in this instance. The inspector was not on the mine property and, rather, was driving along the road just outside the mine when he saw the violation and the imminent danger it posed. The violation was obvious from the road, and should have been obvious to anyone at the mine site. When the inspector entered the mine property, he could see the further extent of the violation, the two trucks being loaded with overburden, driving in the area of unconsolidated material, with the obvious lack of berms or any other device to stop overtravel. In addition, the supervisor told the inspector that he had been watching the operation and would call the trucks on the radio if they got too close to the edge or if he thought they were sinking into the loose ground. A trained supervisor, or any person familiar with mining activities, should immediately recognize the hazard cited by the inspector. The violation was not remote or hidden, but was obvious to any person who observed the activity, even from afar.

Operator’s knowledge of the existence of the violation. In *IO Coal* the Commission reiterated the well settled law that, in addition to actual knowledge, an operator’s knowledge of the existence of a violation may be established where the operator “reasonably should have known of the violative condition.” *IO Coal Co.*, 31 FMSHRC 1346, 1356-1357 (Dec. 2009). The Secretary may establish that an operator “reasonably should have known of the violative condition” by showing that the “operator’s knowledge of the specifics of its operations should have led it to conclude that violation charged would eventually occur[.]” *Eastern Assoc. Coal Corp.*, 32 FMSHRC 1189, 1200-01 (Oct. 2010) (citing *Emery Mining Corp.*, 9 FMSHRC 1997, 2002-04 (Dec. 1987) and *Coal River Mining, LLC*, 32 FMSHRC 82, 92 (Feb. 2010).

Inspector Koskiniemi testified that when he traveled to the location where the dumping was being done, he contacted a miner sitting in a front end loader who was observing the operation. The miner, Luethmers, told the inspector that he was the supervisor of the job. Later, the owner of the mine confirmed that Luethmers was in charge of the two truck drivers who were dumping into the overburden. Given that Luethmers was a part of management, he knew that the drivers were backing up to the edge of the overburden pile, and he was the one directing them to do so, I find that management had actual knowledge of the existence of the violation. This factor weighs heavily in the determination that the violation is unwarrantable.

Based on these facts and this analysis of those facts, I find that Respondent clearly demonstrated high negligence and that the violation was a result of its unwarrantable failure to comply with the mandatory standard. I find these factors to demonstrate aggravated conduct and therefore, the penalty is adjusted below to reflect the conduct and the imminent danger the conduct created.

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 Act delegates the duty of proposing penalties to the Secretary. 30 U.S.C. §§ 815(a), 820(a). Thus when an operator notifies the Secretary that it intends to challenge a penalty, the Secretary petitions the Commission to assess the penalty. 29 C.F.R. § 2700.28. The Act requires, that “in assessing civil monetary penalties, the Commission [ALJ] shall consider “six statutory penalty criteria which include the history of violations, the size of the operator, the negligence, gravity, the ability to continue in business and good faith abatement. 30 U.S.C. § 820(i). In keeping with this statutory requirement, the Commission has held that “findings of fact on the statutory penalty criteria must be made” by its judges. *Sellersburg Stone Co.*, 5 FMSHRC 287, 292 (Mar. 1983), *aff’d*, 736 F.2d 114 7 (7th Cir. 1984). Once findings on the statutory criteria have been made, a judge’s penalty assessment for a particular violation is an exercise of discretion, which is “bounded by proper consideration of the statutory criteria and the deterrent purpose[s] . . . [of] the Act. *Id.* at 294; *Cantera Green*, 22 FMSHRC 616, 620 (May 2000).

The history of assessed violations was admitted into evidence and shows a reasonable history for this mine. The mine is a fairly small, seasonal operator. The parties have stipulated

that the penalties as proposed will not affect the mine's ability to continue in business, and that Respondent demonstrated good faith in abating the citation. The gravity of the violation is greater than the Secretary originally assessed. The two drivers, who had spent one day being trained in a level area, were put in a position where they could easily have been killed. The operator did not dispute that their actions constituted an imminent danger. The negligence and unwarrantable failure finding are discussed above. Since the violation is very serious, a higher penalty is in order, and, considering the size of the operator, I find that a penalty of \$2,500.00 is appropriate.

III. ORDER

Based on the criteria in section 110(i) of the Mine Act, 30 U.S.C. § 820(i), I assess a penalty of \$2,500.00 for Citation No. 8847805. The Respondent is hereby **ORDERED** to pay the Secretary of Labor the sum of \$2,500.00 within 30 days of the date of this decision.

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

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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July 13, 2015

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

v.

LINCOLN LEASING CO., INC.,
Respondent.

CIVIL PENALTY PROCEEDING

Docket No. WEVA 2012-1783
A.C. No. 46-09096-298495

Mine: Pocahontas Highwall Mines

DECISION AND ORDER

Appearances: Noah AnStraus, Esq., Office of the Solicitor, U.S. Department of Labor,
Philadelphia, PA, for Petitioner;

Alexander Macia, Esq., Spilman Thomas & Battle, PLLC, Charleston,
WV, for Respondent.

Before: Judge L. Zane Gill

This proceeding under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) (“Mine Act” or “Act”), involves one section 104(d)(1) citation and one 104(d)(1) order, 30 U.S.C. § 814(d)(1), issued by the Department of Labor’s Mine Safety and Health Administration (“MSHA”) to Lincoln Leasing Co., Inc. (“Lincoln Leasing” or “Respondent”) at the Pocahontas Highwall Mine. The parties presented testimony on May 21 and 22, 2014, in South Charleston, West Virginia.

For the foregoing reasons, I find there was a violation of 77.1605(b) for Citation No. 8142705, the citation was properly designated as significant and substantial, two persons were affected, the operator was highly negligent, and there was an unwarrantable failure. I find there was a violation of 77.410(c) for Order No. 8142706, the order was properly designated as significant and substantial, one person was affected, the operator was moderately negligent, and there was no unwarrantable failure.

Stipulations

The joint stipulations were read into the record at the hearing: (Tr.1 at 24:10 – 26:10)¹

1. The Respondent is an independent contractor whose headquarters are located in Lincoln County, West Virginia. The Respondent provides trucking services for the purpose of hauling coal. At the time of the citation and order entered in this case, the Respondent was working for Pocahontas Highwall Mines located in Raleigh County, West Virginia.
2. The Respondent is subject to the Mine Act.
3. The Respondent has an effect on interstate commerce which is contained in the Mine Act.
4. The Respondent is subject to the jurisdiction of the Federal Mine Safety and Health Review Commission and stipulates that the administrative law judge has the authority to hear this case and issue a decision.
5. The citation and order identified in the Petitioner's petition as well as any modifications thereto were properly served by a dually authorized representative of the Secretary of Labor to MSHA upon an agent of the Respondent on the date and place stated therein.
6. The MSHA inspector named herein was acting in his official capacity as an authorized representative of the Secretary of Labor when he issued the citation that is the subject of this hearing.
7. The Respondent demonstrated good faith in promptly correcting the conditions alleged.
8. The parties stipulate to the authenticity of the following exhibits that may be used in trial:
 - a) Citation Number 8142705 issued on February 13, 2012
 - b) The termination of Citation Number 8142705, (Citation Number 8142705-01) issued on February 16, 2012;
 - c) Order Number 8142706 issued on February 13, 2012;
 - d) The termination of Order Number 8142706, (Order Number 8142706-01) issued on February 16, 2012; and
 - e) The inspection notes of Inspector Vincent Nicolau dated February 13, 2012, and February 16, 2012, related to Citation Number 8142705 and Order Number 8142706.

¹ Tr.1 refers to the transcript for the first day of the hearing and Tr.2 for the second day.

Preliminary Matter: The Secretary is Entitled to an Adverse Inference Against Respondent Based on Spoliation

At the hearing, the Secretary made a motion for an adverse inference based on Respondent's failure to produce pre-operational² examination records for the two weeks prior to the event in question. (Tr.2 at 215:4-7) Rather than decide the issue during the hearing, I directed the parties to address it in their post-hearing briefs. (Tr.2 at 215:13-19)

"It is well-recognized that if a party has control over a writing or other type of evidence, which is relevant to an issue, and fails to produce the evidence, an inference can be drawn that the evidence would be adverse to the party." *IO Coal Co., Inc.*, 31 FMSHRC 1346, 1359, n.11 (Dec. 2009). Indeed, "[w]hen a party intentionally destroys evidence in its control, a judge has discretion to draw an adverse inference that the evidence destroyed would have been unfavorable to the destroying party." *Dynamic Energy, Inc.*, 33 FMSHRC 1998, 2006-07 (Aug. 2001) (ALJ Paez) (citing *Kronsich v. U.S.*, 150 F.3d 112, 126 (2d Cir. 1998)). *McCormick on Evidence* provides that "[w]hen it would be natural under the circumstances for a party to ... produce documents or other objects in his or her possession as evidence and the party fails to do so, tradition has allowed the adversary to use this failure as the basis for invoking an adverse inference." 2 *McCormick on Evid.* § 264 (6th ed. 2006) at 220-21. Additionally, the Commission has held that an Administrative Law Judge must address missing preshift examination reports because the operator had them within its control and should have anticipated litigation. *See IO Coal Co., Inc.*, 31 FMSHRC at 1359, n.11.

Wylie Aaron Stowers, Vice President of Lincoln Leasing, testified that Lincoln Leasing does not have a document retention policy. (Tr.2 at 4:23 – 5:3; Tr.2 at 33:4-10; Tr.2 at 25:20-22) Stowers also testified that Lincoln Leasing did not decide to contest the citation and order until a month or more after their issuance. (Tr.2 at 35:6-19) According to Lincoln Leasing, when it came time to produce the pre-operational examination book, it could not find it. (Tr.2 at 34:3-9) Initially, it may seem that Lincoln Leasing was justified in not keeping the pre-operational reports because the Respondent did not decide to contest the citation and order immediately, thus the reports could be destroyed without concern. However, I find this argument unpersuasive.³

² The Secretary and the Respondent use the terms preshift exam and pre-operational exam interchangeably.

³ The findings of fact here and below are based on the record as a whole and my careful observation of the witnesses during their testimony. In resolving any conflicts in the testimony, I have taken into account the interests of the witnesses, or lack thereof, and consistencies, or inconsistencies in each witness's testimony and between the testimonies of other witnesses. In evaluating the testimony of each witness, I have also taken into account his or her demeanor. Any perceived failure to provide detail about any witness's testimony is not a failure on my part to consider it. The fact that some evidence is not discussed does not mean that it was not considered. *See Craig v. Apfel*, 212 F.3d 433, 436 (8th Cir. 2000) (administrative law judge is not required to discuss all evidence and failure to cite specific evidence does not mean it was not considered). I have also fully considered the contents of the official file, including the pre- and post-hearing submissions of the parties, and the exhibits admitted into evidence.

Before the citation and order were abated, Michael Smailes⁴, the driver of Truck 159, testified that there were two bound 30-day pre-operational books in the truck, but after repairs were made on the truck on February 13, 2012, both books were missing, and he had to obtain a new book. (Tr.1 at 205:8-15) Additionally, although Lincoln Leasing claimed it did not have a document retention policy, and it could not produce the bound exam books, it was able to find the reports for February 11, 12, and 13, 2012. (Ex. P-5)⁵ It is troubling and highly suspect that Lincoln Leasing was able to produce reports for only three days, yet its pre-operational records were kept in a bound 30-day book. Despite this, Lincoln Leasing claims that no other reports could be found. Lincoln Leasing's document retention and production is suspiciously selective, especially since it was able to produce the pre-operational reports used to support its argument that the brakes were adjusted before the shift began. (*See* Resp. Br. at 38, 45-6)

When Lincoln Leasing destroyed or misplaced the pre-operational reports, it had control over the reports and knew it had an obligation to preserve them in anticipation of litigation. The Secretary is entitled to an adverse inference against Lincoln Leasing. However, in this instance, the adverse inference only applies to Citation No. 8142705 for inadequate brakes for the two weeks prior to the issuance of the citation and not for Order No. 8142706 for the broken back-up alarm. Smailes testified that he marked the problems with the brakes on the pre-operational record book for two weeks prior to the issuance of the citation. (Tr.1 at 193:18-21) Additionally, on the pre-operational reports produced, the brake issues were noted on all three, but an inadequate back-up alarm was not noted on any report. (Ex. P-5)

Basic Legal Principles

Significant and Substantial

The citation and order in dispute and discussed below have been designated by the Secretary as significant and substantial ("S&S"). A violation is properly designated S&S "if, based upon the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981). The question of whether a particular violation is S&S must be based on the particular facts surrounding the violation. *Texasgulf, Inc.*, 10 FMSHRC 498 (Apr. 1988); *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 2007 (Dec. 1987). S&S enhanced enforcement is applicable only to violations of mandatory health and safety standards. *Cyprus Emerald Res. Corp. v. FMSHRC*, 195 F.3d 42, 45 (D.C. Cir. 1999). The Secretary bears the burden of proving all elements of a citation by a preponderance of the evidence. *In re: Contests of Respirable Dust Sample Alteration Citations: Keystone Mining*

⁴ At the time of the hearing, Smailes had worked for Lincoln Leasing on-and-off from 2008 to 2014 as a coal truck driver, a mechanic, and an equipment operator. (Tr.1 at 184:17-23) During his employment at the Kingston mine, he drove a truck and ran equipment, and at the Rocksprings mine he drove a truck. (Tr.1 at 185:22-24) While Smailes does not have formal mechanic training, he has been working on trucks his whole life. (Tr.1 at 187:5-9)

⁵ The Secretary's exhibits are referred to as "P" and the Respondent's exhibits are referred to as "D."

Corp., 17 FMSHRC 1819, 1838 (Nov. 1995), *aff'd* 151 F.3d 1096 (D.C. Cir. 1998); *Jim Walter Resources, Inc.*, 30 FMSHRC 872, 878 (Aug. 2008) (ALJ Zielinski) (“The Secretary’s burden is to prove the violations and related allegations, e.g., gravity and negligence, by a preponderance of the evidence.”)

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

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

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

The third element of the *Mathies* test presents the most difficulty when determining whether a violation is S&S. In *U.S. Steel Mining Co., Inc.*, 7 FMSHRC 1125, 1129 (Aug. 1985), the Commission provided additional guidance: [T]he third element of the *Mathies* formula “requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury.” (citing *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1834, 1836 (Aug. 1984)). The Secretary, however, “need not prove a reasonable likelihood that the violation itself will cause injury.” *Cumberland Coal Res.*, 33 FMSHRC 2357, 2365 (Oct. 2011) (citing *Musser Engineering, Inc. and PBS Coals, Inc.*, 32 FMSHRC 1257, 1281 (Oct. 2010)). Further, the Commission has found that “the absence of an injury-producing event when a cited practice has occurred does not preclude a determination of S&S.” *Id.* (citing *Elk Run Coal Co.*, 27 FMSHRC 899, 906 (Dec. 2005)); and *Blue Bayou Sand & Gravel, Inc.*, 18 FMSHRC 853, 857 (June 1996)). This evaluation is also made in consideration of the length of time that the violative condition existed prior to the citation and the time it would have existed if normal mining operations had continued. *Elk Run Coal Co.*, 27 FMSHRC at 905; *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574 (July 1984).

Negligence

Negligence “is conduct, either by commission or omission, which falls below a standard of care established under the Mine Act to protect miners against the risks of harm.” 30 C.F.R. § 100.3(d). “A mine operator is required [...] to take steps necessary to correct or prevent hazardous conditions or practices.” *Id.* “MSHA considers mitigating circumstances which may include, but are not limited to, actions taken by the operator to prevent or correct hazardous conditions or practices.” *Id.* Reckless negligence is present when “[t]he operator displayed conduct which exhibits the absence of the slightest degree of care.” *Id.* High negligence is when “[t]he operator knew or should have known of the violative condition or practice, and there are no mitigating circumstances.” *Id.* Moderate negligence is when “[t]he operator knew or should

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

The Commission has provided guidance for making the negligence determination in *A. H. Smith Stone Co.*, stating that:

Each mandatory standard thus carries with it an accompanying duty of care to avoid violations of the standard, and an operator’s failure to satisfy the appropriate duty can lead to a finding of negligence... In this type of case, we look to such considerations as the foreseeability of the miner’s conduct, the risks involved, and the operator’s supervising, training, and disciplining of its employees to prevent violations of the standard in issue.

5 FMSHRC 13, 15 (Jan. 1983) (citations omitted).

Mitigation is something the operator does affirmatively, with knowledge of the potential hazard being mitigated, that tends to reduce the likelihood of an injury to a miner. This includes actions taken by the operator to prevent or correct hazardous conditions.

Gravity

The gravity penalty criterion under section 110(i) of the Mine Act, 30 U.S.C. § 820(i), “is often viewed in terms of the seriousness of the violation.” *Consolidation Coal Co.*, 18 FMSHRC 1541, 1549 (Sept. 1996) (citing *Sellersburg Stone Co.*, 5 FMSHRC 287, 294-95 (March 1983), *aff’d*, 736 F.2d 1147 (7th Cir. 1984) and *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 673, 681 (Apr. 1987)). The seriousness of a violation can be examined by looking at the importance of the standard which was violated and the operator’s conduct with respect to that standard, in the context of the Mine Act’s purpose of limiting violations and protecting the safety and health of miners. *See Harlan Cumberland Coal Co.*, 12 FMSHRC 134, 140 (Jan. 1990) (ALJ Fauver). The gravity analysis focuses on factors such as the likelihood of an injury, the severity of an injury, and the number of miners potentially injured. The Commission has recognized that the likelihood of injury is to be made assuming continued normal mining operations without abatement of the violation. *U.S. Steel Mining Co.*, 7 FMSHRC at 1130.

Unwarrantable Failure

In *Lopke Quarries, Inc.*, 23 FMSHRC 705, 711 (July 2001), the Commission reiterated the law applicable to determining whether a violation is the result of an unwarrantable failure:

The unwarrantable failure terminology is taken from section 104(d) of the Act, 30 U.S.C. § 814(d), and refers to more serious conduct by an operator in connection with a violation. In *Emery Mining Corp.*, 9 FMSHRC 1997 (Dec. 1987), the Commission

determined that unwarrantable failure is aggravated conduct constituting more than ordinary negligence. *Id.* at 2001. Unwarrantable failure is characterized by such conduct as “reckless disregard,” “intentional misconduct,” “indifference,” or a “serious lack of reasonable care.” *Id.* at 2003-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194 (Feb. 1991) (“*R&P*”); *see also Buck Creek [Coal, Inc. v. FMSHRC]*, 52 F.3d 133, 136 (7th Cir. 1995)] (approving Commission's unwarrantable failure test).

See Manalapan Mining Co., 35 FMSHRC 289, 293 (Feb. 2013). Whether conduct is “aggravated” in the context of an unwarrantable failure analysis is determined by looking at all the facts and circumstances of each case to see if any aggravating factors exist. *Big Ridge, Inc.*, 34 FMSHRC 119, 125 (Jan. 2012) (ALJ Zielinski). These include:

(1) the extent of the violative condition, (2) the length of time that the violative condition existed, (3) whether the violation posed a high degree of danger, (4) whether the violation was obvious, (5) the operator's knowledge of the existence of the violation, (6) the operator's efforts in abating the violative condition, and (7) whether the operator had been placed on notice that greater efforts were necessary for compliance. *See IO Coal Co.*, 31 FMSHRC 1346, 1351-57 (Dec. 2009); *Cyprus Emerald Res. Corp.*, 20 FMSHRC 790, 813 (Aug. 1998), *rev'd on other grounds*, 195 F.3d 42 (D.C. Cir. 1999).

Manalapan Mining Co., 35 FMSHRC at 293; *ICG Hazard, LLC*, 36 FMSHRC 2635, 2637, (Oct. 2014); *Sierra Rock Products, INC.*, 37 FMSHRC 1, 4 (Jan 2015); *Consolidation Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2000); *Cyprus Emerald Res. Corp.*, 20 at 18, *rev'd on other grounds*, 195 F.3d 42 (D.C. Cir. 1999); *Midwest Material Co.*, 19 FMSHRC 30, 34 (Jan. 1997); *Mullins & Sons Coal Co.*, 16 FMSHRC 192, 195 (Feb. 1994); *Peabody Coal Co.*, 14 FMSHRC 1258, 1261 (Aug. 1992); *BethEnergy Mines, Inc.*, 14 FMSHRC 1232, 1243-44 (Aug. 1992); *Quinland Coals, Inc.*, 10 FMSHRC 705, 709 (June 1988) All of the relevant facts and circumstances of each case must be examined to determine if an actor's conduct is aggravated, or whether mitigating circumstances exist. *Consolidated Coal*, 22 FMSHRC at 353; *IO Coal*, 31 FMSHRC at 1351; *Manalapan Mining Co.*, 35 FMSHRC at 293. “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.” *Big Ridge, Inc.*, 34 FMSHRC at 125; *REB Enters., Inc.*, 20 FMSHRC 203, 225 (Mar. 1998).

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 the “authority to assess all civil penalties provided in [the] Act.” 30 U.S.C. § 820(i). The Act delegates the duty of proposing penalties to the Secretary. 30 U.S.C. §§ 815(a), 820(a). Thus, when an operator notifies the

Secretary that it intends to challenge a penalty, the Secretary petitions the Commission to assess said penalty. 29 C.F.R. § 2700.28.

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

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

Although all of the statutory penalty criteria must be considered, they need not be assigned equal weight. *Thunder Basin Coal Co.*, 19 FMSHRC 1495, 1503 (Sept. 1997). Generally speaking, the magnitude of the gravity of a violation and the degree of operator negligence are important factors, especially for more serious violations for which substantial penalties may be imposed. *Musser Engineering*, 32 FMSHRC at 1289 (judge justified in relying on utmost gravity and gross negligence in imposing substantial penalty); *Spartan Mining Co.*, 30 FMSHRC at 725 (appropriate for judge to raise a penalty significantly based upon findings of extreme gravity and unwarrantable failure); *Lopke Quarries, Inc.*, 23 at 713 (judge did not abuse discretion by weighing the factors of negligence and gravity more heavily than the other four statutory criteria). For example, violations involving “extreme gravity” and/or “gross negligence,” or, as stated in the former section of 105(a), “an extraordinarily high degree of negligence or gravity, or other unique aggravating circumstances,” may dictate higher penalty assessments. *See* 30 C.F.R. Part 100 Final Rule, 72 Fed. Reg. 13592-01, 13,621.

In addition, Commission ALJs are obligated to explain any substantial divergence between a penalty imposed and that proposed by the Secretary. As explained in *Sellersburg Stone Co.*, 5 FMSHRC at 293:

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

or lowering of penalties after contest may be jeopardized by an appearance of arbitrariness.

Citation No. 8142705

On February 13, 2012, at 3:50 p.m., MSHA Inspector Vincent L. Nicolau⁶ issued Citation No. 8142705 to Lincoln Leasing at the Pocahontas Highwall Mine alleging a violation of 30 C.F.R. § 77.1605(b) pursuant to Section 105(d)(1) of the Mine Act. The regulation states that “[m]obile equipment shall be equipped with adequate brakes, and all trucks and front-end loaders shall also be equipped with parking brakes.” 30 C.F.R. § 77.1605(b). Section 77.1605(b) is a mandatory safety standard. The citation alleges:

The Mack coal truck C/N: 159, S/N: 9PAE9651 operated by this contractor on this mine property is not currently equipped with adequate brakes. When a brake function test was performed, the truck readily rolled forward with little hesitation. A visual examination of the rear tandem brake components indicated severe deterioration of the driver’s side rear axle brake shoe friction. This condition has been recorded and reported to the contractor supervisor for more than one shift. The pre-shift record for today indicated “[n]eed brakes on back” in the comments section. This record was signed and acknowledged by the contract supervisor who has engaged in aggravated conduct constituting more than ordinary negligence. This is an unwarrantable failure to comply with a mandatory safety standard.

Ex. P-2.

Violation

The citation alleges that an injury was highly likely, could reasonably be expected to result in a fatality, the citation was S&S, a single person was affected, and that the negligence level was high. *Id.* Inspector Nicolau issued the citation because Lincoln Leasing violated

⁶ Nicolau began working for MSHA in May, 2007. (Tr.1 at 27:5-9) Nicolau has worked as a surface coal mine safety and health inspector and as a training instructor, and has received journeyman training, conference litigation representation training, mine elevator inspection training, fatal accident investigation training, and part 50 report and compliance training. (Tr.1 at 27:19-23) Additionally, he received training on surface haulage, which covered multi-axle dump trucks and articulated trucks their end loader brakes and air brakes. (Tr.1 at 35:20 –36:7) He received his AR card in June or July of 2008. (Tr.1 at 27:24 – 28:2) Before working at MSHA, Nicolau working for his father's excavation, demolition and construction business on a need bases from 1994 to 2007 where he owned, operated, and performed maintenance on several pieces of earth-moving equipment, dozers, and cranes. (Tr.1 at 30:9-17) He also attended a brake certification class where he received training in brake inspection. (Tr.1 at 28:23 – 29:24) Nicolau also has a commercial driver's license. (Tr.1 at 34:23 – 35:2)

Section 77.1605(b), “which requires vehicles to be equipped with adequate brakes.” (Tr.1 at 57:11-13) He found that on Truck 159: (1) the slack adjusters were moving beyond the re-adjustment limit; (2) there was severe deterioration of the brake shoe friction; and (3) it failed the pull-through brake function test. (Tr.1 at 72:18 – 73:7)

On February 13, 2012, Nicolau was at the Pocahontas Mine conducting an EO1 inspection. (Tr.1 at 40:24 – 41:4) During his inspection, Nicolau traveled with Bruce Vance⁷ (“Vance”), the maintenance foreman at the Pocahontas Highwall Mine. (Tr.1 at 43:22-23) At the end of the shift, Nicolau and Vance were heading back to the mine office in Vance’s truck when Smailes hailed Vance on the CB radio. (Tr.1 at 44:18-22; Tr. 1 at 98:13-21; Tr.1 at 249:19 – 250:10)

Vance stopped his truck to speak to Smailes in person. Smailes informed Vance that the rear brakes on his truck, Truck 159, were in need of repair. (Tr.1 at 44:23 – 45:7; Tr.1 at 199:8-10)⁸ Smailes explained that the brakes were so bad he did not want to drive downhill. (Tr.1 at 250: 15-19) Smailes also presented a page from his pre-operational examination checklist noting that the truck needed back brakes. (*Id.*; Tr.1 at 46:15-21; Tr.1 at 207:14-21; Tr.1 at 250: 15-19; Ex. P-5)⁹ Vance told Smailes that he would contact Ledford Turley, Jr.¹⁰ (“Turley”) and make sure that his truck got fixed. (Tr.1 at 45:8-10)

As Vance and Nicolau began diving back to the mine office, Nicolau told Vance that he felt it was his duty to inspect all of the trucks on site, to which Vance agreed. (Tr.1 at 45:12-22) All of the trucks were waiting in line to be loaded, so Nicolau began his inspection at the beginning of the line. (Tr.1 at 45:23 – 46:9) He performed the same inspection and function tests with Truck 159 as all the others, including testing the low air alarms, lighting, and braking

⁷ At the time of the hearing, Vance had been the maintenance superintendent at Pocahontas surface mine for five years (Tr.1 at 246:21 – 247:3) He was hired in 2007 as a mechanic and within three months he was the maintenance foreman. (Tr1. at 247:7-15) All of his experience has been in surface coal mining. (Tr.1 at 248:2-7)

⁸ Smailes did not know there was an inspector in the truck with Vance. (Tr.1 at 198:13-21; Tr.1 at 250:22 – 251:1)

⁹ Smailes testified that he filled out the pre-operational forms differently than others. A checkmark indicated that the item inspected was OK; a circle meant it had been repaired, and an x-mark meant it needed to be repaired. (Tr.1 at 209:2-3) If he marked the third column, the condition needed to be fixed. (Tr.1 at 235:7-10)

¹⁰ At the time of the hearing, Turley was working as a mechanic for Lincoln Leasing repairing coal trucks and heavy equipment. (Tr.2 at 38:16-24) He had been a mechanic since 1989. (Tr.2 at 39:3-4) Turley first began employment with Lincoln Leasing in 2001 as a mechanic and held that position until June of 2011 when he was promoted to truck boss or foreman. (Tr.2 41:21 – 42:22) At the time the citation was issued, he was the foreman for Lincoln Leasing.

components. (Tr.1 at 53:18 – 54:5) He also performed a visual exam of the braking components and looked at the pre-operational checklist. *Id.*

Inspector Nicolau found two defects in Truck 159 that involved severe deterioration of the braking components. (Tr.1 at 46:24 – 47:12; Tr.1 at 50:1-6) First, Truck 159 failed the pull-through brake function test.¹¹ (Tr.1 at 55:7-17) Nicolau stood on the fuel tank on the driver-side to communicate with Smailes while he performed the pull-through test. The truck rolled through the brakes without hesitation, indicating that the brakes were inadequate. (Tr.1 at 55:7-17; Tr.1 at 251:16-22) Second, when Nicolau visually¹² inspected the brakes, he found significant defects.¹³ (Tr.1 at 54:6-7) The slack adjusters were out of adjustment, and there was severe deterioration of the driver's side rear brake shoe friction pad, including significant wear of the driver's side rear tandem brake lining, the drum, and the bushings which hold the S-cam. (Tr.1 at 56:16 – 57:2; Tr.1 at 67:15-23) Additionally, the push rod stroke was more than two inches, which exceeded the re-adjustment limit, also decreasing braking effectiveness. (Tr.1 at 69:12-19) The lining on the driver's side rear brake was severely deteriorated and worn down past a quarter of an inch, down to the rivets, which exceeded the out-of-service criteria. (Tr.1 at 69:22 – 70:4; Tr.1 at 71:24 – 72:3; Tr.1 at 74:6-9) A “lip”¹⁴ had worn into the inside of the brake drum, also meeting the out-of-service criteria for the brakes. (*Id.*; 71:5-9) It was evident that the deterioration was significant enough to cause the truck to roll through the brake function test without hesitation.

For the above reasons, I find that Lincoln Leasing violated Section 77.1605(b).

Negligence

High negligence occurs when “[t]he operator knew or should have known of the violative condition or practice, and there are no mitigating circumstances.” *Id.* Nicolau assessed the violation at high negligence because the condition existed for more than one shift, its existence was acknowledged by Turley's signature on the pre-operational checklist, and the truck was

¹¹ The brake function test is the only way the driver of the truck can test the brakes from inside the truck without having to be under the truck looking at the components. (Tr.1 at 54:14-20) The pull-through test is performed as follows: (1) the driver sets the park/emergency brake and then the truck is placed in second gear; (2) the driver lets the clutch out slowly; and (3) either the brakes are tight and hold the truck, or the truck rolls forward because the brakes are inadequate. (Tr. 1 at 54:21 – 5:6) The pull-through test checks the four rear brakes, the parking brake, and the spring brake, but it does not test the front two brakes. (Tr.1 at 166:6-9; Tr.2 at 86:20 – 87:18)

¹² Truck 159 did not have a dust guard covering the wheels, so both Smailes and Nicolau could actually see if the shoes were touching the drum. (Tr.1 at 228:17-23)

¹³ Nicolau checked four out of the six brakes. He did not check all of them because the truck failed the pull through test and found it unnecessary. (Tr.1 at 72:4-16)

¹⁴ A “lip” forms when brake shoe friction has eaten into the drum surface. If the friction wear is an eighth of an inch, it is considered out-of-service. (Tr.1 at 70:10 – 71:4)

placed into service despite this. (Tr.1 at 110:12-18; Tr.1 at 114:20 – 115:7; Tr.1 at 116:4-12; Ex. P-1)

Smailes presented the pages from his pre-operational examination checklist to Vance, and informed Vance that he told Turley, Vance's supervisor and Lincoln Leasing's truck foreman, about the brake problem, but nothing had been done about it. (*Id.*; Tr.1 at 44:23 – 45:7; Tr.1 at 46:15-21; Tr.1 at 207:14-21; Tr.1 at 250: 15-19; Ex. P-5) In Nicolau's opinion the deteriorated condition of the brakes existed for several shifts if not several weeks. (Tr.1 at 7: 21 – 76:4) The condition had been recorded and reported to the supervisor on at least February 11, 12, and 13, 2012. (Tr.1 at 87:23 - 88:1; Ex. P-5)

In the notes recorded in Truck 159's pre-operational examination forms, Smailes indicated on February 11, 2012, that the foot brake needed to be repaired and indicated that the "truck ... [was] not safe." On February 12, 2012, he noted that the truck "need[s] brakes on the back." On February 13, 2012, he also noted the truck "need[s] brakes on [the] back." (Tr.1 at 85:16 – 86:4; Tr.1 at 210:20 – 211:6; Ex. P-5) It is troubling that foreman Turley signed the pre-operational book on all three days, acknowledging the brake problem, but nothing was repaired. (Tr.1 at 8:6-14; Tr.1 at 208:2) Smailes also raised the brake issue with Turley approximately six times over a two week period immediately prior to the issuance of the citation, to which Turley responded that the truck would be fixed, but it never was. (Tr.1 at 82:22 -83:11; Tr.1 at 192:6-9; Tr.1 at 235:21 – 236:4; Tr.1 at 201:15 – 202:9)

Despite Turley's testimony that Smailes never complained about the brakes on the truck in the period leading up to February 13, 2012, on page thirty-four of his deposition testimony, Turley admitted that Smailes told him about the brake issue prior to the citation being written. (Tr.2 at 108:9-18; Tr.2 at 109:9-11) Additionally, due to the adverse inference against Lincoln Leasing, *supra*, I infer that management knew of the brake problem for two weeks prior to the issuance of the citation and still did not remedy the problem.

Turley testified that when he was confronted by Smailes on the morning of February 13, 2012, he instructed one of his mechanics to adjust the brakes on the truck. (Tr.2 at 88:22 – 89:2; Tr.2 at 154:20- 24) After the work was complete, Turley signed the pre-operational form. (Tr.2 at 61:20 – 62:2) This testimony was confirmed by Tracy Man¹⁵ ("Man"). (Tr. 2 at 143:9- 14) However, both Turley's and Man's testimony regarding the work performed on the brakes that morning is inconsistent with other credible evidence.¹⁶

¹⁵ At the time of the hearing Man worked as a mechanic and equipment operator at Lincoln Leasing. (Tr.2 at 130:6-11) At the time of the hearing Man had been working as a mechanic for approximately 15 years. (Tr.2 at 131:2-7) In February 2012, Man was the head mechanic with Lincoln Leasing. (Tr.2 at 132:12-14)

¹⁶ Both Man and Turley made multiple inconsistent and factually unsupported statements that lead me to discredit their testimony, including testimony regarding when repairs were made to Truck 159, the fact that Smailes never told Turley there were bad brakes on Truck 159, and the fact that there was a dust guard on Truck 159 on February 13, 2012.

Inspector Nicolau and Smailes both testified that on the day of the inspection, no work was done on Truck 159's brakes. (Tr.1 at 89:11-14; Tr.1 at 155:7-9; Tr.1 at 193:5-24; Tr.1 at 195:3-8; Tr.1 at 235:14-19) Upon visual examination of the brakes there was little or no friction material on the left rear shoe. Therefore, there was nothing for Man to adjust to make the brakes function. (Tr.1 at 89:3-10; Tr.1 at 155:10-13) Additionally, Smailes testified that he knew no mechanic had touched the truck because the slack adjuster froze while he was braking, indicating that there was no friction; thus, nothing could be adjusted on the brakes to fix the problem. (Tr.1 at 193:9-14; Tr.1 at 236:8 – 237:2) Further, Man did not sign or mark the pre-operational checklist indicating that repairs were made. (Tr.2 at 143:15-18) Therefore, I find that no work was done on Truck 159's brakes on the morning of February 13, 2012.

Even if I found Turley's and Man's testimony to be credible regarding adjusting the brakes the morning of February 13, 2012, their actions to remedy the brake problem would be arguably incorrect. (Tr.1 at 80: 13 – 82:8) Automatic slack adjusters, such as those on Truck 159, are not supposed to be manually adjusted. (*Id.*; Tr.2 at 203:7-15) Indeed, following the initial installation of automatic slack adjusters, if the automatic slack adjusters fail to automatically adjust, they are not functioning properly and must be replaced. (Tr.2 at 203:17 -204:2) According to the Bendix automatic slack adjuster manual, manually adjusting the automatic slack adjusters could give a driver a false sense of security about the effectiveness of the brakes. (Tr.2 at 204:16-23)

On the day of the inspection, Nicolau met with Turley to discuss mitigating circumstances, but Turley admitted that there were none, and that he should have made sure the truck was safe. (Tr.1 at 110:19 – 111:18; Tr.1 at 156:8-12) Turley also admitted that he did not check to see if the brakes were fixed before signing the pre-shift examination form. (Tr.2 at 113:1-3)

It is clear from the record that Lincoln Leasing knew about the problem with Truck 159's brakes for weeks but did nothing to remedy the situation. I find that Lincoln Leasing was highly negligent.

Gravity

The gravity analysis focuses on factors such as the likelihood of an injury, the severity of an injury, and the number of miners potentially injured. Nicolau indicated that the injury was highly likely and could reasonably be expected to result in a fatality. (Tr.1 at 90:3-6; Ex. P-2) Nicolau marked this citation as "one person affected" because there was a single driver in the truck. (Tr.1 at 96:3-8) However, Nicolau testified that defective brakes could also affect others in oncoming traffic. (Tr.1 at 96:11-14)

Nicolau testified that he had tested hundreds of trucks, and any time a truck rolls without hesitation during the pull-through test, there are severe brake issues. (Tr.1 at 90:8-17) Given normal mining operations, had he not intervened, the truck would still be used to haul coal and could potentially cause serious injury or death. *Id.* If an out-of-control truck were to strike another vehicle or a miner, it could cause a disabling injury or even death. (Tr.1 at 98:15-21) Additionally, a driver could lose control of his truck and drive over a drop-off. Therefore, it is

highly likely that inadequate brakes could result in serious injury. I also find that two persons could be affected -- the driver and anyone else encountered in traffic.

Significant and Substantial

There was a violation of a mandatory safety standard. The faulty brakes were safety hazard and created a reasonable likelihood of serious injury. On February 13, 2012, if Smailes had needed to brake for any reason, he probably would not have been able to stop his truck.¹⁷ (Tr.1 at 200:15-20; Tr.1 at 230:3-10) Smailes testified that driving Truck 159 was very dangerous, and the only way he would have been able to stop was to drive it into a ditch. (Tr.1 at 230:3-10; Tr.1 at 200:21-23) The mine road where trucks hauled coal was muddy and rutted and had a grade of 4% to 17%. (Tr.1 at 92:6-19) With brakes in the condition described here, it would be difficult to stop a truck with an empty weight of approximately 10 -12 tons, and more so one weighing 40 tons when loaded, on a relatively flat surface. (Tr.1 at 92:23 – 93:4) Adding a grade to the road causes the danger to increase significantly. Furthermore, the road at this mine was made of shale, old sandstone, and dirt from the old highwall, which easily became muddy. (Tr.1 at 48:12-21) Additionally, while the mine road had two-way traffic, it was only wide enough for one truck to pass at a time on approximately 80-85% of the road. Unloaded trucks would have to wait on the side until the loaded trucks passed. (Tr.1 at 259:23 – 260:7; Tr.1 at 94:1-4) The mine road was used by everybody associated with the mine including mechanics, fuelers, greasers, highwall personnel, foremen, mine examiners, and supervisors, (Tr.1 at 96:17 – 97:1) who typically used smaller vehicles like pick-up trucks. (Tr.1 at 97:4-6)

It is imperative that all pieces of equipment, especially large coal-hauling trucks, have adequate brakes. A miner on foot or in a small vehicle could be hurt or killed. The haul truck driver might not be able to stop from falling over a drop-off. A loss of vehicle control due to inadequate brakes would likely result in a fatality. Therefore, I find that Secretary met his burden to prove a reasonable likelihood that the hazard would result in a serious injury. The citation was properly designated as S&S.

Unwarrantable Failure

The Commission has determined that an “unwarrantable failure” is aggravated conduct constituting more than ordinary negligence and is determined by looking at all the facts and circumstances of each case to see if any of the seven aggravating factors exist.

The Extent of the Violative Condition

It is clear from the record and the analysis above that the rear brakes on Truck 159 were inadequate and needed to be repaired. The slack adjusters moved beyond the re-adjustment limit, there was severe deterioration of the brake shoe friction pad, and the truck failed the pull-through

¹⁷ Smailes testified that he put the truck in low gear to keep it from crashing while he was hauling coal. He also testified that he used the engine jake brake, which only slows the truck down; it will not stop the truck. (Tr.1 at 199:16-20) Nicolau testified that the likelihood of injury was high under those conditions. (Tr.1 at 90:20 – 91:4)

test. On the February 16, 2012, Nicolau came back to the mine property to check if Lincoln Leasing abated the citation. (Tr.1 at 76:15-19) He wrote in his notes taken that day that the passenger side front tandem canister had a broken spring that was replaced, the brake drum was replaced, the back brake shoes were replaced, and all four rear slack adjusters were replaced.¹⁸ (*Id.*; Tr.1 at 206:1-24; Tr.2 at 76:24 – 77:3; Tr.2 at 81:9-12) These parts were removed from Truck 159 at the inspection site on February 13, 2012. It is clear that the brake problem was extensive, and that a single violating condition, or any combination of violating conditions, could have made the truck's brakes inadequate and caused the truck to fail the pull through test.

The Length of Time the Violating Condition Existed

The evidence indicates that the inadequate brake condition lasted for an extended time. The condition had been recorded and reported to the truck foreman, Turley, on February 11, 12, and 13, 2012. This alone is evidence of how long the violating condition, which was acknowledged by Lincoln Leasing's foreman, existed. However, as discussed above, due to the adverse inference against Lincoln Leasing, I infer that management knew of the brake problem for two weeks prior to the issuance of the citation and still did not remedy the problem. Most importantly, it would take a long time for the brake linings to wear down to the rivets (Tr.1 at 4:6-9; Tr.1 at 75:16-20) and to wear down beneath the v-notch line, as noted at the time the citation was written. (Tr.1 at 73:12 – 74:5)

The High Degree of Danger

An out-of-control truck could strike another vehicle or a miner, resulting in a fatality. Inadequate brakes are dangerous on a straight, paved road. However, the mine road in this instance was muddy and rutted, had a steep grade in some places, and was made up of shale, old sandstone, and dirt from the old highwall. This exacerbated the danger of the inadequate brakes on Truck 159.

Even more disturbing, Smailes testified that on February 12, 2012, the day before the citation was issued, as he was driving up the 40 bank in Truck 159 a fuse shorted out. (Tr.1 at 195:12-16; Tr.1 at 196:10 – 197:6) When Smailes tried to stop the truck, it wouldn't stop; it rolled backwards down the hill and finally stopped when it rolled into a ditch. (*Id.*; Tr.1 at 197:8-14) Smailes testified about how frightening it was having to maneuver the truck backwards and downhill when the brakes failed. (Tr.1 at 199:11-15) The Mine Act seeks to protect miners against exactly this type of danger.

¹⁸ Turley testified that he had the mechanic change all four slack adjusters, even though he thought they were in compliance, because he wanted the truck to pass the abatement check. (Tr.2 at 113:15 – 114:9) This argument is unconvincing. Nicolau inspected the brakes on February 13, while they were on the truck, and on February 16, when they were off of the truck and concluded that they were inadequate.

The Operator's Knowledge and the Obviousness of the Violation

Management knew of the deteriorated condition of the brakes for a long time. (Tr.1 at 160:2-6) Lincoln Leasing's truck foreman signed the pre-operational examination book on February 11, 12, and 13, showing knowledge of the inadequate brakes. Smailes had informed Turley of the brake problem approximately six times over a two week period. Lincoln's foreman knew that the condition existed, he had reason to know the extent of the problem, and he let the truck operate in this condition. The condition of the brakes on Truck 159 was obvious, and Lincoln Leasing had knowledge of it.¹⁹

The Operator's Efforts to Abate the Violating Condition

As previously stated, even if Turley's and Man's testimony were credible, it would have been improper to manually adjust the automatic slack adjuster. I find that Lincoln Leasing did nothing to remedy the inadequate brakes until the citation was issued.

Conclusion

The unwarrantable failure designation is justified because Lincoln Leasing engaged in aggravated and intentional misconduct: (1) there was a failure to comply with a mandatory standard; (2) the condition existed for a long time; (3) the condition was obvious; thus, (4) the operator knew or should have known that the condition existed. (Tr.1 at 168:1-12) Truck 159 needed brake work on the back axle for weeks. A supervisor acknowledged the defective brake condition. The truck failed the pull-through test. (Tr.2 at 78:8-14) I agree with Nicolau that this was aggravated conduct constituting more than ordinary negligence. This was an unwarrantable failure to comply with a mandatory safety standard. (Tr.1 at 88:2-6; Tr.1 at 111:19-22)

Penalty

The Secretary proposed a penalty of \$45,708.00 for Citation No. 8142705. Lincoln Leasing operates approximately 192,500 hours at the mine, had approximately 30 past violations, two persons were affected, the citation was S&S, and the operator was found to be highly negligent. Due to the testimony at the hearing and the evidence presented about the circumstances leading up to the violation, I find that the operator is not entitled to a 10% reduction for good faith. Additionally, I find that Lincoln Leasing engaged in questionable

¹⁹ Smailes made some very disturbing statements in his testimony. On the morning of February 13, 2012, Smailes told Turley that he didn't want to drive Truck 159 because of the inadequate brakes. (Tr.1 at 197:23 – 198:2; Tr.1 at 204:20-22; Tr.1 at 231:8-13) Turley's response was that if he didn't drive Truck 159, he should go home. (*Id.*; Tr.1 at 189:13-15; Tr. 1 at 192:4) Smailes took that to mean that if he did not haul coal he would be fired. (Tr.1 at 204:23 – 205:2) At the hearing, Lincoln Leasing tried to discredit Smailes' credibility and denied this allegation, but I, along with Vance, (Tr.1 at 249:11-14), have no reason to believe that Smailes would lie about the events on and leading up to February 13, 2012.

practices regarding its document retention and production in this case. As such, I assess a penalty in the amount of \$55,000.00 for Citation No. 8142705.

Order No. 8142706

At 4:00 p.m. on February 13, 2012, Inspector Nicolau issued Order No. 8142706 to Lincoln Leasing at the Pocahontas Highwall Mine alleging a violation of 30 C.F.R. § 77.410(c) pursuant to Section 105(d)(1) of the Mine Act. The regulation states that “[w]arning devices shall be maintained in functional condition.” 30 C.F.R. § 77.410(c). Section 77.410(c) is a mandatory safety standard. The citation alleges:

The automatic warning device (intended to give an audible alarm when the vehicle is placed in reverse) has not been maintained in functional condition on the Mack Coal truck C/N:159, S/N: 9PAE9651 operating on this mine property. The alarm failed to function when tested. This condition was noted and acknowledged by the contract supervisor on the pre-shift record dated 2-13-2012.

Ex. P-3.

Violation

The order alleges that an injury was reasonably likely, could reasonably be expected to result in lost workdays or restricted duty, the citation was S&S, a single person was affected, and that the negligence level was high. (*Id.*; Tr.1 at 112:14-18) The Secretary attempted to prove that the back-up alarm was not operational at the time of the pre-shift examination on February 13, 2012, and based his negligence, gravity, S&S, and unwarrantable allegations on that premise. However, the evidence does not support the conclusion that the back-up alarm was not working at the time of the pre-shift examination. It does, however, support the conclusion that the alarm was not working at the time of Nicolau’s inspection. (Tr.1 at 174:8-9; Tr.1 at 202:15-23) As a result, I find that the inoperative alarm violated 30 C.F.R. § 77.410(c), but I cannot agree with the Secretary’s assessment of the negligence and unwarrantable failure elements of the charge.

Negligence

High negligence is found when “[t]he operator knew or should have known of the violative condition or practice, and there are no mitigating circumstances.” 30 C.F.R. § 100.3(d). Moderate negligence is present when “[t]he operator knew or should have known of the violative condition or practice, but there are mitigating circumstances.” *Id.*

Nicolau alleged high negligence because, according to his notes taken the day of the inspection, the pre-operational checklist indicated that the back-up alarm was not functioning, and Turley acknowledged the problem by his signature on the form. (Tr.1 at 116:16-19; Tr.1 at 118:2-7) However, the pre-operational exam exhibit admitted into evidence does not indicate that the back-up alarm was in need of repair (Ex. P-5; Tr.1 at 158:15-18), which creates a factual discrepancy. Nicolau acknowledged the discrepancy between Exhibit P-5 and what he observed

and wrote about on February 13, 2012. (Tr.1 at 172:20 – 173:10) Smailes' testimony compounded the discrepancy. He testified that he reviewed the pre-operational exam book and noted that it showed the back-up alarm was not working on February 13, 2012. (Tr.1 at 202:24 – 203:10) It is possible that the pre-operational exam book was tampered with, as both Nicolau and Smailes intimated, however I cannot make that finding based on this evidence. In the absence of more convincing evidence to the contrary, and based on Exhibit P-5, I find that the back-up alarm was in working condition at the time of the pre-shift examination on the morning of February 13, 2012. Thus, I am not convinced that Lincoln Leasing knew or should have known about the issue with the back-up alarm before the shift began.

However, the evidence does support an inference that the combination of muddy conditions at the mine and the location of the alarm wires affected the back-up alarm. The wires on Truck 159 were in a location where they could be easily dislodged, causing the back-up alarm to fail. (Tr.1 at 267:5-11) I infer from this that the alarm stopped working after the pre-shift but before the inspection, due to the accumulation of mud and the effects of vibration. Additionally, based on the testimony of Vance, Man, and Turley, dislodged back-up alarm wires were a common occurrence on Lincoln Leasing coal trucks at this site. Therefore, Lincoln Leasing should have known that driving Truck 159 over muddy and rutted roads could cause the back-up alarm to fail after the pre-shift examination was done. Lincoln Leasing was moderately negligent.

Gravity and Significant and Substantial

The gravity analysis focuses on factors such as the likelihood of an injury, the severity of an injury, and the number of miners potentially injured. Nicolau testified it was reasonably likely that if a person were run over by a coal truck it would result in a fatality. (Tr.1 at 114:14-17) However, Nicolau marked the citation as lost work days or restricted duty because the miners at this site were on constant high alert that trucks were backing-up and maneuvering all the time. (Tr.1 at 114:1-6) Additionally, he marked the citation as affecting one person because he felt if there were a back-up alarm failure, the truck driver would probably hit only one person. (Tr.1 at 120:8-12) If a miner were struck by a coal truck it could result in broken bones and fractures, resulting in lost work days or restricted duty. I concur that it was reasonably likely that this violation could result in a serious injury to one miner.

Nicolau alleged that an injury was reasonably likely because the truck must back-up, maneuver around, and back up into the small highwall area (40 foot radius) where several miners were working on foot. (Tr.1 at 112:21 – 113:21; 262:7-8; 278:6-280:17)

It is important to have functional back-up alarms on every piece of mobile equipment because of the high level of miner activity near the highwall. At this mine, trucks must back up to the highwall area to get loaded, making it reasonably likely that an injury would occur. Therefore, I find that the Secretary proved by a preponderance of the evidence that an S&S designation was warranted here.

Unwarrantable Failure

Based on the evidence submitted at the hearing, and the argument presented in the Secretary's brief, I find that the Secretary failed to prove by a preponderance of the evidence that an unwarrantable failure designation is warranted here. The negligence was moderate, and the operator did not know at the beginning of the shift that the back-up alarm was not functioning. This evidence does not support a finding of recklessness or indifference that an unwarrantable failure designation is intended to protect against.

Penalty

The proposed penalty for Order No. 8142706 was \$7,176.00. Lincoln Leasing operates approximately 192,500 hours at the mine, had approximately 30 past violations, one person was affected, the order was S&S, and the operator was moderately negligent. I assess a penalty of \$2,161.00.

WHEREFORE, it is **ORDERED** that Lincoln Leasing pay a penalty of **\$57,161.00** within thirty (30) days of the filing of this decision.

It is further **ORDERED** that Order No. 8142706 be modified from a 104(d)(1) order to a 104(a) citation.

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

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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July 13, 2015

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

v.

PARAMONT COAL COMPANY
VIRGINIA LLC,
Respondent.

PARAMONT COAL COMPANY
VIRGINIA LLC,
Contestant,

v.

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

CIVIL PENALTY PROCEEDING

Docket No. VA 2010-458
A.C. No. 44-07123-223318

Mine: Deep Mine No. 35

CONTEST PROCEEDINGS

Docket No. VA 2010-369-R
Citation No. 8166777; 04/07/2010

Docket No. VA 2010-370-R
Citation No. 8166778; 04/07/2010

DECISION AND ORDER ON REMAND

Before: Judge Paez

This matter is before me on remand from the Commission. 37 FMSHRC ___, slip op. at 1, No. VA 2010-458 (May 27, 2015) (citing 35 FMSHRC at 1155). On April 30, 2013, Administrative Law Judge George Koutras issued a decision after hearing that involved two section 104(a) citations and two section 104(b) withdrawal orders. 35 FMSHRC 1118, 1158 (Apr. 2013) (ALJ). The Commission’s decision vacated and remanded one aspect of Judge Koutras’s decision regarding one of the section 104(a) citations. 37 FMSHRC ___, slip op. at 6, No. VA 2010-458 (May 27, 2015). Judge Koutras has since retired, so Chief Administrative Law Judge Robert J. Lesnick reassigned this matter to me on June 9, 2015.

The matter on remand involves Citation No. 8166774, which was issued to Paramont Coal Company Virginia LLC (“Paramont”) by the Department of Labor’s Mine Safety and Health Administration (“MSHA”), for a misaligned conveyor belt at Paramont’s Deep Mine

No. 35. The citation alleged a significant and substantial (“S&S”)¹ violation of the safety standard in 30 C.F.R. § 75.1731(b), which requires conveyor belts to be properly aligned.² The Commission determined that Judge Koutras erred by failing to consider the frictional contact between the wooden baffles and the misaligned No. 3 belt as a factor that could contribute to a belt fire. *See* 37 FMSHRC ___, slip op. at 5 (citing 35 FMSHRC at 1155).

I. PROCEDURAL BACKGROUND AND ISSUES ON REMAND

Judge Koutras’s decision in this matter discussed three citations issued by Inspectors Bobby Hall and Lloyd Robinette in connection with their inspection on April 5, 2010, as well as two orders issued on April 7, 2010. First, the Secretary alleged in Citation No. 8166773 that Paramont violated 30 C.F.R. § 75.400 for allowing coal dust to accumulate along the belt line in Deep Mine No. 35. Second, in Citation No. 8166774 the Secretary alleged that the alignment on Paramont’s belt conveyor violated 30 C.F.R. § 75.1731(b). The Secretary designated both citations as S&S and included both citations in Docket No. VA 2010-458.

A few hours later, Inspectors Hall and Robinette returned to the same area of the mine and issued Citation No. 8166775, charging Paramont with a violation of 30 C.F.R. § 75.1731(c). 35 FMSHRC at 1127, 1129. Citation No. 8166775 involved wooden boards—which Judge Koutras refers to as “wooden baffles”—that had been constructed across the belt conveyor and which contributed to a frictional heating hazard. *Id.* at 1124–25. The body of Citation No. 8166775 indicates that the conveyor belt was rubbing against those wooden baffles and the atmosphere smelled like smoldering wood. *Id.* at 1125. Float coal dust and coal fines were also present. *Id.* To abate Citation No. 8166775, Paramont’s foreman “immediately destroyed the wooden baffle materials by knocking them out with a sledge hammer.”³ *Id.* at 1129. Two days later, the Secretary issued section 104(b) Order Nos. 8166777 and 8166778 for failing to abate the conditions cited in Citation Nos. 8166773 and 8166774.⁴ *See* 35 FMSHRC at 1120–21.

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

² 30 C.F.R. § 75.1731(b) states that “[c]onveyor belts must be properly aligned to prevent the moving belt from rubbing against the structure or components.”

³ Citation No. 8166775 was included in a separate docket, Docket No. VA 2010-408, and the parties agreed to settle that civil penalty proceeding. 37 FMSHRC ___, slip op. at 2 n.4. Judge Koutras issued a Decision Approving Settlement for Docket No. VA 2010-408 in 2010. That matter is not before me.

⁴ Paramont contested these section 104(b) orders in Docket Nos. VA 2010-369-R and VA 2010-370-R. Judge Koutras affirmed Order No. 8166778 and vacated Order No. 8166777. 35 FMSHRC at 1166. Although both dockets are before me on remand, the Commission’s decision did not disturb Judge Koutras’s decision regarding either order.

Judge Koutras determined that Citation No. 8166774 was not appropriately designated as S&S. *Id.* at 1158. He declined to consider the frictional contact between the smoldering wooden baffles identified in Citation No. 8166775 and the belt in question as a possible ignition source that should be considered in determining whether a confluence of factors existed that could trigger an explosion or ignition. *Id.* at 1155–58.

In remanding the matter, the Commission states: “only the Secretary’s petition, seeking review of the Judge’s finding that Citation No. 8166774 was not S&S, was granted.” 37 FMSHRC ___, slip op. at 2 n.4. As the Commission stated:

Citation Nos. 8166774 (at issue here) and 8166775 both involved equipment that rubbed against the belt — bottom roller hangers and wooden baffles respectively. Citation No. 8166773 involved accumulations of float coal dust in the area. The main issue in the case is whether the wooden baffles that were the subject of Citation No. 8166775 should also have been considered as a potential cause of a belt fire when the Judge made his S&S determination regarding Citation No. 8166774.

37 FMSHRC ___, slip op. at 2 (footnote omitted). The Commission directs me to “consider whether a confluence of factors, including the wooden baffles, could have contributed to a fire. . . . [and] also consider the Secretary’s argument that the two hot hangers would eventually heat to a sufficient temperature to contribute as an ignition source.” *Id.* at 5–6.

Consequently, the sole issues before me on remand are (1) whether the Secretary established a confluence of factors which would have resulted in the ignition of a belt fire, thus establishing that Citation No. 8166774 was significant and substantial (“S&S”), and (2) the appropriate penalty assessment for Citation No. 8166774.

II. PRINCIPLES OF LAW AND ANALYSIS

A. Significant and Substantial – Principles of Law

A violation is S&S “if, based on the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature.” *Cement 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, 103 (5th Cir. 1988) (approving the *Mathies* criteria).

The Commission has provided guidance to Administrative Law Judges in applying the *Mathies* test. As to the third *Mathies* element, the Commission specifically noted on remand:

[T]he Commission has recognized that “[i]n addressing [whether a hazard is reasonably likely to result in an injury] . . . in cases involving violations which may contribute to the hazard of . . . explosions or ignitions, the likelihood of an injury resulting from the hazard depends on whether a ‘confluence of factors’ exists that could trigger an explosion or ignition.” *McCoy Elkhorn Coal Corp.*, 36 FMSHRC 1987, 1992 (Aug. 2014). Such factors include any potential ignition sources, the presence of methane, float coal dust accumulations, loose coal or other ignitable substance, and the types of equipment operating in the area. *See Utah Power & Light Co., Mining Div.*, 12 FMSHRC 965, 970-71 (May 1990); *Texasgulf*, 10 FMSHRC 498, 501-03 (Apr. 1988).

37 FMSHRC ___, slip op. at 4–5.

The Commission’s remand decision also noted that “an S&S determination must be made at the time the citation is issued ‘without any assumptions as to abatement’ and in the context of ‘continued normal mining operations.’” 37 FMSHRC ___, slip op. at 5 (citing *U.S. Steel Mining Co.*, 6 FMSHRC 1573, 1574 (July 1984)). In addition, the Commission previously indicated that “an inspector’s judgment is an important element” in an S&S determination. *Mathies*, 6 FMSHRC at 5 (citing *Nat’l Gypsum*, 3 FMSHRC at 825–26); *see also Buck Creek Coal*, 52 F.3d at 135 (stating that ALJ did not abuse discretion in crediting opinion of experienced inspector).

B. S&S Analysis of Citation No. 8166774

The first *Mathies* element is satisfied by Judge Koutras’s determination of a violation, a finding which was not appealed. 37 FMSHRC ___, slip op. at 4. Regarding the second *Mathies* element, the Commission concluded that Judge Koutras correctly determined that the violation contributed to the hazard of a belt ignition fire. *Id.*

Turning to elements three and four of the *Mathies* test, I note Judge Koutras’s factual findings that: (1) no methane was present in this area of the mine; (2) no float coal dust was in suspension; (3) no electrical wires were exposed; (4) no float coal dust was turning or backed up in any of the belt rollers; (5) Paramount’s belt was fire resistant or retardant; and (6) no rock dust or footprints were present on the float coal dust to suggest anyone had been in the area. 35 FMSHRC at 1157. Because the Commission’s decision did not disturb these findings, they remain applicable to my S&S analysis on remand.

Judge Koutras also found and concluded that “it [was] unlikely and improbable that the two belt hangers observed by the inspector, as well as the remaining hangers that evidenced past rubbing by the belt[,] were viable heat sources that would contribute to, or result in a belt fire, or an injury of reasonably serious nature.” 35 FMSHRC at 1158. Yet, the Commission has specifically directed me to evaluate whether the friction between the belt and belt hangers would heat to a sufficient temperature in the course of continued mining operations to provide an

ignition source. I note Inspector Hall's testimony that a temperature in excess of 140 degrees was necessary to ignite a belt fire. (Tr. 140:18–141:5.) Likewise, I note Judge Koutras's finding that the misaligned belt had damaged twelve *other* belt hangers at some point. 35 FMSHRC at 1157.

In the course of continued normal mining operations, the repeatedly misaligned belt would continue to rub the belt hangers. *Cf.* 37 FMSHRC ___, slip op. at 5 n.10 (indicating the increase in severity of conditions associated with the wooden baffles over three-and-a-half hours “shows the effect of normal mining conditions on the development and worsening of the hazard.”) Although the temperature of the belt hangers was *presently* insufficient to cause a fire, the record also demonstrates the belt hangers heated up in response to friction. Indeed, the temperature of the two belt hangers in question was already 74 and 75 degrees, respectively, at the time of the citation.⁵ (Tr. 332:19–334:1.) I therefore find that the frictional contact would continue to build heat on the belt hangers and eventually reach a temperature that would provide an ignition source for the float coal dust accumulations located just a few feet away.

The smoldering wooden baffles constituted *another* ignition source for the nearby float coal dust accumulations. *See* 35 FMSHRC at 1133, 1157. Additionally, Judge Koutras found that no rock dust was present at the time the inspector issued the citation, and he inferred that its absence implied that no miners had been present in the area. 35 FMSHRC at 1157. But I recognize that the *absence* of rock dust actually increases the danger that the *presence* of float coal dust raised in this case.⁶ According to Paramont's rock dusting schedule, the area should have been rock dusted the previous day. *See* 35 FMSRHC at 1141–47 (indicating that Paramont applied rock dust to the belts once per week and as needed on other days). Paramont's failure to follow its rock dusting schedule suggests to me that in continued mining operations float coal dust would have been present without any rock dust. Notwithstanding Judge Koutras' finding that no float coal dust was in suspension at the moment, these untreated float coal accumulations would have provided a dangerous fuel source for any suspension or ignition event that occurred.

⁵ The record in this case does not make clear what the ignition temperature for a belt fire would be. On cross-examination, Inspector Hall admitted that it would be higher than 140 degrees. (Tr. 140:25–141:5.) However, it is unclear how high the ignition temperature would be for the fire resistant/retardant belt in question. Given their experience as coal miners and MSHA inspectors (Tr. 57:23–58:25, 191:6–193:11), I credit the testimony from Inspectors Robinette and Hall that friction between the belt and the belt hangers and the wood baffles in question presented an ignition source. (Tr. 87:24–88:4, 89:2–16, 144:14–145:6, 148:5–18, 210:13–22.) *See also Harlan Cumberland Coal Co.*, 20 FMSHRC 1275, 1278–79 (Dec. 1998) (relying on the opinion of an experienced inspector to conclude that substantial evidence supported an ALJ's S&S determination).

⁶ Rock dust is applied to help reduce the dangers of float coal dust. *See, e.g., American Geological Institute, Dictionary of Mining, Mineral, and Related Terms* 465 (2d ed. 1997) (defining rock dust as “[t]he general name for any kind of inert dust used in rendering coal dust inert . . .” and rock dusting as “[t]he dusting of underground areas with powdered limestone to dilute the coal dust in the mine atmosphere and on mine surfaces, thereby reducing explosion hazards.”).

Methane presented a similar problem. Although Inspector Hall did not detect any methane at the time, I recognize that MSHA was required to provide spot inspections of Deep Mine #35 every 10 or 15 working days because it liberated approximately 100,000 cubic feet of methane every twenty-four hours. (See Tr. 130:19–25, 212:11–13; 30 U.S.C. § 813(i).) In the course of continued mining operations, methane could accumulate quickly on the belt line and provide fuel for the belt hanger and wooden baffle ignition sources. Cf. *Knox Creek Coal Corp.*, 36 FMSHRC 1128, 1132 (May 2014) (indicating that the ALJ erred when he took a “‘snapshot’ approach” to the S&S analysis), *appeal pending*, 4th Cir. 14-2313. Given the above evidence of record, I determine that a float coal dust or methane ignition was reasonably likely to occur. I therefore conclude that a belt ignition hazard was reasonably likely to result in injuries, satisfying *Mathies*’ third element.

If a belt did catch fire, I have no doubt that burns and smoke inhalation injuries would be serious. The Commission has routinely considered smoke inhalation and burns to constitute reasonably serious injuries for the purpose of a *Mathies* analysis. See, e.g., *Big Ridge, Inc.*, 35 FMSHRC 1525, 1528–29 (June 2013) (affirming ALJ’s S&S determination where smoke inhalation and burn injuries were reasonably likely). Here, I credit the testimony of Inspectors Hall and Robinette that they would expect smoke inhalation injuries. (Tr. 89:2–10, 96:16–98:2, 217:5–8.) Thus, I determine that the Secretary has satisfied the fourth element of *Mathies*.

In view of the above, the Secretary has met his burden of proof on all four elements of *Mathies*. Accordingly, I conclude that MSHA appropriately designated Citation No. 8166774 as S&S.

III. PENALTY

Although the Secretary proposes penalties, the Commission assesses penalties for violations of the Mine Act *de novo*. *Douglas R. Rushford Trucking*, 22 FMSHRC 598, 600 (May 2000). When assessing a civil penalty, section 110(i) of the Mine Act requires that I consider six criteria, including: the operator’s history of previous violations, the appropriateness of the penalty relative to the size of the operator’s business, the operator’s negligence, the penalty’s effect on the operator’s ability to continue business, the gravity of the violation, and the demonstrated good faith of the operator in attempting to achieve rapid compliance. 30 U.S.C. § 820(i). The criteria are not required to be given equal weight. *Jim Walter Res., Inc.*, 36 FMSHRC 1972, 1979 (Aug. 2014).

In his decision, Judge Koutras found that Paramont’s history of previous violations was “not egregious.” 35 FMSHRC at 1165. He also noted the parties’ stipulation that Paramont was a large mine operator and that the proposed penalties would not adversely affect its ability to remain in business. *Id.* Further, he observed that Paramont’s abatement efforts to achieve compliance were on-going but not completed at the time the section 104(b) orders were issued on April 7, 2010. *Id.* Judge Koutras also agreed with the Secretary that Paramont acted with a moderate level of negligence. *Id.* Finally, he ordered Paramont to pay a civil penalty of \$1,400.00 in connection with Citation No. 8166773, affirmed Withdrawal Order No. 8166778, and vacated Order No. 8166777. *Id.* at 1166.

Because the Commission has not disturbed the above determinations, the only factor that I must revisit under section 110(i) is the gravity of Citation No. 8166774. Based on the evidence before me and in the context of continued mining operations, I have determined that Citation No. 8166774 was sufficiently dangerous to constitute an S&S violation. I therefore conclude that the Secretary's proposed penalty of \$1,569.00 is appropriate for Citation No. 8166774.

IV. ORDER

In light of the foregoing, it is hereby **ORDERED** that Citation No. 8166774 be **AFFIRMED** as written. Furthermore, Paramont is **ORDERED** to **PAY** a total civil penalty of \$1,569.00 within forty (40) days of the date of this decision on remand.

/s/ Alan G. Paez
Alan G. Paez
Administrative Law Judge

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/pjb

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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July 15, 2015

SECRETARY OF LABOR
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
on behalf of THOMAS HARPER,
Complainant,

v.

KINGSTON MINING INC.,
Respondent.

TEMPORARY REINSTATEMENT
PROCEEDING

Docket No. WEVA 2015-816-D
MSHA Case No.: HOPE-CD-2015-09

Mine: Kingston No. 2 Mine
Mine ID: 46-08932

DECISION AND ORDER
REINSTATING THOMAS HARPER

Appearances: J. Matthew McCracken, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, VA, Representing the Secretary of Labor

Arthur M. Wolfson, Esq., Jackson Kelly PLLC, Pittsburgh, PA,
Representing Respondent

Before: Judge Lewis

On June 17, 2015, pursuant to section 105(c)(2) of the Federal Mine Safety and Health Act of 1977 (AAct@), 30 U.S.C. ' 801, *et. seq.*, and 29 C.F.R. ' 2700.45, the Secretary of Labor (ASecretary@) filed an Application for Temporary Reinstatement of miner Thomas Harper ("Harper" or "Complainant") to his former position with Kingston Mining Inc., (AKingston@ or ARespondent@) at Kingston No. 2 Mine pending final hearing and disposition of the case.

That application followed a Discrimination Complaint filed by Harper on May 14, 2015, that alleged, in effect, that his termination was motivated by his protected activity. The Secretary represents that this Complaint was not frivolously brought and requests an Order directing Respondent to reinstate Harper to his former position as a utility/scoop.

Respondent filed a motion requesting a hearing regarding this application on June 26, 2015. On July 2, 2015, Respondent submitted a Pre-Hearing Memorandum of Law addressing its legal arguments in this matter. A hearing was held in South Charleston, WV on July 7, 2015. The Secretary presented the testimony of the complainant. Respondent had the opportunity to cross-examine the Secretary=s witnesses and present testimony and documentary evidence in support of its position. 29 C.F.R. ' 2700.45(d).

For the reasons set forth below, I grant the application and order the temporary reinstatement of Harper.

Discussion of Relevant Law

Section 105(c) of the Mine Act prohibits discrimination against miners for exercising any protected right under the Mine Act. The purpose of the protection is to encourage miners to play an active part in the enforcement of the [Mine Act] recognizing that, if miners are to be encouraged to be active in matters of safety and health, they must be protected against any possible discrimination which they might suffer as a result of their participation. S. Rep. No. 181, 95th Cong., 1st Sess. 35 (1977), *reprinted in* Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2nd Sess., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 623 (1978).

Congress created the temporary reinstatement as “an essential protection for complaining miners who may not be in the financial position to suffer even a short period of unemployment or reduced income pending the resolution of the discrimination complaint.” S. Rep. No. 181, 95th Cong., 1st Sess. 36-37 (1977), *reprinted in* Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong. 2nd Sess., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 624-25 (1978).

Temporary Reinstatement is a preliminary proceeding, and narrow in scope. As such, neither the judge nor the Commission is to resolve conflicts in testimony at this stage of the case. *Sec’y of Labor on behalf of Albu v. Chicopee Coal Co.*, 21 FMSHRC 717, 719 (July 1999). The substantial evidence standard applies.¹ *Sec’y of Labor on behalf of Peters v. Thunder Basin Coal Co.*, 15 FMSHRC 2425, 2426 (Dec. 1993). A temporary reinstatement hearing is held for the purpose of determining whether the evidence mustered by the miners to date established that their complaints are non-frivolous, not whether there is sufficient evidence of discrimination to justify permanent reinstatement. *Jim Walter Resources*, 920 F.2d 738, 744 (11th Cir. 1990).

In adopting section 105(c), Congress indicated that a complaint is not frivolously brought if it appears to have merit. S. Rep. No. 181, 95th Cong., 1st Sess. 36-37 (1977), *reprinted in* Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong. 2nd Sess., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 624-25 (1978). In addition to Congress appears to have merit standard, the Commission and the courts have also equated “not frivolously brought” to “reasonable cause to believe” and “not insubstantial.” *Sec’y of Labor on behalf of Price v. Jim Walter Res., Inc.*, 9 FMSHRC 1305, 1306 (Aug. 1987), *aff’d*, 920 F.2d 738, 747 & n.9 (11th Cir. 1990). “Courts have recognized that establishing ‘reasonable cause to believe’ that a violation of the statute has occurred is a ‘relatively

¹ A substantial evidence means such relevant evidence as a reliable mind might accept as adequate to support [the judge’s] conclusion. *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2163 (Nov. 1989) (quoting *Consolidated Edison Co. V. NLRB*, 305 U.S. 197, 229 (1938)).

insubstantial' burden." *Sec'y of Labor on behalf of Ward v. Argus Energy WV, LLC*, 2012 WL 4026641, *3 (Aug. 2012) citing *Schaub v. West Michigan Plumbing & Heating, Inc.*, 250 F.3d 962, 969 (6th Cir. 2001).

In order to establish a *prima facie* case of discrimination under section 105(c) of the Act, a complaining miner must establish (1) that he engaged in protected activity and (2) that the adverse action complained of was motivated in any part by that activity. *Sec'y of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786 (Oct. 1980), *rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3rd Cir. 1981); *Sec'y of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803 (April 1981).

However, in the instant matter, the Secretary and Harper need not prove a *prima facie* case of discrimination with all of the elements required at the higher evidentiary standard needed for a decision on the merits. Rather, the same analytical framework is followed within the "reasonable cause to believe" standard. Thus, there must be "substantial evidence" of both the applicant's protected activity and a nexus between the protected activity and the alleged discrimination. To establish the nexus, the Commission has identified these indications of discriminatory intent: (1) hostility or animus toward the protected activity; (2) knowledge of the protected activity; and (3) coincidence in time between the protected activity and the adverse action. *Sec'y of Labor on behalf of Lige Williamson v. CAM Mining, LLC*, 31 FMSHRC 1085, 1089 (Oct. 2009). The Commission has acknowledged that it is often difficult to establish a motivational nexus between protected activity and the adverse action that is the subject of the complaint. *Sec'y of Labor on behalf of Baier v. Durango Gravel*, 21 FMSHRC 953, 957 (Sept. 1999). The Commission has further considered the disparate treatment of the miner in analyzing the nexus requirement. *Secretary of Labor on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2510 (Nov. 1981), *rev'd on other grounds*, 709 F.2d 86 (D.C. Cir. 1983).

Contentions of the Parties

On May 14, 2015, Harper executed a Summary of Discriminatory Action, which was filed with his Discrimination Complaint. In this statement he alleged the following:

I made complaints about the evening shift no cleaning section properly and was unjustly laid off

Application for Temporary Reinstatement at Exhibit B, p. 2.

The Secretary also submitted the June 11, 2015 Affidavit of James R. Humphrey, a Special Investigator employed by the Mine Safety and Health Administration with the Application. Humphrey wrote that he investigated Harper's discrimination claim against Respondent. Humphrey laid out his findings of fact based on his investigation. *Id.* at Exhibit A, p. 1-3. He concluded:

3. There is reasonable cause to believe that the Complainant was discharged

because he engaged in protected activities. Harper engaged in protected activity when he expressed concern about unsafe working conditions at the Kingston No. 2 Mine. Harper suffered an adverse action when he was discharged on April 10, 2015.

4. Based on my investigation to this date, I have concluded that there is a reasonable cause to believe that Harper was discharged because he engaged in protected activities by complaining about unsafe practices at the mine and providing running right cards to be used in a Commission proceeding. I have concluded that the complaint filed by Harper was not frivolous.

Id. at Exhibit A, p. 3-4. The Secretary cited this declaration as a basis for the formal request for temporary reinstatement. *Id.* at 4.

In its pre-hearing submission, Respondent argued that Harper did not engage in any protected activity. (*Respondent's Memorandum* at 10-13). Further, it argued that even if Harper engaged in protected activity, there was no nexus between that protected activity and the adverse employment action. (*Id.* at 13-17).

Summary of Testimony

Thomas Carl Harper was present at hearing and testified. (Tr. 14). At the time of the hearing he was not employed. (Tr. 14). His last position was as a utility scoop operator with Respondent. (Tr. 14-15). In that capacity he cleaned and dusted the section to prepare it for the next cut. (Tr. 16). He sometimes filled in on the roofbolter and operated a forklift. (Tr. 36-37). Harper worked for nine years at the mine as a utility scoop operator, bolter, hauler, buggy/forklift operator, and motor runner. (Tr. 15, 28). He had nearly 15 years of mining experience. (Tr. 15, 40). He was a certified underground miner. (Tr. 28). During his career, Harper was never disciplined, told he was not doing a good job, or fired. (Tr. 15-16).

At hearing, Harper testified that he engaged in series of protected activities, including complaints to management and state officials. (Tr. 29-30, 53). He stated that following those protected activities, he was discriminatorily discharged during a layoff at the mine. (Tr. 29). He testified his relevant protected activity began in early 2015. (Tr. 17-18, 48-49)

In 2015, Mine Foreman Danny Helmondollar retired and was replaced by Tim Alderman.² (Tr. 16). On March 19, after Alderman took over, he told Harper's direct supervisor, Eric Bragg, that he wanted to split the duties of the two scoop operators so that one man would clean the section and the other would go outby to rock dust and bring supplies. (Tr. 16-17, 34-36,

² Timothy Alderman was present at hearing and testified. (Tr. 111). At the time of the hearing Alderman was employed at Kingston and had started on March 9, 2015. (Tr. 111-112). When he arrived, he was a general mine foreman replacement for Martin. (Tr. 112, 114). Two weeks after his arrival Helmondollar retired and Alderman stepped into the position. (Tr. 114-115). He had prior experience as a superintendent at two other Alpha subsidiaries. (Tr. 115).

47, 49-50, 116-117). Before this new policy was in place, both scoop operators performed both of those tasks. (Tr. 34-36). Alderman testified that he hoped to equalize the load and hold everyone accountable. (Tr. 116). Harper became the inby operator in charge of cleaning. (Tr. 34). Harper “didn’t think too much,” of this plan because it left some work undone and it made it impossible to clean the whole section. (Tr. 17). While Harper managed to clean the section on his shift, the evening shift failed to do so. (Tr. 33-35). However, the problems with cleanliness on the section started before Alderman took over. (Tr. 30-31).

Alderman believed that the crew had done an excellent job keeping the area clean even before he changed the duties of the scoop operators. (Tr. 117). Every time he saw the section, both before and after the change, it looked good. (Tr. 117-118). He was happy with the results of the new plan because he was a stickler on cleanliness. (Tr. 125). In fact, a government roof control specialist told Alderman on June 25, 2015, that the section was beautiful. (Tr. 118).

It was a violation and a hazard to start mining before the section was cleaned and dusted. (Tr. 17, 49). Under Section 75.400, the section had to be free of combustible material within 40 feet of the working face. (Tr. 49). Alderman did not believe a small amount of accumulation was a problem, especially given the fact that water and dust were present. (Tr. 127, 129). Alderman testified that an accumulation would have to “terrible” or block the section to be a hazard. (Tr. 127-130). MSHA asked Respondent to produce accumulation citations issued between February 1 and April 10 at the mine. (Tr. 55-56). Respondent produced two citations (one of which was for an accumulation of hydraulic oil) but the investigator, James Humphrey, did not know if these were all of their citations.³ (Tr. 55-57, 59).

In early January 2015, Harper complained to Bragg about the problems with the new policy and coal dust accumulations. (Tr. 17-18, 48-49). Harper told Bragg he needed to ensure that the evening shift was doing what they needed to do. (Tr. 18). Harper continued to speak with Bragg about this issue daily until the time he was laid off. (Tr. 18, 48-50). His written statement also indicated that he had made a complaint to Bragg two weeks before his layoff about the failure to clean combustible material as a result of the new clean-up policy. (Tr. 32).

In another incident that occurred about two weeks before he was laid off, Harper spoke with safetyman John Murphy about an issue during a safety meeting. (Tr. 19, 32-33, 48-49). The entire section was present for the meeting, but Harper could not recall if members of management were present. (Tr. 20). Specifically Harper noted that the evening shift was not following the mining procedure. (Tr. 19). He believed it was important to point out that the evening shift was not cleaning because that failure was a violation. (Tr. 20). He was not complaining about the evening shift doing a poor job but about the violations. (Tr. 20).

³ James R. Humphrey was present at the hearing and testified. (Tr. 46). At the time of the hearing, Humphrey was a special investigator with MSHA. (Tr. 46). He had worked for MSHA for 15 years, 8 years as special investigator. (Tr. 46). Special investigators conduct 105(c) investigations when a miner believes he faces discrimination and 110(c) investigations. (Tr. 47).

Alderman testified he never heard any complaints about the new plan. (Tr. 125-126). Alderman never heard from Harper and he never mentioned that he was unhappy with the night shift leaving coal accumulations on the section he worked. (Tr. 126). If a miner complained about coal accumulations, he would take it seriously and follow up. (Tr. 130).

A couple of weeks before Harper was laid off, Alderman went to Harper's section, Section No. 2, and discussed a "Running Right" comment card that had been submitted that dealt with bolting downwind of the continuous miner more than once during a shift. (Tr. 21, 25, 37-38, 50-51, 122). Bolting in the return air more than once a shift was not permitted at the mine and the card indicated that it was happening. (Tr. 23-24). In fact in early 2015, Harper knew it was happening and at one point he spoke with a state inspector about the issue. (Tr. 24, 39, 52). The inspector filed a complaint and eventually went to the mine and spoke to the management. (Tr. 24-25, 39-40). The complaint was anonymous and it was unlawful for the company to try to find out the identity of the complainer. (Tr. 39). The state conducted an investigation but Harper did not know if citations were issued. (Tr. 39). Four miners and a boss were fired at some point due to bolting in the dust. (Tr. 23, 38). However, Harper believed Respondent fired them for doing what management had ordered. (Tr. 37).

The card Alderman had was a safety report filled out by a miner and placed in a box for management to read. (Tr. 22, 119). These cards were supposed to allow management to know what was going on at the mine and to help correct problems. (Tr. 22, 119). The cards were anonymous. (Tr. 22, 119). Alderman reviewed the cards daily. (Tr. 120). The Running Right program was a company-wide policy of Respondent's parent company, Alpha Natural Resources. (Tr. 40). It included Employment Involvement Group meetings and Performance Group meetings that involved hourly workers in the process. (Tr. 41-42). Alpha also spent a large amount of money to create a Running Right Leadership Academy in West Virginia. (Tr. 42) Harper did not think that the program did much good. (Tr. 25). Men wrote cards and expected answers but never heard anything back. (Tr. 26). Harper recalled making comments to this effect to John Murphy. (Tr. 26).

When speaking to the miners on the No. 2 Section, Alderman said the comment card he had first addressed No. 3 Section, where the card was written, and that "nobody up there was man enough" to tell him who wrote it. (Tr. 21, 37, 51). He asked if anyone on No. 2 Section knew who had submitted the card. (Tr. 51). Harper responded that under the training and Running Right policies, Alderman was not allowed to ask who wrote the cards or to confront the miners. (Tr. 22, 51-52). Harper believed it was wrong and a violation of company policy for Alderman to ask about the cards. (Tr. 22-23). Harper never saw the card. (Tr. 37).

Alderman testified that he spoke with the Miners on the No. 3 Section and asked about their concerns. (Tr. 122, 130). He asked the four bolt men if they bolted downwind more than once a shift and they denied it. (Tr. 122-123). Alderman testified that he never tried to find out who filled out the cards at Kingston or at any other Alpha mine. (Tr. 119-120, 123). He just told them that as the new mine manager, if they had any concerns they should come and talk to him. (Tr. 123). Alderman then went to the No. 2 Section and did the same thing. (Tr. 124, 131). He wanted to hear the concerns of all of the miners on the production shifts and to develop a rapport

with them. (Tr. 131). When he arrived on the section he read the card to the miner and was clear that he did not care who made the complaint. (Tr. 131-132). He asked the bolters as a group and individually if they bolted downwind more than once a shift and they denied it. (Tr. 124). He did not attempt to determine who wrote the card. (Tr. 124). He did not have a confrontation with Harper about discussing the card and the only time he met Harper was in the hallway at the hearing. (Tr. 124, 126-127, 133). He did not believe Harper or anyone else would find his questions intimidating. (Tr. 132-133).

Humphrey later interviewed Alderman about this incident. (Tr. 61). Alderman denied that he received a Running Right card about the bolter operating in the dust. (Tr. 61-62). However, several miners corroborated the story. (Tr. 62, 64). Humphrey did not ask Alderman if he tried to find the identity of the person who wrote the card. (Tr. 61-63). He did not believe there was a reason to pursue that question. (Tr. 63). He also did not ask about Harper contacting the West Virginia official. (Tr. 64). Alderman believed that during his interview Humphrey asked him if he allowed miners to bolt downwind, and he said “no, never.” (Tr. 121). He did not believe Humphrey asked if he ever received any Running Right cards on that topic. (Tr. 121). If that was the intent of the question, Alderman misinterpreted it. (Tr. 121). He received Running Right cards about bolting downwind more than once. (Tr. 120-121).

Respondent had an operational performance group (“OPG”) designed to figure out how to run more coal. (Tr. 26-27, 42). The group made recommendations, conducted studies, and watched what occurred on the section. (Tr. 42-43). He did not believe the OPG had a safety function. (Tr. 27). While at the mine, Harper voiced objections about the OPG to other miners. (Tr. 27). He believed that 90% of the workforce did not like OPG and other miners voice concerns as well. (Tr. 43-44). He stated in safety meetings and with other miners that the OPG did not know what they were doing. (Tr. 27). The OPG would tell Harper to work faster, but he did not believe faster was safer. (Tr. 43). He complained to Murphy, Helmondollar, and general mine foreman Kenny Martin. (Tr. 28, 49). Helmondollar and Martin agreed with his assessment but said they had to go along. (Tr. 27).

In January 2015, Kingston No. 2 mine began to encounter geological conditions that slowed their production. (Tr. 67-68). The sections were producing too much rock and the area was not profitable. (Tr. 68). Geological surveys were used to determine what conditions would look like further out. (Tr. 69). No. 1 Section was marked for a possible shutdown. (Tr. 68-69).

On January 22, a meeting was held with Shad West, HR Director Kyle Bane, General Manager Robert Gordon, and the mine superintendents for Kingston No. 1 and No. 2 to plan accordingly.⁴ (Tr. 69, 72). If the coal producing section was shut down, Respondent could not afford the employees budgeted for that section. (Tr. 70). Kyle Bane, the HR Director for the

⁴ Shad Allen West was present at the hearing and testified. (Tr. 66). At the time of the hearing he was employed by Maxxim Shared Services, a subsidiary of Alpha with responsibility over Kingston Mining and Mammoth Coal Company as a human resources manager. (Tr. 66). In that capacity he dealt with staffing, labor relations, and workers’ compensation. (Tr. 66). West held that position from January 2011 and had no previous HR experience. (Tr. 67).

region covering Kingston, conducted training on employee evaluation forms with a PowerPoint presentation (RX-1). (Tr. 71-72). The training discussed employee evaluations, the evaluation forms, and the ways to properly conduct evaluations in the event of a layoff. (Tr. 70).

The evaluation process contained 15 criteria (RX-1, p. 7) that were graded on a scale of 1-5, with one being the lowest score and five being the highest.⁵ (Tr. 73, 75-76, 94-95). There were large categories and then subcategories that included the actual criteria. (Tr. 96). One of the criterion was “Running Right” and the goal was to grade people on how well they adhered to company policy and maintained high ethical standards when conducting business and interacting with others. (Tr. 73-74). Another criterion was Job Efficiency, which dealt with whether the miner understood his duties and responsibilities, demonstrated knowledge, the ability to analyze details and break problems into smaller components, and to make decisions that drove the company’s vision. (Tr. 74). Another criterion was Initiative, which dealt with a miner’s skill and inventiveness to tackle complex issues, developing strategies that anticipated and exceeded business needs and objectives despite associated risk, and generating new ideas that lead to financial gain. (Tr. 74-75). The miners were not represented by a union and seniority did not play a role in the layoffs. (Tr. 70-72). Management’s stated goal was use the evaluation process to keep the most talented employees. (Tr. 72-73). Miners with the lowest scores would be laid off in the event of downsizing. (Tr. 95).

The Human Resources Department asked two people to evaluate each miners: the mine superintendent of each mine and the miner’s department head. (Tr. 76). Each candidate would then be evaluated on the 1-5 scale using the criteria from the evaluation form. (Tr. 76-77). At hearing, West reviewed the evaluation form (RX-1, p. 4). Every employee working as part of the underground mine was evaluated. (Tr. 77-78). The two separate Kingston mines were considered together and some miners would be transferred after a lay off. (Tr. 88-89). There were also two blank boxes for comments to support the numerical ratings. (Tr. 78, 97).

Harper was evaluated by Helmondollar and Martin on January 29, 2015 (RX-3). (Tr. 79, 99). At hearing West reviewed the spreadsheet showing Harper’s subtotal score based on the 15 criteria (RX-2, p. 45-46, line 246). (Tr. 89). The total, rather than subtotal score, included bonus points for certifications like EMT or electrician. (Tr. 78, 90). Miners were to be compared using their subtotals and the total was used as a tie breaker. (Tr. 90). Harper was evaluated as a scoop operator because that was the task he normally conducted. (Tr. 91, 93). Harper’s position , utility operator, was a legacy from a time when the mine was owned by a different company and was being phased out through attrition. (Tr. 91-93). Harper was the lowest scoring scoop operator at both mines. (Tr. 93).

The only comments initially included for Harper were that he needed to improve his “initiative” and his Running Right engagement. (Tr. 107). Later management determined that some miners did not have comments and some of the comments were vague with respect to

⁵ A score of 1 meant unsatisfactory, 2 meant needs development, 3 meant meets expectations, 4 meant exceeding expectations, and 5 meant substantially exceeding expectations. (Tr. 75-76).

reasons for a low score. (Tr. 107-108). West testified that Harper's comments were not robust enough and better explanations were needed. (Tr. 108). West followed up with the superintendent's to get additional information on the low ratings. (Tr. 108-109). After receiving these additional comments, nothing was changed with respect to Helmondollar's ranking of workers. (Tr. 110).

After the forms were completed they were given to West on February 3 and 4. (Tr. 80). West then placed the values into an Excel spreadsheet (RX-2), completing the task on February 19. (Tr. 80-81, 98, 107-108). The spreadsheet was forwarded to Bane. (Tr. 81).

On February 26, there was a PG meeting at the Running Right Leadership Academy and West met with Helmondollar, Jiles, the maintenance chiefs from both mines, and the mine foremen (including Martin). (Tr. 82). That day they were told the number of miners that would remain in the event of a layoff. (Tr. 82-83). No decision had yet been made to go forward with the layoff. (Tr. 82). West gave the superintendents staffing charts that were blank except for the positions. (Tr. 83). The people responsible for making the evaluations were responsible for filling out these charts with the budgeted number of miners. (Tr. 83). Helmondollar returned the completed staffing chart for the instant mine to West the next day (RX-4). (Tr. 84-85). On March 27, West compared the staffing chart to the employee evaluations to ensure that the miners laid off were the miners with the lowest scores. (Tr. 85-87, 98). West, Helmondollar, and Gordon spoke on the phone about the issue. (Tr. 87). Respondent also conducted additional "discrimination testing" at the corporate level to ensure there was no disparate impact. (Tr. 86). No changes were made to Halmondollar's original list. (Tr. 87).

West believed this process was objective. (Tr. 95). He believed the appropriate ratings were ensured because two people were involved in the evaluation process. (Tr. 98-99, 102-103). Helmondollar was present for the January 22 training with the PowerPoint presentation, but Martin was not. (Tr. 99-100, 103). Helmondollar trained him with copies of the PowerPoint. (Tr. 99, 103). West testified that objectivity was also protected by including the supporting comments and reasons for low ratings. (Tr. 100-101, 106-107). When possible he could also cross reference the ratings with documents, like attendance records and disciplinary and corrective actions. (Tr. 100, 105). The evaluators were told to be objective in every case and West believed they went out of their way to do so. (Tr. 104).

However, West agreed it was ultimately a subjective judgement about each miner. (Tr. 104-105). It was possible that if an evaluator did not like a miner that he could give the miner a lower score on any given category. (Tr. 105). Also, for many categories, like "quick learner" it was not possible to cross reference a record. (Tr. 101-102). Respondent relied on evaluators to understand the mining process to determine a miner's ability to learn quickly. (Tr. 101-102). Relying on an evaluator's score meant depending on his objectivity. (Tr. 102).

The decision to go forward with the layoffs was made between March 30 and April 2. (Tr. 86). Alderman testified he had no role in the layoff and did not learn about it until April 9. (Tr. 115-116). On April 10, 2015, Harper learned from his son that he had been laid off. (Tr. 28, 52, 88, 115). A total of 23 miners were laid off. (Tr. 88-89). He believed he was laid off for

speaking his opinions and possibly because of his age and health. (Tr. 29). He often spoke his mind about what was not right at the mine including the failure to properly clean the section. (Tr. 29-30). He also spoke with state regulators and management about safety issues, sometimes in front of the crew. (Tr. 53). Humphrey believed that Harper's claim was not frivolous and that he suffered discrimination for his safety complaints. (Tr. 53). Humphrey also believed that Harper was inaccurately evaluated for the layoff.⁶ (Tr. 53-54).

Findings and conclusions

Protected Activity and Adverse Employment Action

As discussed *supra*, to obtain a temporary reinstatement a miner must raise a non-frivolous claim that he engaged in protected activity with a connection, or nexus, to an adverse employment action. The initial issue here is whether Harper engaged in activity that triggered those protections.

Under the Act, protected activity includes filing or making a complaint of an alleged danger, or safety or health violation, instituting any proceeding under the Act, testifying in any such proceeding, or exercising any statutory right afforded by the Act. *See* 30 U.S.C. § 815(c)(1); *See also Sec=y of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786 (Oct. 1980), *rev=d on other grounds sub nom. Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3rd Cir. 1981). According to the legislative history:

The Committee intends that the scope of the protected activities be broadly interpreted by the Secretary, and intends it to include not only the filing of complaints seeking inspection... or the participation in mine inspections... but also the refusal to work in conditions which are believed to be unsafe or unhealthful and the refusal to comply with orders which are violative of the Act or any standard promulgated thereunder, or the participation by a miner or his representative in any administrative and judicial proceeding under the Act.

(S. Rep. No. 181, 95th Cong., 1st Sess. 35-36 (1977), *reprinted in* Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong. 2nd Sess., *Legislative History of the Federal Mine Safety and Health Act of 1977* (1978). Further, "the listing of protected rights contained in section [105(c)(1)] is intended to be illustrative and not exclusive." *Id.*

In this matter, Harper testified that he engaged in a long-term campaign of protected activity that began no later than early January 2015. Specifically, he testified that in early January 2015, he began to complain to Bragg about the cleanliness of the section. (Tr. 17-18, 48-49). He continued to raise this issue daily until he was laid off. (Tr. 18, 48-49). He also

⁶ Humphrey was familiar with the evaluation because this was not the first 105(c) case arising from that evaluation. (Tr. 54). Bragg had also been evaluated by Martin and Helmondollar and Humphrey also believed he was inaccurately evaluated. (Tr. 54). Humphrey did not interview Martin, Helmondollar, or Bragg. (Tr. 54-55).

complained about this issue to Murphy at a safety meeting. (Tr. 19, 32-33, 48-49). These conditions started before Alderman took over as foreman/superintendent. (Tr. 30-31).

Also in early 2015, Harper spoke to state inspectors about miners bolting twice in return air. (Tr. 24, 39, 52). This action was a violation of the ventilation plan and constituted a safety hazard. Eventually, the state inspector returned to the mine and spoke with management about the condition. (Tr. 24-25, 39-40).

Harper also testified that while at the mine he voiced concerns about the OPG to other miners. (Tr. 27). He also complained to Martin and Helmondollar. (Tr. 28, 49). In particular, he was concerned that the OPG was telling miners to work more quickly. (Tr. 43). Harper believed that working more quickly would affect safety. (Tr. 43). It is not exactly clear when this activity occurred but Harper's testimony implied his complaints were ongoing and certainly occurred before Alderman took over.

Finally, just a few weeks before the layoff, Harper testified that he had a confrontation with Alderman. Alderman had received a complaint card regarding miners bolting twice in return air. (Tr. 21, 25, 37-38, 50-51, 122). According to Harper, Alderman attempted to find out who had submitted the card, claiming that others were "not man enough" to tell him. (Tr. 21, 37, 51). Harper testified that he confronted Alderman and told him that under company policy he was not supposed to attempt to find out the identity of someone making a safety complaint. (Tr. 22, 51-52).

Taken together, Harper's testimony regarding his actions constitutes a series of ongoing safety complaints. Starting at least from January 2015, Harper lodged safety complaints and caused the institution of a state safety investigation. Those actions would constitute protected activity under the Mine Act.

At hearing and in its brief, Respondent argued that Harper's complaint was not protected activity. (*Respondent's Memo* at 10-13). Specifically, Respondent argued that Harper's complaint only referenced the fact that the evening shift was not cleaning properly. (*Respondent's Post-Hearing Brief* at 11). Respondent claimed this was his opinion about the performance of another crew rather than a safety complaint. (*Id.*). Further, Respondent argued even if Harper made additional complaints they were specious because the section was clean and Respondent had not been cited for it. (*Id.* at 11-12). Respondent also argued that Harper never confronted Alderman regarding the Running Right Program and that even if he did, he was not making a safety complaint but instead "questioning Mr. Alderman's administration of that process." (*Id.* at 13). Finally, at hearing Respondent's counsel claimed that all of the protected activity alleged by Harper in this case occurred after Harper received his low evaluation for the purposes of layoff. (Tr. 139-140). Further, Respondent took great pains at hearing to demonstrate that the layoff process was objective and fair.

With respect to Respondent's first argument, regardless of what Harper claimed in his initial complaint, testimony at hearing made clear that this was a safety complaint. The cleanliness of the section and whether another crew was performing its task bore direct relation

on whether there were accumulations of combustible material on the section. Clearly this would be a safety issue and therefore Harper's complaints were related to a safety concern.

With respect to the remaining arguments, the above-cited case law is quite clear that the ALJ should not resolve conflicts in testimony at a temporary reinstatement proceeding. Ultimate credibility assessments and fully scale discovery enquiries are beyond the statutory scope of temporary reinstatement proceedings and are to be reserved for the full on-the-merits section 105(c) hearing. Further, under *Sec'y of Labor on behalf of Ratliff v. Cobra Natural Resources, LLC*, if the objectivity of the layoff as applied to the miner is called into question in the temporary reinstatement phase of the litigation, the ALJ must apply "the not frivolously brought" standard contained in section 105(c)(2). 35 FMSHRC 394 (Feb. 2013).

Respondent essentially asserts two intertwined arguments to avoid the mandates of applicable case law in respect to temporary reinstatement and tolling proceedings. First, Respondent advances a variant of the *post hoc ergo propter hoc* argument⁷: the miner's layoff took place *after* the employee evaluation rankings had been concluded; therefore the miner's layoff was solely *because* of his low ranking. Secondly, since the employee rankings were completed before much of the miner's protected activity, the temporary reinstatement/tolling issue can be resolved without need for credibility determinations.

Placing aside the problematic logic of Respondent's assertions, the ALJ notes that Respondent's arguments rest upon factual assumptions that would demand ultimate credibility determinations that only could be reached after complete discovery and a full on-the-merits hearing. Initially, there is some question as to whether the employee evaluations had *in fact* been completed *before* any of the miner's protected activity had taken place. As discussed *supra*, in January 2015 Harper began to complain about the cleanliness of the section, in early 2015 he complained to state inspectors about the mining process, and he appeared to make ongoing complaints about OPG before Helmondollar and Martin conducted the evaluations in February. Furthermore, even if the evaluations had been initially completed before the layoff, there is an additional question as to whether there had been any changes in the rankings after the miner had expressed his safety complaints. As West testified, additional comments were added to Harper's evaluation much later in the process. (Tr. 107-110).

Even without Harper and Humphrey's testimony that protected activity occurred before Respondent's evaluation commenced, there is a non-frivolous issue regarding the effect Harper's complaints had on his layoff. After spending more than forty years in the law, this court has observed countless instances where dates and time periods have been asserted that were later found to be inaccurate and/or manipulated.

Further, many of the criteria utilized by Respondent in ranking miners (for layoff) struck this ALJ as being extremely subjective with associated numerical values that could be easily

⁷ Latin for "after this, therefore because of this" – a logical fallacy that has been the basis for many superstitions and erroneous beliefs.

manipulated to punish an offending miner for protected activity.⁸ It is significant that Respondent explicitly failed to take into account seniority, one truly objective standard. In fact, West conceded at hearing that the rankings criteria were, ultimately, subjective. (Tr. 104-105).

The ALJ recognizes that Respondent's layoffs may have been conducted in an objective manner, that the Respondent may have reached its ranking of Harper in good faith and that a valid affirmative defense may well exist. However, such ultimate credibility and fact determinations and legal conclusions are beyond the scope of this proceeding.

Therefore, the ALJ finds that Harper's claim that he engaged in protected activity was not frivolously brought.

The next issue is whether Harper suffered an adverse action. According to the Act and well-settled Commission precedent, suffering a discharge is an adverse employment action. 30 USC ' 815(c)(1); *see also Moses v. Whitley Dev. Corp.*, 4 FMSHRC 1475, 1478 (Aug. 1982), *aff'd*, 770 F.2d 168 (6th Cir. 1985). It is uncontested that Harper was laid off on April 10, 2015.

⁸ My esteemed colleague, Judge Andrews, apparently reached the same conclusion in assessing such. *See Sec'y of Labor on behalf of Brooks v. Kingston Mining, Inc.*, 2015 WL 3932760 (Jun. 19, 2015). In that case, Judge Andrews evaluated the same layoff at issue here with respect to a different miner. He concluded:

At hearing Respondent presented extensive evidence showing that it created an objective method for determining the layoffs. Specifically, it created an evaluation form, reviewed by two or three members of management, to rank employees based on objective measures. (Tr. 63-64, 7677, 80-81). Those rankings were then used to determine layoffs. (Tr. 73, 125-126).

Ultimately, I am unconvinced by the evidence showing that the layoffs were conducted in an objective manner. Both Bane and West admitted under cross examination that values could be subjectively assigned to a miner to ensure that he received a low ranking. (Tr. 82, 133). The extent to which Brooks' scores, particularly for "attitude" and "right thing," were low because of his protected activity, rather than work performance, is not clear. Similarly, Respondent's impression that Brooks did not get along with others may have been related to his service in a safety capacity and consequently being considered a "snitch" by other employees. (Tr. 39). There is reason to believe that that Brooks' layoff occurred, at least in part, because of his safety complaint and his decision to participate in a Commission proceeding. Under Commission case law, an ALJ is permitted to review an operator's proffered objective layoff procedure to ensure that it is not a rationalization of a discriminatory action. *See Sec'y of Labor on behalf of Ratliff v. Cobra Natural Resources, LLC*, 35 FMSHRC 394 (Feb. 2013).

Id. at *14.

(Tr. 28, 52, 88, 115). Therefore, Harper's claim that he suffered an adverse employment action is not frivolous.

Nexus between the protected activity and the alleged discrimination

Having concluded that Harper engaged in protected activity and suffered an adverse employment action, the examination now turns to whether that activity has a connection, or nexus, to the April 10 layoff. The Commission recognizes that direct proof of discriminatory intent is often not available and that the nexus between protected activity and the alleged discrimination must often be drawn by inference from circumstantial evidence rather than from direct evidence. *Phelps Dodge Corp.*, 3 FMSHRC at 2510. The Commission has identified several circumstantial indicia of discriminatory intent, including: (1) hostility or animus toward the protected activity; (2) knowledge of the protected activity; (3) coincidence in time between the protected activity and the adverse action; and (4) disparate treatment of the complainant. *See, e.g., CAM Mining, LLC*, 31 FMSHRC at 1089; *see also, Phelps Dodge Corp.*, 3 FMSHRC at 2510.

Knowledge of the protected activity

According to the Commission, "the Secretary need not prove that the operator has knowledge of the complainant's activity in a temporary reinstatement proceeding, only that there is a non-frivolous issue as to knowledge." *CAM Mining, LLC*, 31 FMSHRC at 1090 *citing Chicopee Coal Co.*, 21 FMSHRC at 719. In fact, evidence is sufficient to support a finding of knowledge if an operator erroneously suspects a miner made safety complaints, even if no complaint was made. *See Moses v. Whitley*, 4 FMSHRC at 1478.

Here, many of the Harper's protected complaints were made directly to members of management. Harper complained to Bragg and to Murphy regarding the cleanliness of the section. (Tr. 17-19, 32-33, 48-49). He also complained to Helmondollar and Martin about OPG. (Tr. 28, 49). Significantly, Helmondollar and Martin were the members of management who evaluated Harper for the purposes of his layoff. (Tr. 79, 99). Further, he complained directly to Alderman regarding the Running Right program. (Tr. 22, 51-52). Harper also complained to a West Virginia state inspector and was aware that the inspector later spoke to management. (Tr. 24, 39, 52). While the evidence for knowledge here is less straightforward, it is not absurd to believe that management would conclude Harper was behind the investigation given his penchant for safety complaints. Therefore, I find that Harper has raised a non-frivolous issue as to whether Respondent had knowledge of his protected activity.

In its brief, Respondent argued that all of Harper's complaints were made to Murphy, Bragg, and Alderman and that these three individuals had no role in Harper's layoff. (*Respondent's Post-Hearing Brief* at 14). Only Helmondollar and Martin were involved in that decision. (*Id.*) Respondent's argument fails for two reasons. First, as noted *supra*, Harper's complaints regarding OPG were made directly to Helmondollar and Martin. Further, the issue is whether Respondent had knowledge of Harper's protected activity, not whether any particular member of management had actual knowledge. As a general matter, the knowledge of an agent is

imputed to the operator under the Mine Act. See *Martin Marietta Aggregates*, 22 FMSHRC 633, 637 (May 2000); *Pocahontas Fuel Co.*, 8 IBMA 136, 147 (Sept. 1977) aff'd 590 F.2d 95 (4th Cir. 1979) (Coal Act case) (adopting the common law principle that acts or knowledge of an agent are attributable to a principal); see also *Sec'y of Labor on behalf of J. Don Arnold v. BHP Navajo Coal Company*, 2015 WL 2174407, *31 (Apr. 24, 2015)(ALJ Lewis). There is a non-frivolous issue as to whether Murphy, Bragg, or Alderman shared the information they learned from Harper with Helmondollar and Martin before the layoff occurred. Therefore, there is sufficient evidence of knowledge to support such a finding for the purposes of a temporary reinstatement.

Coincidence in time between the protected activity and the adverse action

The Commission has accepted substantial gaps between the last protected activity and adverse employment action. See e.g. *CAM Mining, LLC*, 31 FMSHRC at 1090 (three weeks) and *Sec'y of Labor on behalf of Hyles v. All American Asphalt*, 21 FMSHRC 34 (Jan. 1999) (a 16-month gap existed between the miners' contact with MSHA and the operator's failure to recall miners from a layoff; however, only one month separated MSHA's issuance of a penalty resulting from the miners' notification of a violation and that recall failure). The Commission has stated "We 'appl[y] no hard and fast criteria in determining coincidence in time between protected activity and subsequent adverse action when assessing an illegal motive. Surrounding factors and circumstances may influence the effect to be given to such coincidence in time.'" *All American Asphalt*, 21 FMSHRC at 47 (quoting *Hicks v. Cobra Mining, Inc.*, 13 FMSHRC 523, 531 (Apr. 1991)).

Here, Harper made several safety complaints starting in early January and continued to do so right up until the time he was laid off. Further, he was making these complaints during the course of Respondent's decision-making process regarding layoffs. As a result, I find that the time span between the protected activities and the adverse action easily meets the threshold requirements for a temporary reinstatement proceeding.

Respondent argued that Harper's alleged complaints were, in fact, too close to the adverse employment action. (Respondent's Post-Hearing Brief at 16). Specifically, it argued that all of Harper's protected activity occurred after his low evaluation and therefore did not contribute to his layoff. (Id.). As demonstrated *supra*, there is a non-frivolous issue as to whether some of Harper's protected activity occurred before the evaluation, the objectivity of the evaluations, and whether changes were made in the evaluation after the protected activity. Therefore, the timing here is sufficient to establish a nexus.

Hostility or animus towards the protected activity

The Commission has held, "[h]ostility towards protected activity--sometimes referred to as 'animus'--is another circumstantial factor pointing to discriminatory motivation. The more such animus is specifically directed towards the alleged discriminatee's protected activity, the more probative weight it carries." *Secretary of Labor on behalf of Chacon v. Phelps Dodge Corporation*, 3 FMSHRC 2508, 2511 (Nov. 1981) (citations omitted).

Harper testified that Helmondollar and Martin were dismissive of his safety complaints. Specifically, when Harper complained about OPG, Martin and Helmondollar told him that everyone had to follow the OPG's recommendations. (Tr. 27). He also testified that Alderman was openly hostile to safety complaints and attempted to find out who had complained about miners bolting twice in return air. (Tr. 51). This was a violation of company policy. (Tr. 22-23, 51-52). Further, Respondent's actions in giving Harper a low overall performance rating and his low reputation with management that this rating implies, also demonstrate animus towards Harper's protected activity. *See e.g. Cobra Natural Resources, LLC*, 35 FMSHRC 101, 115 (2013)(ALJ Steele) *aff'd* 35 FMSHRC 394 (Feb. 2013). These actions constitute animus sufficient to meet the evidentiary standards of a temporary reinstatement.

Respondent argued that there was no animus in this case and that the company had an excellent record with respect to accumulation violations, showing it took cleanup issues seriously. (*Respondent's Post-Hearing Brief* at 15-16). Determining the cleanliness of the section at issues would require making credibility assessments which, as discussed *supra*, are barred at this time. Further, even if the area were clean, that would not change the animus demonstrated by management towards Harper's safety complaints.

Disparate Treatment

"Typical forms of disparate treatment are encountered where employees guilty of the same, or more serious, offenses than the alleged discriminatee escape the disciplinary fate which befalls the latter." *Secretary of Labor on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2512 (Nov. 1981). The Commission has previously held that evidence of disparate treatment is not necessary to prove a *prima facie* claim of discrimination when the other indicia of discriminatory intent are present. *Id.* at 2510-2513.

In the instant matter, insufficient evidence was presented to establish that Harper faced disparate treatment.

However, as has already been shown, there is sufficient evidence to conclude that this discrimination claim was not frivolously brought as it relates to animus, knowledge, and coincidence in time. Therefore, I find that the Secretary has established a nexus between Harper protected activity and the Respondent's subsequent adverse action.

Conclusion

In concluding that Harper's complaint herein was not frivolously brought, I find that there is reason to believe that Harper made safety complaints in January through April 2015 and that he caused a state investigation to be instituted against Respondent. I also conclude there was a non-frivolous issue as to whether Harper suffered an adverse employment action. Finally, I conclude that there was reason to believe Respondent was aware of Harper's actions, that Respondent showed animus toward Harper, and that there was a close connection in time between the alleged protected activity and the disparate treatment. Therefore, there is a non-

frivolous issue as to whether there was a nexus between the protected activity and the adverse employment action.

ORDER

For the reasons set forth above, it is **ORDERED** that Complainant Thomas Harper be reinstated by Respondent to his former position, or the equivalent, at the same rate of pay, hours worked, and with all other benefits he was receiving at the time of his discharge, effective the date of this decision. The parties may elect to economically reinstate Harper if Respondent so desires and Harper and the Secretary freely agree.

The court retains jurisdiction over this temporary reinstatement proceeding. 29 C.F.R. § 2700.45(e)(4). The Secretary **SHALL** complete the investigation of the underlying discrimination complaint as soon as possible but no later than 90 DAYS following the receipt of the complaint of discrimination. 30 U.S.C. § 815(c)(3). Immediately upon completion of the investigation, the Secretary **SHALL** notify counsel for Respondent and my office, in writing, whether a violation of Section 105(c) of the Mine Act has occurred. Id. If, upon expiration of the statutory period a decision has not been made, I will entertain a motion to issue an order to show cause why the reinstatement should not be terminated.

/s/ John Kent Lewis
John Kent Lewis
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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July 16, 2015

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

v.

WARRIOR INVESTMENT COMPANY,
INC.,
Respondent.

CIVIL PENALTY PROCEEDING:

Docket No. SE 2014-388
A.C. No. 01-03419-351947

Mine: Maxine-Pratt Mine

DECISION

Appearances: Lauren A. Polk, Esq., U.S. Department of Labor, Office of the Solicitor,
Denver, Colorado for Petitioner

J.D. Terry, Esq., Warrior Investment Company, Inc., Jasper, Alabama for
Respondent

Before: Judge Barbour

In this civil penalty case arising under sections 105(d) and 110(i) of the Federal Mine Safety and Health Act of 1977 (Mine Act), as amended (30 U.S.C. §§ 815(d), 820(i)), the Secretary of Labor (Secretary) on behalf of his Mine Safety and Health Administration (MSHA) seeks the assessment of civil penalties for two alleged violations of mandatory safety standards for the nation's underground coal mines. The standards are set forth at 30 C.F.R. Part 75. In citing the alleged violations MSHA's inspectors made findings as to whether the violations were significant and substantial contributions to mine safety hazards (S&S violations). They also made findings regarding the violations' gravity and the negligence of Warrior Investment Company, Inc. (Warrior Investment or the company). The violations purportedly occurred at an underground bituminous coal mine owned and operated by Warrior Investment. The mine is located near Jasper, Alabama.

Following issuance of the citations, the Secretary proposed civil penalties. When the company contested the Secretary's assessments, the Secretary filed the subject petition requesting the Commission assess the penalties as proposed. The company answered, admitting it was subject to the Mine Act, but denying the violations occurred, or, if they did, stating that the proposed penalties were inappropriate. The Commission's Chief Judge assigned the case to the court, which directed the parties to engage in discussions to determine if the alleged violations could be settled. The court advised the parties that it would receive evidence and arguments concerning allegations the parties could not settle. The parties ultimately agreed to settle one of the violations. The other violation was tried on March 18, 2015, in Birmingham, Alabama.

THE MINE and THE INSPECTION

The company’s Maxine-Pratt mine contains four belt conveyers. Tr. 23. The violation that went to hearing allegedly occurred on the 15 West section. *Id.* Two conveyers are on the section, 15 West and 15-5. *Id.* The 15 West belt runs east-west, and the 15-5 belt runs north-south. Tr. 64-65. The alleged violation occurred on the 15-5 belt. Tr. 32-33.

Randall Weekly is an MSHA inspector. Tr. 108. At the time of the events in question, he had over nine years of experience with MSHA. *Id.* On the morning of March 5, 2014, Weekly traveled to the Maxine-Pratt Mine to continue an earlier inspection. Tr. 112-113. Shortly after arriving and before traveling underground, Weekly met with mine foreman Joseph Holbrook. Tr. 113. Weekly learned that earlier that morning section foreman Charles Gunroe was injured while cleaning coal and mud off part of the 15-5 conveyer belt. *Id.* Weekly also learned that Gunroe was being brought to the surface, and he briefly spoke with Gunroe about the accident and Gunroe’s injury before Gunroe was taken to the hospital. Tr. 114-115. Weekly then went underground, spoke to several of the miners who worked with Gunroe, concluded the accident was the result of a violation of a mandatory safety standard, and issued Citation No. 8526289 to the company for the alleged violation.¹ The citation was issued pursuant to section 104(a) of the Act. 30 U.S.C. §814(a).

THE ALLEGED VIOLATION

<u>CITATION NO.</u>	<u>DATE</u>	<u>30 C.F.R. §</u>	<u>PROPOSED PENALTY</u>
8526289	3/5/14	75.1725(c)	\$5,961

The citation states:

On the 15 west section on the 15-5 belt, the belt was not locked out or blocked against motion when maintenance was being performed on it on the day shift. The section [f]oreman was cleaning coal and mud off of a top roller frame when the belt started pulling his arm between the top belt and roller injuring his arm severely enough that he was transported to the hospital to receive medical treatment. If this condition is allowed to exist persons working on the belt would receive permanently disabling or fatal injuries while working on the belt.

Gov’t Exh. 1.

¹ Weekly’s inspection additionally resulted in the issuance of Citation No. 8529309, the citation the parties settled.

Section 75.1725(c) states:

Repairs or maintenance shall not be performed on machinery until the power is off and the machinery is blocked against motion, except where machinery motion is necessary to make adjustments.

Charles Gunroe, the injured second shift section foreman, was called to testify by the Secretary. Tr. 16. Gunroe stated that at the time of the accident he had 14 years of mining experience. Tr. 17. On March 5, he arrived at the mine at 6:00 a.m. and proceeded to the face of the 15 West section. Tr. 25-26. Gunroe and his crew began to mine when the tailpiece of the 15-5 conveyer belt started spilling coal. Tr. 26. Gunroe instructed his men to stop mining and to adjust the tailpiece. *Id.* The belt was shut down. There were piles of coal at each end of the belt. Tr. 28. Gunroe thought that the tailpiece and rollers near it needed to be cleaned and adjusted to prevent the spillage and to keep the belt from breaking. *Id.*

As Gunroe and his crew were cleaning and adjusting a roller near the tail piece, Gunroe noticed mud on the roller. Tr. 33. Gunroe was holding a piece of wood. Tr. 34. He attempted to remove the mud, using the piece of wood. Tr. 40. Due to the low roof, Gunroe was on his knees and he bent over and toward the belt as he attempted to remove the mud. Tr. 46-47. Gunroe stuck his arm between the frame of the belt and the belt roller. Tr. 38. As he did so, a miner on Gunroe's crew turned on the belt. Tr. 48. Almost immediately, Gunroe's arm was pulled between the belt and the roller. *Id.* (Gunroe believed that the belt caught his shirt, and this caused his arm to be caught. *Id.*) The belt was quickly turned off. Tr. 49. Gunroe's crew cut him free of the belt. Tr. 49-50. Gunroe testified that he was in a lot of pain. Tr. 49. He stated he felt like an elephant was standing on his arm. *Id.* He knew he needed medical attention and began to ascend from the mine, meeting Holbrook on the way. Tr. 51. Once he reached the surface, Gunroe briefly met with Weekly before heading to the hospital. Tr. 52. A representative of the company, Bobby Meadows, accompanied Gunroe to the hospital. *Id.*²

THE VIOLATION

The court finds that the violation occurred as charged. The language of the standard is clear and must be applied as written. The standard pertains to machinery or equipment that is being repaired or maintained. *Walker Stone Co.*, 19 FMSHRC 48, 51 (Jan. 1997)³; *Jim Walter Res., Inc.*, 28 FMSHRC 983, 987-88 (Dec. 2006). The cited conveyer belt was both machinery ("all devices . . . which permit a thing to function or accomplish an end") and equipment ("the

² Gunroe still had a knot in his arm at the time of hearing, but suffered no permanent damage to his arm, regaining full use of it. He was unable to work in the mine for a month after the accident, during which time he sat in the mine office or received physical therapy. Tr. 55-56.

³ Although *Walker Stone* concerns 30 C.F.R. §56.14105, the metal nonmetal standard pertaining to procedures used during repairs or maintenance of machinery or equipment, the Commission's holdings regarding interpretation of section 56.14105 and the meaning of "repair" and maintenance apply equally to similarly worded section 75.1725(c).

implements . . . used in operation or activity”). *Webster's Third New Int'l Dictionary, Unabridged* 768 (1986). Equally important, cleaning the mud and coal from the rollers and adjusting the tail piece were both “repair” (“to restore to a sound . . . state”) and maintenance (“[p]roper care, repair, and keeping in good order”). *Webster's* at 1923 (1986); *A Dictionary of Mining, Mineral, and Related Terms* 675 (1968).

There is no doubt that the belt was not powered off or blocked against motion when Gunroe was injured. Tr. 135. The court accepts Gunroe’s testimony that the belt needed to be shut down and the tailpiece cleaned to prevent the belt from breaking and to stop the spillage. Tr. 26-28. The court rejects the company’s assertion that maintenance was not being performed on the belt at the time of injury, as Gunroe’s act of attempting to remove the mud from the roller was part of his overall effort to “[keep the belt] in good order” and thus was clearly an act of maintenance within the meaning of section 75.1275(c). *Webster's* at 1923 (1986). Because Gunroe was performing repair and maintenance on the 15-5 belt, because the power to the belt was not locked out even though the belt was shut down, and because the belt was not blocked against motion, the company violated section 75.1725(c).

GRAVITY and S&S

As the Commission has noted, the gravity penalty criteria and a finding of S&S are not identical, but are frequently based on the same evidence. *Quinland Coals, Inc.*, 9 FMSHRC 1614, 1622 n.11 (Sept. 1987). The court finds Weekly’s analysis of the gravity of the violation persuasive. Weekly noted that Gunroe was lucky to have survived, as accidents of this sort are often at least permanently disabling, and if Gunroe had not been quickly cut free and the power to the belt had not been quickly shut off, the result easily could have been fatal. Tr. 133. The court finds that the violation was serious.

The court further agrees with the Secretary that the violation was S&S. A violation is S&S, “if, based upon the particular facts surrounding the violation there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature.” *Cement Div., National Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981). The Commission explained:

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

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

The court believes that all four elements have been met. There was an underlying violation of a mandatory safety standard. Power to the belt was not off and the belt was not

blocked while maintenance was underway, creating a discrete safety hazard. As evidenced by the fact that the accident happened, there was a reasonable likelihood that an injury would result, fulfilling the third element. Lastly, it was reasonably likely that the injury in question would be reasonably serious. Indeed, as noted above, Gunroe was lucky to survive. Tr. 133.

NEGLIGENCE

Weekly also found that the company was highly negligent in allowing the violation. Gov. Exh. 1. He noted that Gunroe was an agent of the operator as a foreman and knew what he was doing was wrong.⁴ Tr. 157. While it is true, as Respondent's counsel noted, that there is an exception to imputing the negligence of a supervisor to the company, Gunroe's conduct does not fall within the exception. The exception only applies ["w]here . . . an operator has taken reasonable steps to avoid a particular class of accident and the erring supervisor unforeseeably exposes only himself to risk." *Nacco Mining Co.*, 3 FMSHRC 848, 850. In this case, neither element of the exception is satisfied.

The court recognizes the company trained Gunroe on belt safety. However, Gunroe must not have paid attention. He testified that he had cleaned the rollers in the same way before and he had witnessed other miners doing it as well. Tr. 48. In the context of continuing mining, it was not unforeseeable that the accident would happen. In addition, the company offered no evidence Gunroe received any discipline for his actions or that it took reasonable steps to avoid the type of accident that was foreseeable. Gunroe was also not the only one at risk; by not locking and tagging out the belt, the other miners were also at risk of the belt suddenly being turned on. The court concludes the unsafe practice was pervasive and the company should have known about it and taken steps beyond routine training to stop it.

High negligence is appropriate when the actor has knowledge of the violative condition and fails to act. *Deshetty, emp. by Island Creek Coal Co.*, 16 FMSHRC 1046, 1053 (May 1994). Gunroe was aware that the belt was not locked out and not blocked against motion when he attempted to clean the mud. Tr. 37. Given this and the fact that the exception to attributing the negligence of a supervisor to the company does not apply, the court agrees with the Secretary that the company was highly negligent.

OTHER CIVIL PENALTY CRITERIA

The parties stipulated that the company exhibited good faith in abating the violation. Joint Exh. 1 at 2. No testimony was given on the size of the company. Therefore, the court accepts the Secretary's findings as to the size of the company and as a result finds that while the subject mine is small, the company as a controlling entity is large. In addition, no testimony was given regarding the impact of the civil penalties assessed on the company's ability to continue in business. Therefore, the court assumes there is no impact. The Secretary submitted a printout purporting to show all violations cited and assessed at the mine that became final between September 5, 2012, and March 4, 2014. Gov't Ex. 5. There are 83 such final violations. The court finds that the company had a large history of prior violations.

⁴ Weekly reached the conclusion that Gunroe knew what he was doing was wrong based on Gunroe's experience, training, and position. Tr. 136-137.

ASSESSMENT OF CIVIL PENALTIES

<u>CITATION NO.</u>	<u>DATE</u>	<u>30 C.F.R. §</u>	<u>PROPOSED PENALTY</u>	<u>ASSESSMENT</u>
8526289	3/5/14	75.1725(c)	\$5,961	\$5,961

The court finds that the violation was serious and the company's negligence was high. Given these findings and the other civil penalty criteria, the court assesses a penalty of \$5,961 for the violation.

SETTLED VIOLATION

The parties agreed to settle one alleged violation. At the close of the hearing, counsel for the Secretary read the details of the settlement into the record. Tr. 217-221. The settlement is as follows:

<u>CITATION NO.</u>	<u>DATE</u>	<u>30 C.F.R. §</u>	<u>PROPOSED PENALTY</u>	<u>SETTLEMENT AMOUNT</u>
8529309	4/23/14	75.220(a)(1)	\$1,026	\$700

There are no modifications to the citation. However, the reasons for the settlement were explained by counsel after which the settlement was approved on the record by the court. Tr. 221.

ORDER

In view of the conclusions, findings, and approval set forth above, within 30 days of the date of this decision the company **SHALL PAY** civil penalties in the amount of \$6,661 (\$5,961 for the contested violations and \$700 for the settled violations).⁵ Upon **PAYMENT** of the penalties, this proceeding **IS DISMISSED**.⁶

/s/ David F. Barbour
David F. Barbour
Administrative Law Judge

⁵ Payment shall be sent to: MINE SAFETY AND HEALTH ADMINISTRATION, U.S. DEPARTMENT OF LABOR, PAYMENT OFFICE, BOX 790390, ST. LOUIS, MO 63179-0390.

⁶ This decision was prepared by Commission Intern Cole Stevens.

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/db

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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303-844-3577 FAX 303-844-5268

July 17, 2015

THE AMERICAN COAL COMPANY,
Contestant

v.

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

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

v.

THE AMERICAN COAL COMPANY,
Respondent

CONTEST PROCEEDINGS

Docket No. LAKE 2007-215-R
Order No. 6669778; 08/15/2007

Docket No. LAKE 2007-216-R
Order No. 6669779; 08/15/2007

Galatia Mine
Mine ID. 11-02752

CIVIL PENALTY PROCEEDINGS

Docket No. LAKE 2007-171
A.C. No. 11-02752-122978-08

Docket No. LAKE 2007-172
A.C. No. 11-02752-122978-09

Docket No. LAKE 2007-202
A.C. No. 11-02752-125002-01

Docket No. LAKE 2007-205
A.C. No. 11-02752-125002-04

Docket No. LAKE 2008-004
A.C. No. 11-02752-127021-01

Docket No. LAKE 2008-037
A.C. No. 11-02752-129287

Docket No. LAKE 2008-080
A.C. No. 11-02752-131664-01

Docket No. LAKE 2008-082
A.C. No. 11-02752-131664-02

Docket No. LAKE 2008-120
A.C. No. 11-02752-133868-02

Docket No. LAKE 2008-139
A.C. No. 11-02752-136300-02

Docket No. LAKE 2008-140
A.C. No. 11-02752-136300-03

Docket No. LAKE 2008-141
A.C. No. 11-02752-136300-04

Docket No. LAKE 2008-143
A.C. No. 11-02752-136300-06

Docket No. LAKE 2008-231
A.C. No. 11-02752-139912-01

Docket No. LAKE 2008-232
A.C. No. 11-02752-139912-02

Docket No. LAKE 2008-234
A.C. No. 11-02752-139912-04

Docket No. LAKE 2008-235
A.C. No. 11-02752-139912-05

Docket No. LAKE 2008-239
A.C. No. 11-02752-139912-09

Docket No. LAKE 2008-526-A
A.C. No. 11-02752-153962-02

Docket No. LAKE 2008-528
A.C. No. 11-02752-153962-04

Docket No. LAKE 2008-529
A.C. No. 11-02752-153962-05

Docket No. LAKE 2008-531
A.C. No. 11-02752-153962-07

Docket No. LAKE 2008-582
A.C. No. 11-02752-157112-01

Docket No. LAKE 2008-583
A.C. No. 11-02752-157112-02

Docket No. LAKE 2008-584
A.C. No. 11-02752-157112-03

Docket No. LAKE 2008-585
A.C. No. 11-02752-157112-04

Docket No. LAKE 2008-624
A.C. No. 11-02752-160144-01

Docket No. LAKE 2008-625
A.C. No. 11-02752-160144-02

Docket No. LAKE 2008-626
A.C. No. 11-02752-160144-03

Docket No. LAKE 2009-007
A.C. No. 11-02752-162890-02

Docket No. LAKE 2009-008
A.C. No. 11-02752-162890-03

Docket No. LAKE 2009-206
A.C. No. 11-02752-171747-01

Docket No. LAKE 2009-445
A.C. No. 11-02752-182275-02

Docket No. LAKE 2009-546
A.C. No. 11-02752-188266

Galatia Mine

DECISION ON REMAND

These cases were brought under section 105(d) of the Federal Mine Safety and Health Act of 1977 (the “Mine Act”). They are now before me upon a remand order issued by the Commission on April 17, 2015. The history of these cases is complicated and is summarized below.

The American Coal Company (“AmCoal”) contested all of the citations and orders (“citations”) at issue in the above dockets. A large number of the citations were issued on the basis of notices to provide safeguards authorized under 30 U.S.C. § 874(b). AmCoal filed a motion for summary decision on the legal issues it raised concerning notices to provide safeguards and the citations issued under such safeguard notices. By order dated December 17, 2010, I denied AmCoal’s motion for summary decision on the safeguard issues it raised. *The American Coal Company*, 33 FMSHRC 2636 (issued Dec. 2010, published Oct. 2011). AmCoal continued to contest three of the citations that were based on safeguard notices but it agreed to

settle the remaining citations while reserving the right to appeal to the Commission the legal issues it raised in its motion for summary decision.

On October 24, 2011, I issued a decision after hearing on the merits of three citations issued on the basis of safeguard notices. *The American Coal Company*, 33 FMSHRC 2574 (Oct. 2011). I also approved the settlement of a number of other citations in that decision. Also on October 24, 2011, I issued a separate decision approving settlement of more citations issued in these dockets. Finally, on November 9, 2011, I issued another decision approving the settlement of another group of citations in these dockets. All three decisions incorporated by reference my December 17, 2010, order denying AmCoal's motion for summary decision and they constituted my final orders in the cases so that the validity of the underlying safeguards could be appealed to the Commission.¹ Between these three decisions, all of the citations in the above dockets were settled or adjudicated including citations that were issued for violations of mandatory safety standards.²

On November 23, 2011, AmCoal filed a petition for discretionary review with the Commission raising issues concerning the validity of citations issued by MSHA inspectors based on notices to provide safeguards. The Commission granted AmCoal's petition for discretionary review on December 2, 2011, and stayed all of the cases listed in the caption above.³

On December 8, 2014, the Commission ordered AmCoal to "submit a supplemental document listing the citation number for each of the [safeguard] citations referenced in its petition" and to "categorize the citations by the cited safeguard number." (Order at 1). AmCoal was also required to associate the citations by docket number and it was encouraged to confer with the Secretary to ensure that the list was complete and accurate. The Commission issued another order on February 19, 2015, asking the Secretary to review the contested citations in the same manner. Both AmCoal and the Secretary filed detailed responses.

On March 31, 2015, AmCoal filed with the Commission a motion to dismiss its appeal of all the cases with prejudice. It agreed to pay any penalties that I previously assessed for the violations in these cases that remain unpaid. The Secretary did not object to the motion. The Commission's order of April 17, 2005, remanded the cases to me "for further proceedings, as appropriate, with respect to 'any issues that remain regarding the safeguard-related violations in these matters.'" (Order at 2 quoting AmCoal Motion at 1).

¹ These three decisions also included dockets that did not involve citations issued based upon safeguard notices. These dockets were not appealed to the Commission and are not at issue.

² As noted in these decisions, I previously issued orders approving partial settlement for some of the citations in these dockets.

³ While these cases were stayed, the Commission issued two decisions that resolved most if not all the safeguard issues raised by AmCoal in these cases. *The American Coal Company*, 34 FMSHRC 1963 (Aug. 2012); *Oak Grove Resources, LLC*, 35 FMSHRC 2009 (July 2013).

These cases involve 743 citations. Most of the citations were issued for violations of mandatory safety standards rather than notices to provide safeguards. AmCoal has already paid civil penalties for most of the citations in accordance with my three decisions. The amounts paid were based on settlement agreements reached by the parties and approved by me in decisions approving settlement or were assessed by me in my October 24, 2011 decision after hearing.

Given that AmCoal has withdrawn its appeal in these cases, they are all ripe for a final disposition. Upon remand, I ordered the parties to review the cases and the citations therein to determine the amount of any civil penalties that AmCoal has not yet paid. Working with MSHA's Office of Assessments, counsel for the Secretary prepared a table listing those citations for which AmCoal has not paid the entire penalty and the amount owed. The table does not list all of the citations in these dockets; it only lists those citations for which AmCoal has not paid the entire settled penalty amount.⁴ The table is attached to this decision as Attachment A.

As set forth in Attachment A, the outstanding penalty amount is \$236,162. In order to ensure that the amount paid is properly credited to the correct docket, the Secretary asked and AmCoal agreed that AmCoal will prepare a separate check for each docket and that the citation numbers for that docket will be written on the corresponding stub of each check.

ORDER

I previously concluded that the parties' proposed settlements for the citations are appropriate under the criteria set forth in section 110(i) of the Mine Act. The American Coal Company is **ORDERED TO PAY** the Secretary of Labor the sum of \$236,162 within 40 days of the date of this decision.⁵ A separate check shall be written for each docket for the amount shown in Attachment A. The docket number for each docket listed in Attachment A shall be written on the face of the corresponding check. The docket number and citation numbers listed for each docket in Attachment A shall be written on the corresponding stub of each check. Upon payment, all of the dockets are **DISMISSED**.

/s/ Richard W. Manning
Richard W. Manning
Administrative Law Judge

⁴ During the review of these dockets by counsel and the Office of Assessments, it was discovered that some of the penalties previously paid by AmCoal for settled citations were not applied to the correct citations in the docket. Working with representatives of AmCoal and counsel for the Secretary, the Office of Assessments was able to work through all of the citations in the dockets and determine the amount that AmCoal owes for each citation. Once AmCoal makes the payment ordered herein, the total settled penalty for the citations in every docket will have been paid.

⁵ The checks should be sent to the Mine Safety and Health Administration, U.S. Department of Labor, Payment Office, P.O. Box 790390, St. Louis, MO 63179-0390

Distribution:

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RWM

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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July 27, 2015

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

v.

ELLIS & EASTERN COMPANY,
Respondent.

CIVIL PENALTY PROCEEDING

Docket No. CENT 2014-0451
A.C. No. 39-00008-351487

Mine: Sioux Falls Quarry

DECISION AND ORDER

Appearances: Daniel McIntyre, Trial Attorney, Office of the Solicitor, U.S. Department of Labor, Denver, CO, for Petitioner;

Jeffrey A. Sar, Esq. Baron, Sar, Goodwin, Gill & Lohr, Sioux City, IA, for Respondent.

Before: Judge L. Zane Gill

This proceeding, arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) (“Mine Act” or “Act”), involves a 104(a) citation, 30 U.S.C. § 814(a), issued by the Department of Labor’s Mine Safety and Health Administration (“MSHA”) to Ellis & Eastern Company (“E&E” or “Respondent”) at its railroad shop in Sioux Falls, South Dakota. E&E is a railroad company which primarily transports quarry products, building materials, lumber, fly ash, and cement. (Mulloy¹ Supplemental Aff. at 1–2)

The parties submitted briefs, affidavits, and documentary evidence, the last of which was received on June 22, 2015. All submissions pertain to the sole issue of MSHA’s asserted jurisdiction over the Sioux Falls railroad shop. The Secretary asserts jurisdiction over the shop either as part of a mine, a place where mining equipment is repaired, or as an independent contractor’s facility. E&E claims MSHA has no jurisdiction because E&E is not a mining company, and additionally requests that its Independent Contractor Identification Number be vacated. (Resp. Br. at 15) For the reasons stated below, I find that there is no genuine issue of material fact, and the Respondent is entitled to Summary Disposition as a matter of law because

¹ Jon Mulloy (“Mulloy”) is President of E&E, holding that position since 2001. (Mulloy Aff. at 1) Mulloy began working at E&E in 1988, as Operations Superintendent, immediately after its incorporation. *Id.* In 1994, Mulloy was appointed E&E’s Vice President and General Manager. *Id.*

MSHA does not have jurisdiction over the railroad shop, even though E&E is an independent contractor. Citation No. 8753373 is vacated.

Background History

E&E considers itself a railroad corporation, and solely under the jurisdiction of the Federal Railway Administration (“FRA”). (Resp. Br. at 2) As described in the affidavits, E&E daily brings empty railcars into Concrete Materials’ Sioux Falls quarry, which are then loaded by miners during the night shift. (Zahn² Aff. at 1–2; Schmidt³ Aff. at 4) The railcars are moved by E&E on Concrete Materials’ private tracks which connect into the Burlington Northern Santa Fe (“BNSF”) railroad system. (Mulloy Aff. at 2) The BNSF is a “general railroad system of transportation,” and under FRA jurisdiction. (Schmidt Aff. at 3); *See also* (Sec. Br. at 12–13) The tracks lie between the E&E railroad shop and Concrete Materials’ mining pit, ending in the mine’s screening and washing area where the railcars are loaded. (Ex. GX 1) A public road must be crossed to travel from the mine’s quarry or processing areas to E&E’s railroad shop. *Id.*

Historically, MSHA inspected the railway shop on February 17, 2010, and issued two citations. (Mulloy Aff. at 2–3); (Ex. GX 4); (Ex. GX 5) MSHA later vacated the citations because of concerns that E&E had not received sufficient notice of its jurisdiction. (Peck⁴ Aff. at 1–2) In its letter vacating the citations, MSHA explicitly asserted jurisdiction over E&E’s “tracks, railcars, and maintenance shop.” (Ex. GX 6)

On March 19, 2014, MSHA Inspector Alan Roberts⁵ (“Roberts”) inspected E&E’s railroad shop. (Resp. Br. at 1) E&E informed Roberts before the inspection that it did not acknowledge MSHA’s authority over the building. *Id.* Prior to 2010, the maintenance shop was solely inspected by the FRA. (Mulloy Aff. at 2) Citation No. 8753373 was issued because the parking brake was not set on a truck inside the railroad shop. (Resp. Br. at 2) The only question

² George Zahn (“Zahn”) has been the Quarry Superintendent at the Sioux Falls Mine since 2002. (Zahn Aff. at 1) Zahn began working at the Concrete Materials mine in 1970. *Id.* Zahn’s positions at Concrete Materials have included equipment hauler, loading operator, and quarry head man. *Id.*

³ Bill Schmidt (“Schmidt”) is the Operations Superintendent at E&E. (Schmidt Aff. at 1) Schmidt entered the railroad industry in 1984, working at D & I Railroad. *Id.* In 1995, Schmidt became a locomotive engineer. *Id.* Schmidt joined E&E in 2002, has attended and taught numerous classes on railroad safety. *Id.* at 2.

⁴ James Peck (“Peck”) is a Staff Assistant to the MSHA District Manager in Duluth, MN. (Peck Aff. at 1) Peck’s career in the mining industry began in 1982 as an underground miner. *Id.* Subsequently, Peck worked as a mobile equipment and mine operator at various private enterprises. *Id.* Peck joined MSHA in 2008, and has served as a Conference Litigation Representative and Inspector. *Id.*

⁵ The Secretary did not present Inspector Roberts’ qualifications or attach an affidavit from him.

examined in this motion is whether MSHA had jurisdiction over the maintenance shop where the citation was issued.

Standard of Review

The Commission held that “summary decision is an extraordinary procedure.” *Mo. Gravel Co.*, 3 FMSHRC 2470, 2471 (Nov. 1981). It is “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. When weighing the parties’ arguments, all inferences are “viewed in the light most favorable to the party opposing the motion.” *Hanson Aggregates NY, Inc.*, 29 FMSHRC 4, 9 (Jan. 2007) (citations omitted).

Chevron Deference

When judging the validity of an MSHA statutory interpretation, the first issue is “whether Congress has directly spoken to the precise question at issue.” *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984). If the “statute is clear and unambiguous, effect must be given to its language.” *Watkins Eng’rs & Constructors*, 24 FMSHRC 669, 672–73 (July 2002) (citations omitted). If the statute is ambiguous or silent on a point in question, further analysis is required to determine whether the agency’s interpretation of the statute is reasonable. *Id.*

“It is only when the plain meaning is doubtful or ambiguous that the issue of deference to the Secretary’s interpretation arises.” *Bluestone Coal Corp.*, 19 FMSHRC 1025, 1028 (June 1997) (citing *Pfizer Inc. v. Heckler*, 735 F.2d 1502, 1509 (D.C. Cir. 1984)). Deference is accorded to “an agency’s interpretation of the statute it is charged with administering when that interpretation is reasonable.” *Energy W. Mining Co. v. FMSHRC*, 40 F.3d 457, 460 (D.C. Cir. 1994) (citing *Chevron*, 467 U.S. at 844). “The agency’s interpretation of the statute is entitled to affirmance as long as that interpretation is one of the permissible interpretations the agency could have selected.” *Watkins*, 24 FMSHRC at 673 (citations omitted). Furthermore, “the statutory provision underlying the regulation, as well as any related statements accompanying the regulation’s publication in the *Federal Register*, may illuminate the regulation’s meaning.” *Lehigh Southwest Cement*, 33 FMSHRC 3229, 3234 (Dec. 2011)(ALJ Paez) (citing *Lodestar Energy Inc.*, 24 FMSHRC 689, 693 (July 2002)). Additionally, “[i]n the absence of a statutory or regulatory definition of a term, or a technical usage, we look to the ordinary meaning of the terms used in a regulation.” *Bluestone*, 19 FMSHRC at 1029 (citing *Peabody Coal Co.*, 18 FMSHRC 686, 690 (May 1996)).

Definition of a Mine

Section 4 of the Mine Act provides that “[e]ach coal or other mine... shall be subject to the provisions of this Act.” 30 U.S.C. § 803. “Coal or other mine” is defined in Section 3(h)(1) of the Act as:

(h)(1) "coal or other mine" means (A) *an area of land from which minerals are extracted...* (B) private ways and roads *appurtenant* to such area, and (C) lands, excavations, underground passageways, shafts, slopes, tunnels and workings, structures, *facilities*, equipment, machines, tools, or other property... used in, or to be used in, *or resulting from, the work of extracting such minerals...* or used in, or to be used in, the milling of such minerals, or *the work of preparing coal or other minerals*, and includes custom coal preparation facilities.

30 U.S.C. § 802(h)(1) (emphases added).

The work of preparation includes “breaking, crushing, sizing, cleaning, washing, drying, mixing, storing and *loading*” of mining products “as is usually done by the [mine] operator...” 30 U.S.C. § 802(i) (emphasis added). Specifically on the issue of jurisdiction, the Senate Committee on Human Resources specified that

there may be a need to resolve jurisdictional conflicts, but it is the Committee's intention that what is considered to be a mine and to be regulated under this Act be given the *broadest possibl[e] interpretation*, and it is the intent of this Committee that doubts be resolved in favor of inclusion of a facility within the coverage of the Act.

S. Rep. No. 95-181 at 14 (1977), *reprinted in* Senate Subcomm. on Labor, Comm. on Human Res., *Legislative History of the Federal Mine Safety and Health Act of 1977* at 602 (1978) (emphasis added). The Commission holds that “questions of statutory coverage must be resolved within the Act's overall purpose of protecting miners' safety and health.” *W.J. Bokus Indus., Inc.*, 16 FMSHRC 704, 708 (Apr. 1994) (citation omitted).

The Railroad Shop is not a Private Way Appurtenant to the Mine

MSHA claims jurisdiction over E&E's railroad maintenance shop in several ways, and asserts all of them are entitled to *Chevron* deference. Essentially, the Secretary argues that miner safety is affected by the condition of the train tracks and railcars because miners daily load the locomotives. (Sec. Br. at 8) Therefore, the building in which the trains are maintained should be under MSHA supervision. *Id.* at 1–2.

The Secretary's first argument alleges that E&E's railroad shop is a mine. (Sec. Br. at 6) Citing Mine Act Section 802, the Petitioner argues the railroad tracks are a “private way appurtenant to” the quarry and is thereby part of the mine. *Id.* The words “private” and “appurtenant” as used in 30 U.S.C. § 802(h)(1), are recognized by the Commission as being ambiguous. *Nat'l Cement Co. of Cal., Inc.*, 30 FMSHRC 668, 670 (Aug. 2008). Therefore, the question is whether the Secretary's interpretation of these terms as including E&E's maintenance shop is reasonable. *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984).

MSHA's authority over appurtenant ways extends to roads not owned by the mine, if they are integral to the operation. See *TXI Operations, LP*, 23 FMSHRC 54, 60 (Jan. 2001)(ALJ Feldman). E&E admitted that Concrete Materials owns the train tracks connecting the mine to the BNSF rail system. (Resp. Reply Br. at 2) However, MSHA's asserted jurisdiction over the railway is immaterial because the citation was issued for a violation inside the maintenance shop, rather than for a condition or activity on the outside train tracks. Additionally, while private ways to mines are under MSHA jurisdiction, the vehicles which travel upon them are not. *Nat'l Cement Co. of Cal., Inc.*, 573 F.3d 788, 793 (D.C. Cir. 2009). The shop where the citation was issued only repairs locomotives, over which MSHA has no jurisdiction. *Id.*

The Secretary cites two cases supporting its claim that the railroad shop is a mine, however those precedents are distinguishable. *Harman Mining Corp.* and *CML Metals Corp.*, both dealt with hauling accidents on railways adjacent to mine loading areas. 671 F.2d 794, 796 (4th Cir. 1981); 35 FMSHRC 1962, 1962-63 (June 2013)(ALJ Miller). In *Harman*, MSHA retained jurisdiction because the accident's close proximity to the loading machinery made it incidental to the mine. *Id.* However in E&E's case, the cited truck was in a building physically separated from loading and all other mining processes.

In conclusion, the E&E railway repair shop is not a mine under the Mine Act. The Secretary's interpretation, which asserts jurisdiction over the shop because its proximity to the railroad tracks somehow makes it part of the mine, is unreasonable and not entitled to deference.

The Railroad Shop does not Repair Mining Equipment

The Secretary claims E&E's trains are mining equipment, and therefore MSHA has authority over the railroad shop as part of its general jurisdiction over maintenance areas. (Sec. Br. at 6); *E.g. U.S. Steel Mining Co., Inc.*, 10 FMSHRC 146, 149 (Feb. 1988); *W.J. Bokus Indus., Inc.*, 16 FMSHRC 704, 708 (Apr. 1994); *Jim Walter Res., Inc.*, 22 FMSHRC 21, 25 (Jan. 2000). Classifying E&E's trains as mining equipment is essential to MSHA's jurisdiction claim, because the railroad shop does not repair any other alleged mining machinery. (Schmidt Aff. at 4; Zahn Aff. at 2) However, the railcars are not used in any of the 30 C.F.R. § 802(i) mining activities of "breaking, crushing, sizing, cleaning, washing, drying, mixing, storing... [except for] loading." I do not find this language to be ambiguous, and therefore, restrict the analysis to its plain meaning.

However, even the loading process is done by Concrete Materials' miners rather than E&E's railway workers. (Zahn Aff. at 1) Based on this evidence, it is inaccurate to designate the railcars as mining equipment, because loading is simply incidental to their primary usage in transportation. *Id.* While loading is an activity listed in the Mine Act, the Commission has provided guidance that an operation should be considered holistically to determine whether it engages in mining. *Oliver M. Elam, Jr., Co.*, 4 FMSHRC 5, 7 (Jan. 1982). This is based on the Mine Act, which extends MSHA jurisdiction to activities "usually done by the operator of the coal mine." 30 C.F.R. § 802(i). In *Elam*, a coal barge loader's operation was ruled not to be a mine because the nature of the business was fundamentally different. 4 FMSHRC at 7. The inherent differences between barge loading and mining outweighed the fact that the operator broke, crushed, sized, and loaded coal, all of which are activities associated with mining. *Id.* at

5–6. Similarly, based on the nature of E&E’s business, its vehicles are properly viewed as railroad, rather than mining, equipment.

Furthermore, none of E&E’s railroad vehicles enter the quarry extraction area. (Schmidt Aff. at 3) As noted in *Pickett Mining Grp.*, equipment must be used in mining to come under MSHA jurisdiction. 36 FMSHRC 2444, 2452 (Sept. 2014)(ALJ Rae). Specifically, MSHA cannot “regulate equipment that is not located within the boundaries of the extraction area, is not a component of an appurtenant road or way, is not used by the operator's employees, and bears no relation to its mining operations.” *Id.* at 2451. The extraction and processing areas, rather than the legal property boundaries, determine the zone of MSHA authority. *Id.*

I find that E&E’s equipment is not mining equipment because it is not used in activities “usually done by the operator,” according to the Mine Act’s plain meaning. 30 C.F.R. § 802(i). None of the cases cited by the Secretary demonstrates MSHA’s jurisdiction over buildings exclusively dedicated to transportation equipment maintenance. I find that the machinery E&E maintains in railroad shop is not mining equipment, and therefore it is not under MSHA jurisdiction.

E&E and Concrete Materials are not a Single Operation

Alternatively, the Secretary argues that Concrete Materials and E&E are “integral components of a single operation,” run by their parent company Sweetman Construction (“Sweetman”). (Sec. Br. at 1, 7) Therefore, jurisdiction over the mining company Concrete Materials also encompasses the E&E railroad corporation. *Id.* To support this contention, the Secretary argued that: (1) Many of the same individuals are E&E’s and Concrete Materials’ chief officers; (2) Sweetman owns the property on which the mine and railroad shop are located; (3) In 1995, approximately 90% of the materials E&E transported were Concrete Materials’ products; (4) Both corporations share the same website; (5) and E&E stated that it is “primarily transporting aggregate products for Concrete Materials.” *Id.* at 2-4, 7, 10; (Ex. GX 1; Ex. GX 8; Ex. GX 9; Ex. GX 10). E&E did admit that its stock “is owned by Sweetman as is the quarry which Sweetman operates under the name of Concrete Materials.” (Resp. Reply Br. at 2)

Citing *Mineral Coal Sales, Inc.*, the Secretary alleges E&E and Concrete Materials are in substance a single company. 7 FMSHRC 615, 620–21 (May 1985). However, *Mineral Coal Sales*, primarily dealt with the issue of companies dividing mining processes functionally into separate corporations to limit liability. *Id.* The reliance on this case law is misplaced because Concrete Materials has not decreased or attempted to decrease its liability for the mine’s conditions. Here, the goods E&E delivers are finished products, (Resp. Br. at 11) costumers often pick up finished goods from mines, and operators are liable for any violations costumers commit onsite. *El Paso Rock Quarries, Inc.*, 1 FMSHRC 2046, 2047–48 (Dec. 1979)(ALJ Moore); *C.D. Livingston*, 7 FMSHRC 1485, 1487 (Sept. 1985)(ALJ Morris) (citation omitted). However, operators are never liable for the conditions of costumers’ offsite transportation maintenance facilities. Concrete Materials is not dodging any liability it would normally bear.

The fact that both E&E’s and Concrete Materials’ worksites are on the same property is immaterial because clear boundaries exist between the work areas. (Sec. Br. at 4) Physical

barriers prevent direct access from E&E's facility to Concrete Materials' mine. (Mulloy Aff. at 2); (Resp. Ex. 102) Traveling from the quarry to E&E's shop necessitates briefly going on a public road. (Resp. Br. at 3) Both facilities have separate entrance gates, and a wooded drop off lies between the E&E shop and Concrete Materials quarry. (Goembel⁶ Aff. at 2–3); (Resp. Ex. 124; Resp. Ex. 128) MSHA does not possess jurisdiction over facilities even when they are adjacent to a mining operation, unless they have a connection with the mine. *See Clarkson Constr. Co., Inc.*, 37 FMSHRC 450, n.1 (Feb. 2015)(ALJ Manning). I find no connection between the mine and railroad shop, other than the maintenance of trains which distribute some of the quarry's products, therefore, MSHA does not have jurisdiction over E&E's shop.

Lastly, the Respondent presented persuasive evidence showing E&E and Concrete Materials are different companies. Only 15% of E&E's volume in 2014 originated from the Sioux Falls quarry. (Mulloy Supplemental Aff. at 1) Business from outside Sweetman accounted for nearly half of the goods E&E shipped in 2014. *Id.* at 1–2. Other companies contracting with E&E include “GCC Dakota Cement, Holcim Cement, and Headwaters Fly Ash.” (Schmidt Aff. at 5) Besides quarry products, E&E also transports “rebar, re-enforcing steel, and scrap metal.” (Resp. Br. at 5) Lastly, 73% of E&E's revenue came from sources besides Sweetman's various subsidiaries. (Mulloy Supplemental Aff. at 2) These facts demonstrate that E&E is a separate company for the purposes of the Mine Act. The overlap in Concrete Materials' and E&E's senior management is irrelevant. (Sec. Br. at 3) Many companies have diverse holdings, and common senior management teams indicate little about whether they are a single mining operation.

I find that E&E and Concrete Materials cannot reasonably be treated as a single operation. Both corporations have sufficiently diverse holdings and interests to merit treatment as distinct companies.

E&E is an Independent Contractor

Respondent argues it is not an independent contractor because it only provides *de minimis* services to Concrete Materials. (Resp. Br. at 9) For this reason, E&E requests that its Independent Contractor Identification Number be vacated. *Id.* at 15. Specifically, E&E's relationship with the mine is limited to the delivery of finished products. *Id.* at 11. E&E relies on the view that “delivery of coal to a consumer after it is processed usually does not fall under the coverage of the Mine Act.” *United Energy Servs., Inc.*, 35 F.3d 971, 975 (4th Cir. 1994). However, *Bulk Transport. Servs., Inc.* demonstrates that distributors can be held liable as independent contractors. 13 FMSHRC 1354, 1358 (Sept. 1991). Respondent attempted to distinguish *Bulk* as primarily a precedent on subcontractor liability. (Resp. Reply Br. at 11–12) While *Bulk* addresses this topic, the holding still undermines E&E's position because a distributor was found to be an independent contractor. 13 FMSHRC at 1358. Like *Bulk*, E&E

⁶ Kevin Goembel (“Goembel”) is the Safety Director at Concrete Materials. (Goembel Aff. at 1) Goembel began working at Concrete Materials in 1978 as a quarry laborer. *Id.* Between 1978 and 1988, Goembel was a heavy equipment operator. *Id.* In 1988, Goembel became night shift foreman at the Sioux Falls quarry. Goembel has also been a supervisor at Concrete Materials' various plants, including the sand and gravel operation.

maintained a continuing presence at the mine through the daily drop off and shipment of railcars. (*Id.*; Schmidt Aff. at 4)

The meaning of an operator under the Mine Act is very broad and includes “any independent contractor performing services at a mine.” *Otis Elevator Co.*, 921 F.2d 1285, 1290 (D.C. Cir. 1990). However, a business relationship can be “so infrequent or *de minimis* that it would be difficult to conclude that services were being performed.” *Id.* at n.3 (citation omitted). Not working at a mine for five years is a sufficient time gap for a company’s services to become *de minimis* and outside MSHA’s jurisdiction. See *Clarkson Constr. Co., Inc.*, 37 FMSHRC 450, 453 (Feb. 2015)(ALJ Manning). Additionally, the services rendered do not have to be “significant” to bring a company under MSHA’s purview. *Williams Natural Gas Co.*, 19 FMSHRC 1863, 1868 (Dec. 1997). Some activities, like weekly deliveries, are insubstantial enough to be considered *de minimis*. *N. Ill. Steel Supply Co.*, 294 F.3d 844, 848–49 (7th Cir. 2002). Although E&E cites *N. Ill. Steel Supply Co.*, to support its characterization of its services as *de minimis*, its relationship is much more substantial than the “once or twice a week” deliveries made in that case, because its locomotives transport goods for Concrete Materials daily. *Id.* at 845; (Zahn Aff. at 1–2; Schmidt Aff. at 4)

The services E&E performs are not *de minimis*. At a minimum, E&E carries 10% of Concrete Materials’ quarry products. (Mulloy Supplemental Aff. at 1) Furthermore, the affidavits describe E&E as dropping railcars off daily for loading during the nightshift. (Zahn Aff. at 1–2; Schmidt Aff. at 4) This means that during a normal operating day, E&E’s trains enter the worksite at least twice. Although both Concrete Materials and E&E have other transportation and revenue sources, the relationship between the two companies is significant. *Id.* at 2. Furthermore, the concept of *de minimis* often represents the amount of time spent at the mine. See *D.Q. Fire & Explosion Consultants, Inc.*, 34 FMSHRC 2318, 2330 (Aug. 2012). The minimum time necessary to pass the *de minimis* requirement is quite small, “as little as 1.5 hours per week in the mine.” *Id.* at 2332. (citations omitted) E&E’s daily presence at the Sioux Falls quarry makes its services greater than *de minimis*. (Schmidt Aff. at 4) While no evidence has been presented directly on the amount of time E&E’s workers spend at the mine, it is reasonable to conclude that it surpasses 90 minutes per week.

Since E&E’s services to Concrete Materials are not *de minimis*, its request that the Independent Contractor Identification Number be vacated is denied.

E&E’s Railroad Shop is not Under MSHA Jurisdiction as an Independent Contractor

While operators and independent contractors are liable for all violations committed on mine property, *Cemex, Inc.*, 33 FMSHRC 1169, 1172 (May 2011)(ALJ Paez), the shipping of mine products is at the outer bounds of MSHA’s authority because the “delivery of coal to a consumer after it is processed usually does not fall under the coverage of the Mine Act.” *United Energy Servs., Inc.*, 35 F.3d 971, 975 (4th Cir. 1994); See also *PA Elec. Co.*, 969 F.2d 1501, 1504 (3rd Cir. 1992). Additionally, even if located adjacent to a mine, an independent contractor’s repair facility is not subject to MSHA jurisdiction if outside the extraction area. See *Justis Supply & Mach. Shop*, 22 FMSHRC 544, 547 (Apr. 2000)(ALJ Manning). Here, E&E’s

maintenance shop is outside MSHA jurisdiction because it is off the mine site and only involved in the repair of transportation equipment used to deliver finished goods.

I find that E&E's repair shop is located outside of the mining areas and that MSHA cannot reasonably assert jurisdiction under the Mine Act. Because MSHA does not have jurisdiction over the facility, there is no need to consider whether there is a conflict with the FRA's authority.

Conclusion

I find that there is no genuine issue as to any material fact, and therefore, the moving party is entitled to summary decision as a matter of law based on jurisdiction. As such, while E&E is an independent contractor, its maintenance shop within which the citation was issued is outside MSHA's jurisdiction as defined by 30 U.S.C. § 802(h)(1). Therefore, E&E cannot be liable for a violation of 30 C.F.R. § 56.14207, which requires operators to set the parking brakes on unattended vehicles, in that building.

WHEREFORE, Citation No. 8753373 is **VACATED** and E&E's request that the Independent Contractor Identification Number be vacated is **DENIED**.

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

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July 29, 2015

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

v.

CONSOL PENNSYLVANIA COAL
COMPANY, LLC,
Respondent

CIVIL PENALTY PROCEEDING

Docket No. PENN 2013-385
A.C. No. 36-07416-331352

Mine: Enlow Fork

DECISION

Appearances: Matthew R. Epstein, Esq., U.S. Department of Labor, Office of the Solicitor, Philadelphia, PA for the Secretary of Labor

James P. McHugh, Esq., Hardy Pence, PLLC, Charleston, WV for Respondent

Before: Judge Harner

This case is before me upon a petition for assessment of civil penalty filed by the Secretary of Labor (“Secretary”), acting through the Mine Safety and Health Administration (“MSHA”), against Consol Pennsylvania Coal Company, LLC, (“Consol” or “Respondent”) at its Enlow Fork Mine, pursuant to Sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820 (the “Act”). This case includes a Citation and Order, both of which were issued under 104(d) of the Act. The Secretary of Labor assessed a civil penalty of \$29,116.00 for these alleged violations. The parties presented testimony and documentary evidence at a hearing held in Pittsburgh, Pennsylvania on November 4-6, 2014.

STIPULATIONS

1. Respondent is an operator subject to the Mine Act and the Federal Mine Safety and Health Review Commission has jurisdiction. (Transcript, pg 6).¹
2. The Court has jurisdiction over the Citation and Order. (Tr. 6-7).

¹ Hereinafter, the official hearing transcript will be referred to as “Tr.” followed by the page number(s). The Secretary’s exhibits will be referred to as “GX” followed by a number and Respondent’s exhibits will be referred to as “RX” followed by a letter.

3. The Citation and Order are true and accurate copies of what was served on Respondent. (Tr. 7).
4. The payment of the proposed penalty will not affect the operator's ability to remain in business. (Tr. 7).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The findings of fact are based on the record as a whole and my careful observation of the witnesses during their testimony. In resolving any conflicts in the testimony, I have taken into consideration the interests of the witnesses, or lack thereof, and consistencies, or inconsistencies, in each witness's testimony and between the testimonies of the witnesses. In evaluating the testimony of each witness, I have also relied on his demeanor. Any failure to provide detail as to each witness's testimony is not to be deemed a failure on my part to have fully considered it. The fact that some evidence is not discussed does not indicate that it was not considered. *See Craig v. Apfel*, 212 F.3d 433, 436 (8th Cir. 2000)(administrative law judge is not required to discuss all evidence and failure to cite specific evidence does not mean it was not considered).

I. BASIC LEGAL PRINCIPLES

A. Significant and Substantial

The Citation and Order in dispute and discussed below have been designated by the Secretary as significant and substantial and unwarrantable failures to comply with mandatory safety standards. A significant and substantial ("S&S") violation is described in section 104(d)(1) of the Act as a violation "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." 30 U.S.C. § 814(d)(1). A violation is properly designated S&S "if, based upon the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981).

The Commission has explained that:

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

Mathies Coal Co., 6 FMSHRC 1, 3-4 (Jan. 1984) (footnote omitted); *see also, Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 135 (7th Cir. 1999); *Austin Power, Inc. v. Secretary*, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff'g Austin Power, Inc.*, 9 FMSHRC 2015, 2021 (Dec. 1987) (approving *Mathies* criteria).

The difficulty with finding a violation S&S normally comes with the third element of the *Mathies* formula. In *U.S. Steel Mining Co., Inc.*, 7 FMSHRC 1125, 1129 (Aug. 1985), the Commission provided additional guidance: We have explained further that the third element of the *Mathies* formula “requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury.” *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1834, 1836 (August 1984). We have emphasized that, in accordance with the language of section 104(d)(1), it is the *contribution* of a violation to the cause and effect of a hazard that must be significant and substantial. *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1866, 1868 (August 1984); *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574-75 (July 1984). The Secretary “need not prove a reasonable likelihood that the violation itself will cause injury.” *Cumberland Coal Resources, LP*, 33 FMSHRC 2357, 2365 (Oct. 2011) (citing *Musser Engineering, Inc. and PBS Coals, Inc.*, 32 FMSHRC 1257, 1281 (Oct. 2010)).

This evaluation is made in consideration of the length of time that the violative condition existed prior to the citation and the time it would have existed if normal mining operations had continued. *Elk Run Coal Co.*, 27 FMSHRC 899, 905 (Dec. 2005); *U.S. Steel Mining Co., Inc.*, 6 FMSHRC at 1574. The question of whether a particular violation is S&S must be based on the particular facts surrounding the violation. *Texasgulf, Inc.*, 10 FMSHRC 498 (Apr. 1988); *Youghiogeny & Ohio Coal Co.*, 9 FMSHRC 2007 (Dec. 1987).

B. Negligence and Unwarrantable Failure

Negligence “is conduct, either by commission or omission, which falls below a standard of care established under the Mine Act to protect miners against the risks of harm.” 30 C.F.R. § 100.3(d). “A mine operator is required to be on the alert for conditions and practices in the mine that affect the safety or health of miners and to take steps necessary to correct or prevent hazardous conditions or practices.” *Id.* MSHA considers mitigating circumstances which may include, but are not limited to, actions taken by the operator to prevent or correct hazardous conditions or practices. *Id.* Low negligence exists when “[t]he operator knew or should have known of the violative condition or practice, but there are considerable mitigating circumstances.” *Id.* Moderate negligence is when “[t]he operator knew or should have known of the violative condition or practice, but there are mitigating circumstances.” *Id.* High negligence exists when “[t]he operator knew or should have known of the violative condition or practice, and there are no mitigating circumstances.” *Id.* See also *Brody Mining, LLC*, 33 FMSHRC 1329 (2011) (ALJ Gill). Finally, the operator is guilty of reckless disregard where it “displayed conduct which exhibits the absence of the slightest degree of care.” 30 C.F.R. § 100.3(d).

The Commission has defined an unwarrantable failure as aggravated conduct constituting more than ordinary negligence. *Emery Mining Corp.*, 9 FMSHRC 1997, 2001 (Dec. 1987). Unwarrantable failure is defined by such conduct as “reckless disregard”, “intentional misconduct”, “indifference”, or a “serious lack of reasonable care”. *Emery Mining Corp.*, 9 FMSHRC at 2003; see also *Buck Creek Coal, Inc.*, 52 F.3d 133, 136 (7th Cir. 1995).

The Commission has recognized that whether conduct is “aggravated” in the context of unwarrantable failure is determined by considering all the facts and circumstances of each case to determine if any aggravating factors exist, or if any mitigating circumstances exist.

Aggravating factors include the length of time that the violation has existed, the extent of the violative condition, whether the operator has been placed on notice that greater efforts were necessary for compliance, the operator's efforts in abating the violative condition, whether the violation was obvious or posed a high degree of danger, and the operator's knowledge of the existence of the violation. See *Consolidation Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2000). Repeated similar violations are relevant to an unwarrantable failure determination to the extent that they serve to put an operator on notice that greater efforts are necessary for compliance with a standard. *Peabody Coal Co.*, 14 FMSHRC 1258, 1261 (Aug. 1992).

The Commission has made clear that it is necessary for a judge to consider all relevant factors, rather than relying on one to the exclusion of others. *Windsor Coal Co.*, 21 FMSHRC at 1001; *San Juan Coal Co.*, 29 FMSHRC 125, 129-36 (Mar. 2007) (remanding unwarrantable determination for further analysis and findings when judge failed to analyze all factors). While an administrative law judge may determine, in his or her discretion, that some factors are not relevant, or may determine that some factors are much less important than other factors under the circumstances, all of the factors must be taken into consideration and at least noted by the judge. *IO Coal Company*, 31 FMSHRC 1346, 1351 (Dec. 2009).

I rely on the state of the law as discussed herein in considering each issue addressed below and whether the Citation and Order, which are alleged to be S&S and unwarrantable failures, meet the above noted criteria.

II. DISCUSSION WITH FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Background

The instant citation was issued for alleged violations of safety standards in the Enlow Fork E-tailgate bleeder system. (GX-1 and GX-2). According to the Commission, “bleeder entries” are defined as “panel entries driven on a perimeter of a block of coal being mined and maintained as exhaust airways to remove methane promptly from the working faces to prevent buildup of high concentrations either at the face or in the main intake airways.” *Consolidation Coal Co.*, 20 FMSHRC 227, FN 6 (Mar. 1998) *citing* American Geological Institute, *Dictionary of Mining, Mineral, and Related Terms* 55 (2d ed. 1997).

The bleeders at Enlow Fork were maintained with weekly examinations. (Tr. 31, 69-70, 173). Examiners were foremen; regular miners did not travel in the bleeder. (Tr. 69-70). At the time at issue, examiners walked the bleeders alone but by the time of the hearing a company-wide policy required travel in pairs. (Tr. 490-491, 507, 706, 722). The instant matter occurred in the E-15- to E-22 bleeder system, an older bleeder about 8 miles long. (Tr. 32-35, 470). An experienced examiner would take 4-5 hours to complete an examination run here. (Tr. 33-34). The purpose of a bleeder exam was to ensure proper ventilation at certain “evaluation points.”² (Tr. 30). The examiner would check for methane, erratic changes in the amount or direction of

² Exams occurred in the No. 3 travel entry. It was possible to reach the evaluation points via other entries, but it was not clear this would be a complete exam. (Tr. 199-200, 229-230, 389, 480, 500-501). Such a bypass occurred about twice a year when the primary entry was blocked. (Tr. 500-501). The examiner only bypassed one block and could see the areas missed. (Tr. 501).

air, the quality of the air, air pressure, ventilation controls, roof support, and anything else affecting ventilation. (Tr. 30-32). The examiner would also check for things affecting safe passage, including water accumulations. (Tr. 31, 56).

Most bleeder systems have water in them and all have pumps to remove that water. (Tr. 34, 280). The E-15 to E-22 bleeder was a challenge to keep dry. (Tr. 315). Significant accumulations could occur in a matter of hours. (Tr. 505-506). Most of the water was clear, though it could be cloudy, orange, and murky from magnetite, sulfur and “nasty stuff.” (Tr. 488-489, 756). Clear water might not be a hazard because a miner could see where he was walking. (Tr. 53-54).

To reroute this water, Respondent’s ventilation plan permitted a system of 18-23 air pumps that dumped water into a 12-13 foot deep sump.³ (Tr. 41-43, 48, 118, 188, 214-215, 471-475, 478). The sump was partially filled with mud and coal fines and could be murky. (Tr. 474, 489). Two four-inch discharge lines transferred water in the sump to an underground retaining pool. (Tr. 216, 272-273, 475-476, 650-651, 763). The discharge lines drained at half capacity 24 hours a day. (Tr. 472, 475-477). Half a pipe of water issuing from the discharge lines meant the pumps were working properly. (Tr. 508, 511-512).

If the water system was disrupted, the sump could fill in two to three hours and then overflow, causing water to cover the walkways in the bleeder. (Tr. 477-478). The mine could not keep up if even one or two air pumps went down. (Tr. 478-480, 510). If the water backed up, it could block the evaluation points and prevent examination of the bleeder. (Tr. 479-480). If the pumps were broken, regulator doors could be opened to allow water to run to the next pump or to the sump (at the lowest spot). (Tr. 480-481, 662).

Daily monitoring of the pumps was not required by the plan but Respondent had two pumpers check the pool and discharge lines three times a day. (Tr. 215, 475-476, 502, 520, 648-649, 651, 706, 753, 777-778). Pumpers were not certified to enter the bleeder, only to check the pool for water discharge and air readings. (Tr. 710, 768, 778). This check only showed how much water went from the sump to the pool, not the level of water in the sump or bleeder. (Tr. 216, 502-503, 508, 656, 710, 768). It also showed that the air pumps were working. (Tr. 217, 502, 656). A large amount of water being discharged would imply that the sump was full. (Tr. 769). Water not coming out of the discharge pipes would indicate that a pipe, booster, or compressor was broken, air was insufficient, or that there was no electricity. (Tr. 476-477, 657-

³ The Consol Enlow Fork Mines Ventilation Plan (GX-3, p. 1) stated:

[T]he means for maintaining safe travel will include compressed air lines routed underground used in conjunction with air pumps to remove water as necessary to permit safe travel through the perimeter bleeder system. Discharge lines will direct pump water to the mine dewatering system. Ditches, bridges, and natural drainage are used to maintain bleeder entries free from standing water that effect ventilation and prevent safe travel.

(Tr. 55-56).

658, 768-769, 778). It could also mean that the sump was empty. (Tr. 769). If water was not discharged, the pumpers called the examiner to check the area. (Tr. 765-766, 769).

A back-up sump pump system was also in place but not included as part of the ventilation plan. (Tr. 43-44, 188-189, 214-215, 472). The sump system was only used in an emergency, like when air pumps broke or when there was too much water for the air system. (Tr. 44, 188-189, 477, 512). The sump pump was located and maintained on the surface and could not be heard underground. (Tr. 473-474, 518, 520-521). Surface fan examiners checked whether the pump was working, the level of water underground, and the status of the surface tanks. (Tr. 282-283, 590). The miners underground and above ground communicated about the sump pump. (Tr. 518, 661-662).

Originally, the sump pump was turned on manually but a bubbler system was later installed that automatically activated when water in the sump reached a set level. (Tr. 188-189, 472-473, 565, 663). A bubbler works by forcing a set amount of air down tubes from the surface to the sump and, if the air displaces water, activates the pump. (Tr. 241-242, 536-539). Craig Yoho set the level at 22 inches.⁴ (Tr. 663). Once the water was removed, the pump turned off automatically. (Tr. 559). The bubbler gave an idea of the water level in the sump. (Tr. 538-539, 758, 761). In fact, there may have been a gauge attached to the bubbler at the surface that showed the depth in the sump. (Tr. 542).

A mechanic examined the bubbler daily and kept a log of the bubbler readings to keep track of water levels and plan maintenance (GX-11, RX-N). (Tr. 557-558, 561-565, 753-754). Generally, if the bubbler readout showed “zero inches” the mechanics would not touch the pump. (Tr. 558). However, if the bubbler showed “0” for a long time, the mechanic might suspect there was a problem. (Tr. 754). Mechanics could only test the accuracy of the bubbler reading by forcing air down the tubes and seeing if the pump would run. (Tr. 541, 558-559). Only experienced mechanics and electricians would know to take this action. (Tr. 539-542, 558-560).

In February 2013, the E-15 overflow from the sump deposited water in three outdoor tanks with a total capacity of 63,000-64,000 gallons. (Tr. 44-45, 650-651, 737). The pump moved 250-300 gallons a minute and could fill the tanks in three hours. (Tr. 284). When the tanks were full the sump pump could not run and 4,610-gallon trucks would have to unload the tanks. (Tr. 45-46, 559, 564, 613, 737-738). The tanks were designed so they could not overflow. (Tr. 610, 755-756). There was no sediment pond or overflow system, and the water in the tanks had to be removed by trucks and processed for environmental reasons because it was considered “dirty”. (Tr. 284-285, 761). Burns Trucking was contracted to empty these tanks and did so regularly. (Tr. 564, 612-613). Burns Trucking and the fan man monitored the tanks daily. (Tr. 282-283, 613-614). Frank Vorhes testified that Burns checked the pumps as a courtesy but never conducted repairs.⁵ (Tr. 546-547, 629-632-633).

⁴ Craig Yoho was present at the hearing and testified. (Tr. 731). At the time of the hearing, Yoho was employed as a maintenance foreman at Consol. (Tr. 731).

⁵ Frank Vorhes was present at the hearing and testified. (Tr. 612). At the time of the hearing, Vorhes was employed by Burns Drilling, Excavating, and Trucking as a dispatcher. (Tr. 612).

According to Respondent's witnesses, water in the bleeder only needed to be reported in the examination book if the condition could not be fixed or if more repairs were needed. (Tr. 450-451, 490). The examiner carried tools and spare parts so that conditions could be fixed quickly. (Tr. 502-505). If the examiner could not finish a run, the existence of water would have to be recorded in the book along with any other hazardous conditions that were not corrected. (Tr. 451-452). The condition would be repaired the next day with any assistance necessary. (Tr. 490-492). Water 42-inches or deeper should go in the book so that the inspector and miners would be aware. (Tr. 503). Sometimes the examiner would make additional exams during the week to make repairs, but there were no books for these extra exams. (Tr. 493).

The ventilation plan permitted digging trenches to move or control water and building bridges above them in the bleeder system. (Tr. 48, 50-51). Water still had to be controlled with pumps, but walkways could be used over static puddles, mud holes, and bad bottom. (Tr. 48-49, 51-52). Submerged bridges, especially in muddy or murky water, would be a tripping hazard. (Tr. 53-54). The sump area had a wet walkway above the collected water. (Tr. 43-44, 645, 722, 791). There were two or three other walkways in the E-15 area.⁶ (Tr. 47, 55, 155-156). The E-21 walkway was 400-500 feet long and covered a low spot where the continuous miner had dipped that filled with mud and water. (Tr. 482-487). There were valves and pumps in this low spot. (Tr. 487-488). Some of the bridges were 24-36 inches off the bottom while others were only four or five inches from the bottom. (Tr. 54, 484). Most of the walkways in the E-15 to E-22 bleeder were in decent shape, though some were rotted, steep, or muddy. (Tr. 48). Walkways were to be kept clear and cribs and cables were used to mark the path and served as handholds. (Tr. 725, 789).

There was no communication system in the Enlow Fork bleeders. (Tr. 36-37). Miners in the area were tracked manually, meaning they called out at the last tracking signal to explain they would go off the grid and then called again when they left the bleeder. (Tr. 37). If a miner did not check in, someone was sent after him. (Tr. 38). Two years before the hearing a miner at Bailey Mine had a heart attack and died in a bleeder. (Tr. 38, 705-706, 721). If a miner were to fall in murky water and hit his head on rocks, pumps, pipes, or other obstructions he could be rendered unconscious and drown. (Tr. 39). The miner at Bailey and the instant matter were among the reasons Respondent changed its policy to require that two miners conduct examinations together. (Tr. 706).

Power outages occurred often in the bleeder, affecting fans and compressors. (Tr. 493). The examiner would check the pump to ensure that water was still coming out, especially if the outage was close to the regular exam day. (Tr. 493-494). If there was insufficient water there was an indication that the pump or bleeder valve was affected by the outage. (Tr. 493-494).

⁶ The exact number and location of the walkways was unclear from the record.

On November 20, 2012, MSHA inspector Walter R. “Bud” Young traveled this bleeder system as part of a normal, quarterly EO-1 inspection.⁷ (Tr. 61-63). During that inspection, Young issued a citation (GX-7) for excessive water in sump area of the E-tailgate bleeder system. (Tr. 63-64, 74, 183-184). The water was 24-36 inches deep, murky, and contained tripping hazards including air lines, discharge hoses, cribs, cables, wires, irregular mine floor, and sloughage. (Tr. 64, 198, 200). Young did not know where the water came from but Respondent believed it occurred because a contractor had accidentally cut the surface sump pump cord. (Tr. 64, 66, 187-188, 190, 585). Respondent removed the water with the surface and tailgate pumps and laid a new cable. (Tr. 64, 586). The citation was issued on the last day of the weekly exam period, but Young testified that it would have been a violation on any day. (Tr. 184-186). When Young left the mine he told Jerry Wright, the assistant mine foreman, that every time he went into this bleeder it got worse and Wright promised to take care of it. (Tr. 66).

The citation was issued for a §75.370 violation under Section 104(a) for a tripping hazard. (Tr. 193-194). The citations was marked as “reasonably likely” to occur. (Tr. 193). Young factored in that the area was limited access and that only one miner conducted the weekly exam. (Tr. 193). The citation was marked as lost workday/restricted duty because of the length, depth, and extent of the conditions and the possibility for cellulitis, broken bones, contusions, lacerations, dislocations, and hypothermia. (Tr. 195-196, 199-200). The citation was marked as “low” negligence because there were significant mitigating circumstances, including the fact that the area was lightly traveled, the line was cut, no one knew (though they should have known) about the water, and it was the last day of the exam period. (Tr. 190-191, 197-198).

As a result of the water accumulation, the bleeder inspection could not be completed and Young returned on December 10, 2012 to finish the inspection of the bleeder. (Tr. 63). On that day, he issued another citation for excessive water in the bleeder (GX-8). (Tr. 65, 73-74, 202). There was water at the sump and at the other end of the bleeder. (Tr. 65). The water was hazardous because it was 24 inches deep, contained tripping hazards, and was so dark and murky that the mine floor was not visible. (Tr. 65). Respondent believed the water accumulated because the surface tanks were full and because there was a hole in the pump line. (Tr. 45, 71, 202, 842-843).

This citation was marked as lost workdays because there was wood floating in the area, the water was murky, and there were concealed tripping hazards. (Tr. 209). A miner could have easily fallen, struck his head or body, and been injured. (Tr. 209). Miners could twist an ankle, break a leg, or get sores on their feet. (Tr. 68-69). The water was also orange and contained bacteria. (Tr. 69). Young had once gotten cellulitis, a painful blood borne infection in his feet, from walking through mine water. (Tr. 68). There had also been cases of MRSA. (Tr. 69). The citation was marked as affecting one person because miners only traveled during exams. (Tr. 205-206). The citation was issued six days after the Respondent had completed its last exam of the area. (Tr. 206). The citation was marked as moderate negligence because management was

⁷ Walter R. “Bud” Young was present at the hearing and testified. (Tr. 24). At the time of the hearing, he was an MSHA ventilation specialist. (Tr. 25). He had received training and held several certifications. (Tr. 25-30). Young had worked 30 years in the industry at several different positions, including 15 years at the Enlow Fork Mine. (Tr. 26-30). When he worked at Enlow Fork, Young examined the bleeders, but did not examine the E-15 bleeder. (Tr. 28, 30).

on notice that there was a water problem from the previous citations but did not adequately address the problem. (Tr. 207). The violation was mitigated because the areas were small and could be avoided. (Tr. 208-209, 239).

Young wrote in this citation that Respondent was on notice that increased removal of standing water in the bleeder and clearing of the walkway was necessary or increased enforcement would occur. (Tr. 67-68, 71). He relayed this information to Mine Foreman Mike Giavonelli.⁸ (Tr. 66-67, 694). Young had traveled the E-15 bleeder many times and had cited water at least twice before. (Tr. 39-41, 46). Young only cited the bleeder when water went over his 18-inch boots, when it covered a vast area, when it was discolored, or when it contained tripping hazards, but the bleeder always contained some water. (Tr. 40, 46-47, 172-173). This was the worst bleeder system Young had ever seen for water build-up. (Tr. 34-35). Young was concerned about the effect of standing water on the health and safety of miners. (Tr. 68).

Giavonelli promised to install an alarm on the sump pump to monitor the water levels by computer and to devote more miners to keep the area clear. (Tr. 67, 71, 202-203, 275, 294-295, 512). After this citation, additional exams were conducted by the examiners and pump men. (Tr. 662, 698). Respondent also split the bleeder system, though this did not necessarily limit the amount of water in the area. (Tr. 203-205, 699). Respondent may also have added pumping capability to the area. (Tr. 273, 699). The timing of these changes is unclear. (Tr. 700).

At some point management installed the promised monitoring system, allowing them to view the bubbler system on computer screens so examiners would not have to go to the pump. (Tr. 521, 637, 663). The pump was linked with a wireless system to the E-15 fan monitoring system. (Tr. 294, 572, 736-737). The monitor showed air pressure in the bubbler, rather than inches of water in the mine. (Tr. 605, 751-752). The screens showed a visual alarm when the pump activated, when the surface tanks were full or when the power was off. (Tr. 573, 737-739, 753-755). There were monitoring stations at the tracking center, the foreman's office, the electrician's office, both superintendents' offices, the plaza, the communication center, and the corporate office. (Tr. 738-739, 751). Someone watched the screens at all times. (Tr. 738). The system was tested and worked. (Tr. 737). The system could only monitor, not remotely control, the pump. (Tr. 584). After installation, management monitored the bubbler with examiner reports, the pumper reports, and by looking at the computer monitor. (Tr. 664-665). Paper records were maintained even after the remote system was put in place. (Tr. 572).

It was not clear when this system was installed or if it was installed before the instant matter. (Tr. 70, 254-255, 295, 520, 522, 637, 701-702). The evidence is conflicting about the time of the installation and no records were produced at the hearing to disclose when the system was installed. (Tr. 747). Young believed it was installed after December 10. (Tr. 256). Yoho stated that it was completed after December 10 and definitely before February 5. (Tr. 732-734, 736-740, 747, 754). Initially, Christopher E. Demidovich testified it was installed after February

⁸ Michael Giavonelli was present at the hearing and testified. (Tr. 634). At the time of the hearing, Giavonelli had been a mine foreman at Enlow Fork for 10 years. (Tr. 634).

5, 2013.⁹ (Tr. 570-571). However, he later stated it was installed starting on December 11, 2012 and was in place on February 5, 2013. (Tr. 573, 577-579). Finally, he stated he was not certain on the timing of the installation. (Tr. 580-582).

B. The February 5, 2013 Inspection

On February 5, 2013¹⁰, Young's supervisor, Dave Severini, called him at home about a 103(g) complaint (GX-3) at Enlow Fork for accumulation of water in the bleeders and possible problems with the ventilation.¹¹ (Tr. 56-57, 76, 159-161, 372, 374, 385, 682). Young was sent because he was the ventilation specialist in charge of Enlow Fork. (Tr. 77-78, 160-161, 359-360). Severini said another inspector at the mine needed to be relieved. (Tr. 78, 162, 360-361). Severini and Young did not discuss whether issuances under 104(d) were being considered. (Tr. 161).

Young arrived at Enlow Fork at 9:00 p.m. (Tr. 112-113, 406-407, 805). John Brottish¹², William Gross¹³, and Rod Henry¹⁴ were highlighting the mine map (GX-3, p. 23-25) for accumulations of water. (Tr. 79, 156-158, 164-166, 223-224). They told Young what they had found and confirmed their findings on the map. (Tr. 167-173, 362, 410-411). Brottish and Gross agreed on the location of the accumulations and measurements. (Tr. 795, 805).

Gross had begun his regular inspection at 7:00 a.m. and was accompanied by Brottish. (Tr. 342, 785). Normally bleeders are not checked in a quarterly inspection, but when Gross got

⁹ Christopher E. Demidovich was present at the hearing and testified. (Tr. 548). At the time of the hearing he was employed by Consol as a surface maintenance supervisor. (Tr. 548-549). In that capacity he maintained surface equipment. (Tr. 549).

¹⁰ Unless otherwise indicated, all dates refer to 2013.

¹¹ Section 103(g) of the Mine Act provides, *inter alia*, “[w]henever a representative of the miners or a miner in the case of a coal or other mine where there is no such representative has reasonable grounds to believe that a violation of this chapter or a mandatory health or safety standard exists, or an imminent danger exists, such miner or representative shall have a right to obtain an immediate inspection by giving notice to the Secretary or his authorized representative of such violation or danger.” 30 U.S.C. §813(g).

¹² John Brottish was present at the hearing and testified. (Tr. 784). At the time of the hearing, Brottish was employed by Respondent as a “safety mentor.” (Tr. 784-785). Before that, and at the time at issue, he was a safety inspector. (Tr. 785).

¹³ William Gross was present at the hearing and testified. (Tr. 334). At the time of the hearing, Gross was an MSHA inspector. (Tr. 334-335, 369). He was trained by MSHA and had extensive experience and certifications. (Tr. 335-339). Gross had been at the Enlow Fork Mine that day conducting a normal, two-week long quarterly inspection. (Tr. 339-340).

¹⁴ Rod Henry was present and testified at the hearing. (Tr. 770). At the time of the hearing Henry was retired but had last worked as a safety supervisor at Enlow Fork. (Tr. 770).

back outside at 11:30, he learned (while in the mine office) that there was a 103(g) complaint regarding the bleeders. (Tr. 105, 132, 341-344, 370-372, 785-786). Gross informed Brottish, Henry, and Giavonelli that the 103(g) complaint was about water accumulations in the E-District bleeders affecting ventilation. (Tr. 343, 682, 771, 773, 777, 786). Brottish recalled telling Gross that the examiner had an issue with water that morning. (Tr. 774, 786). Gross did not recall this conversation; he just knew what he read in the 103(g) complaint. (Tr. 373-375). Henry and Brottish recalled asking Gross how much water was too much and seeing Gross lift his hand to his chin. (Tr. 773, 779, 786-787). Brottish assumed this meant he was not worried about going through that depth of water. (Tr. 787). Gross did not recall this exchange. (Tr. 375).

Gross and Brottish took a mantrip to the E-tailgate area and planned to walk from the mouth, to the corner mentioned in the 103(g) complaint, and then walk the whole perimeter from E-15 to E-22. (Tr. 173, 343-344, 357, 772, 787). Brottish volunteered to go with Gross. (Tr. 399, 786). Gross did not note any violations (with roof, ribs, or any other area) until he found a water accumulation starting at the 47 crosscut. (Tr. 163, 347, 417-418, 787-788, 799). The water ranged from 12 inches to 42 inches at the deepest spot near the sump. (Tr. 80, 156-157, 347-348, 382, 385-389, 788, 799). The whole area near the sump was flooded. (Tr. 388). Despite the water, there was no indication that the visual alarm on the remote monitoring system sounded that day. (Tr. 72). Gross took only one measurement. (Tr. 391, 794, 798). However, water was also halfway up over a man door (which sat 24 inches from the bottom). (Tr. 349, 788-789). The water was rib to rib, very cold, murky (from dirt and coal dust), cloudy, and the bottom could not be seen. (Tr. 172, 348, 411-412). There was no indication that the water was receding. (Tr. 364-366). Gross did not recall Brottish's reaction to the water or if Brottish was already aware of it. (Tr. 423-424).

Gross did not hear the sump pump running or see water rippling from it. (Tr. 365-366, 402). He did not recall anyone saying the pump started at 5 a.m. (Tr. 405). In fact, Gross was not aware of the sump pump system at that time, only the air pump system. (Tr. 409). However, it was possible the discharge lines were feeding into the sump. (Tr. 368). Brottish knew the pump was running because water was coming out of the pipe. (Tr. 795-796).

Gross and Brottish traveled through the water and through a mandoor to reach a dry area near the fan to take air readings and check for methane buildup in the corner. (Tr. 348-349, 788, 790, 799-800). The highest reading was only 0.4% methane and the air flow was adequate; there was no ventilation problem. (Tr. 80-81, 350, 375-377, 774-775, 790). Gross did not think he would die as he walked in the water. (Tr. 398). However, he testified that he would not have entered the water alone because no one could help him if he fell. (Tr. 349, 367, 398). Gross and Brottish shuffled their feet and moved slowly because they could not see the bottom. (Tr. 349, 411, 425). Later, after returning to the MSHA office, Gross was verbally reprimanded by the district manager for entering water that deep, but believed at the time that he acted to ensure the safety of miners. (Tr. 349-350, 366-367, 399, 401). Brottish felt safe walking the area. (Tr. 789, 793).

They continued on and about 300 feet from the corner they reached another accumulation of water. (Tr. 351). Gross believed that this entire area was about 600-700 feet. (Tr. 79-80, 125-126, 167, 169, 351-353, 377). It was later determined that the water accumulation started at 46

crosscut, so it was only 400-500 feet. (Tr. 377-378, 382, 384). Gross believed that this might have dropped because the pumps were later running. (Tr. 384, 387-388).

Gross and Brottish encountered another accumulation of water at E-19. (Tr. 350-351, 353, 791, 800). The water here ranged from 12 to 36 inches deep from the surface of the water to the mine floor (not the bottom of the walkway) and went over Gross' mid-calf boots. (Tr. 125-126, 173, 354, 356, 366, 391-392, 394, 420, 791-792, 801). It was 12 inches from the top of the bridge to the surface of the water. (Tr. 792, 801-802). The deepest point was halfway across the area on the walkway. (Tr. 393-394). The ground was uneven and Brottish believed the deepest location was a low spot on the walkway. (Tr. 395, 792, 801). Gross only made two measurements in this area. (Tr. 392, 794). Gross agreed that he should have taken more, but he already knew the area was unsafe for travel even if some areas may have only been a few inches deep. (Tr. 394-396). The water stretched two panels from E-19 to E-21 (about 2,000 feet) without any dry areas. (Tr. 79-80, 125-126, 167-169, 173, 354, 379-380).

Gross was less concerned about the depth here and more concerned that the water was murky and obscured the walkway, their feet, and the bottom. (Tr. 172, 354-356, 392, 394-395). Brottish believed the water was clear until they kicked up material. (Tr. 793, 825-826). The pumps were running, but were not effective. (Tr. 366, 401, 424, 792). Gross did not believe he said he would issue citations for the pumps. (Tr. 403).

Gross and Brottish exited the mine around 8:30 to 9:00. (Tr. 406, 682-683, 774-776). Brottish, Gross, and Henry discussed the conditions and then a later meeting occurred with more management covering the same issues. (Tr. 796-797, 825). After traveling through the area, Gross considered the murky water a tripping hazard. (Tr. 356, 411, 775). However, neither he nor Brottish tripped. (Tr. 412, 789-790, 793).

Gross did not issue a citation right away because he wanted to gather more information for the 103(g) complaint.¹⁵ (Tr. 356-357, 398). Management believed Gross said he would write citations that were low negligence and non-S&S. (Tr. 357, 397, 402-403, 790-791, 796, 804, 823-824). Gross did not recall making any comments to this effect.¹⁶ (Tr. 397). Brottish recognized that the alleged comment was made before Gross looked at the books, spoke to the examiners, or saw all of the conditions. (Tr. 796-797, 823-824). Henry recalled Gross saying it would "probably" be S&S, though Brottish may have told him. (Tr. 775, 780-781). Regardless, Gross believed Respondent needed to take immediate action. (Tr. 397-398). Brottish believed the company took all citations seriously but acted more quickly and took more notes for S&S citations. (Tr. 793-794). Respondent also cared more about the justification for S&S citations. (Tr. 794).

¹⁵ A 103(g) inspections might go on for three weeks without a decision about whether to issue a citation. (Tr. 418). Gross believed that good investigations take time. (Tr. 413).

¹⁶ It does not appear likely that Gross made any comment about the type of violation since he needed to gather more information.

Gross then called Severini, his supervisor, and told him he wanted to speak to the two examiners when they returned to the mine for their shift to determine negligence and unwarrantable failure before issuing anything. (Tr. 357-359, 405, 409-410, 774-775, 777, 797). They discussed that the citation could be a (d)(1) issuance pending that conversation. (Tr. 360). It was not uncommon for an inspector to want to speak with someone before making a determination. (Tr. 816). Gross did not tell Severini he was issuing non-S&S 104(a) citations and did not recall who brought up (d) orders. (Tr. 404). They did not discuss mitigating circumstances and Gross did not take notes about the conversation. (Tr. 407-408). Gross did not know that the bleeder had been cited earlier and that the mine was on notice. (Tr. 364, 369-370). After talking to Severini, Gross decided to wait for Young before writing anything. (Tr. 361).

Sometime after speaking with Severini, Gross told Giavonelli and Brottish there would be two (d) orders. (Tr. 403-405, 683, 804). Giavonelli and Brottish claimed that Gross rescinded his earlier announcement that he would issue two citations after speaking with Severini and stated, "you are not going to believe this I have to write you two Orders." (Tr. 683, 798). Gross claimed that at the time of the hearing he believed the unwarrantable failure designation was appropriate. (Tr. 410). After this conversation regarding (d) Orders, Giavonelli made a note in the book (RX-W) indicating that there was water but that it had not roofed or caused ventilation problems. (Tr. 679-680, 717-721, 720-721, 724).

After Young arrived at the mine, Gross updated him about these circumstances, gave Young his notes and left the mine at 11:00 p.m. before the two examiners, Dan Stalnaker¹⁷ and Kevin Saunders¹⁸, returned for their shift. (Tr. 112-114, 162-163, 360-363, 379-380, 400, 410-411, 416-417, 419). Gross had no further involvement, as Young completed the investigation. (Tr. 363, 405, 417).

After hearing about the conditions, Young told Brottish and Head of Safety Steve Apperson that he was going to issue a 104(d)(1) Citation for the water conditions unless they presented mitigation. (Tr. 88, 90, 119, 806, 818). This citation was based on Gross' observations, the map, and what the examiners might tell him. (Tr. 90, 164-166, 170, 211-212). He started drafting the body of the citation before he ever saw the water. (Tr. 114, 154-155). Young and Gross never discussed the type of issuance and Young did not know what Gross had told Respondent before he left. (Tr. 174-175).

Young knew that two examiners, Stalnaker and Saunders, had earlier walked through the area. (Tr. 89-89). Young did not know if the exam had been completed and he wanted to talk to

¹⁷ Dan Stalnaker was present at the hearing and testified. (Tr. 297). At the time of the hearing Stalnaker was retired, but his previous job was working around eight years as a regular mine examiner at Enlow Fork. (Tr. 297-298). Stalnaker did not regularly examine bleeders and had only been in the cited area two or three times. (Tr. 298-299, 314, 496). He encountered water in the area before the instant incident, preventing him from examining the area in its entirety. (Tr. 299, 313-314).

¹⁸ Kevin Saunders was present at hearing and testified. (Tr. 426). At all relevant times he was a foreman at Enlow Fork. (Tr. 426, 436-437). Saunders was regularly assigned to examine a different bleeder and had examined, at most, E-15 twice in the past. (Tr. 427, 436).

them. (Tr. 89). The examiners returned to duty at around 11:00 p.m. (Tr. 90). Young, Brottish, and Apperson spoke to Saunders and Stalnaker together. (Tr. 91, 97, 818).

Stalnaker conducted the bleeder run the previous day because the normal examiner, Jamie Greene, was out.¹⁹ (Tr. 298, 301, 313, 448, 494-495). Greene had examined the area on January 22 and 29 and found that everything was in order.²⁰ (Tr. 320, 321, 491-492, 667, RX-C). Greene also inspected it two or three days in a row before Stalnaker filled in for him to ensure the area was in good repair. (Tr. 495-496, 519-520). At no time did anyone tell Greene that the mine was on notice to prevent water in the bleeders and he did not know about the previous citations issued by Young. (Tr. 501-502, 509). Further, Greene did not remember any recent power outage. (Tr. 519).

On February 5, Stalnaker went to E tailgate No. 3 Entry and made it to an access door around the 47 crosscut. (Tr. 91, 299, 646-647). He took air readings and signed date board entries. (Tr. 303). At the sump he encountered high areas of water and tried the pumps, but did not retreat. (Tr. 91, 227, 299). The water was relatively clear but had debris, gridlocks, and pieces of wood floating in it. (Tr. 312). Stalnaker usually inspected working areas and would not have let miners work in that amount of water. (Tr. 310-311). However, because the area was remote and he would be the only one working, he entered the water. (Tr. 310-311).

His boots were not tall enough but he found chest waders in the area and put them on so he could continue the exam. (Tr. 300-303). The waders did not have a flotation device, as required by law. (Tr. 310, 419-420, 455). He did not know who placed the chest waders there. (Tr. 301-302). Giavonelli and Midnight Foreman Bob Price did not know the chest waders were present or how they got there.²¹ (Tr. 455, 704). According to Giavonelli and Price, Respondent did not want miners to use chest waders in case they filled with water.²² (Tr. 455, 500, 704).

As Stalnaker walked through the water, the area was fairly clear of obstruction. (Tr. 316). He took shorter steps and used his walking stick. (Tr. 316). The nearest pump at the 49 crosscut

¹⁹Jamie Greene was present at the hearing and testified. (Tr. 469). At the time of the hearing, Greene was employed as a fireboss at Enlow Fork. (Tr. 469). He was the normal examiner of the E-15 bleeder at the time of the Citation and Order and was familiar with it, including locations with water. (Tr. 225, 470, 488). Young believed Greene did an excellent job at that difficult task. (Tr. 225-226, 509-511). Saunders and Stalnaker may not have been as familiar with the area as Greene. (Tr. 488).

²⁰ According to Greene, the bleeder system made him “gray just worrying about it” and “[e]very time I go back, I don’t know what I am going to get.” (Tr. 506).

²¹ Robert Price was present at the hearing and testified. (Tr. 445). At the time of the hearing, Price was the continuous miner coordinator for Enlow Fork. (Tr. 445). On February 5, Price was a shift foreman and tasked with keeping the mine safe and efficient. (Tr. 446-447).

²² Greene claimed that he never used the chest waders during his examinations. (Tr. 499-500).

was not working and Stalnaker tried to prime it to see if the water would recede. (Tr. 92-93, 116-117, 127). Some of the pumps were working, but not nearly enough to get the water going into the sump. (Tr. 312). He also believed that the sump pump was not working. (Tr. 308-309). He looked for the date board at the No. 3 outlet and found it was in the water. (Tr. 303). Eventually, he tried to pass into another entry so as to bypass the water and reach the next evaluation point. (Tr. 314-315). He had not been told to bypass the area; he was just trained to complete the run in a timely manner. (Tr. 315). He tried to go through a 3-foot high mandoor between entries and got his methane detector wet. (Tr. 91-92, 94, 127, 227, 280-281, 299-300, 304, 322, 660, 773-774). Water had poured into his waders when he bent over. (Tr. 300, 422).

After that, Stalnaker left the bleeder the way he entered and called Price to say he could not complete the exam due to his wet detector. (Tr. 88-89, 92, 94-95, 300, 304-305, 322, 447-448, 457, 493, 660). This was the first Price learned that there was water in in the sump area. (Tr. 459-460). Much of the exam was not complete when Stalnaker stopped. (Tr. 95-96). Price believed Stalnaker would have pushed through and finished if his detector had not gotten wet. (Tr. 452). Stalnaker went to Price's shanty and gave him his papers. (Tr. 305). Price then called the surface at that time to ensure the pump was running and the air compressor was on (though he never got a report back). (Tr. 448-449, 453-454, 458-459). Stalnaker spoke with Price at 4:00-4:30 a.m. (Tr. 100, 103, 305, 321-322, 455-456).

Sometime between 4:45 and 5:30 a.m., Stalnaker updated Giavonelli who told him Saunders would finish the run. (Tr. 100, 103, 305, 308-309, 321-322, 455-456, 635-636, 711). Giavonelli was concerned about the travel hazard and called Russ Ciapetta on the surface to restart the sump pump.²³ (Tr. 128-129, 226, 234, 239, 272, 308-310, 322, 588-589, 636, 711, 804, 832-833). Jeff Hohman had already told Ciapetta to start the pump 15 minutes earlier. (Tr. 588). Giavonelli knew the ventilation was good because of the fan report. (Tr. 711-712). He believed the pump would be sufficient to clear the area so the exam could be completed by the end of the day. (Tr. 644, 666). He also told Ciapetta to call Burns Trucking to get the water out of the holding tanks if necessary.²⁴ (Tr. 636, 639-640).

²³ Russ Ciapetta was present at the hearing and testified. (Tr. 587). At the time of the hearing he worked in the maintenance department. (Tr. 588). In that capacity, Ciapetta would work out of the shop on belt lines, elevators, pumps, or anything broken down. (Tr. 588).

²⁴ Eventually Demidovich called Burns Trucking. (Tr. 549, 551-552, 761). Four drivers were initially dispatched to the pump (a usual number) and eventually two more were sent (which was unusual) (RX-S and RX-U). (Tr. 623-624). One driver, Gordon Scott, worked 11.5 hours that day and completed six loads of 4,620 gallons each. (Tr. 624-627). Drivers did not take partial loads; they waited until the tank was full. (Tr. 627-628). Water was pumped all day on the February 6; from 8:30 a.m. to 5:00 p.m. on February 7; and from 8:00 a.m. until 5:00 p.m. on February 8. (Tr. 631). A review of the records showed that the tanks were empty on February 4 at 9:00 a.m. and that no one had checked the tanks on February 2 or 3. (Tr. 628-629, 632). Vorhes, the dispatcher was not certain if the tanks had been emptied at any time between December 18, 2012 and February 1, as he did not have the necessary records at hearing to make that determination. (Tr. 630-632).

Ciapetta reached the outside pump at 5:00 a.m. and saw it was not running. (Tr. 589, 593). He bypassed the bubbler by allowing more air into the system and got the pump running around 5:05-5:10 a.m. (Tr. 226, 532, 557, 589, 593, 597, 638). He had never overridden the bubbler before. (Tr. 611). It kicked on at 80 inches of air. (Tr. 597). Once started, it continued to run. (Tr. 593-594). Ciapetta saw the tanks filling and updated Giavonelli. (Tr. 594).

After dealing with the pump, Giavonelli got a report from the discharge lines at the sump from Wendell Hawk showing that water was going into the pool, a favorable indication (RX-I).²⁵ (Tr. 647-649, 656-660, 707, 710, 764-766, 768). In fact, Hawk checked the pipe twice (at 1:00 a.m. and 6:00 a.m.) and found that between half a pipe and a quarter of a pipe was flowing at all times. (Tr. 765, 767). By the second check, Hawk had already given Stalnaker a ride out of the mine and knew there was water in the area regardless of the water coming out of the discharge pipes. (Tr. 658-659, 767).

After speaking with Giavonelli, Stalnaker went home. (Tr. 306, 310). On his way home, he called Greene and said he could not finish the run. (Tr. 498-499). Greene thought Stalnaker was joking at first, but he recognized that water accumulates quickly. (Tr. 498-499, 519).

After speaking with Stalnaker, Price called Saunders and asked if he could complete a bleeder run from the opposite direction (to avoid problems). (Tr. 88-89, 97, 427-428, 448-453, 457, 498-499, 647, 703-704, 774). Price chose Saunders because he was familiar with the area. (Tr. 457-458). The run had to be completed by the end of the day. (Tr. 459, 433). Price gave Saunders Stalnaker's notes. (Tr. 305, 449). Price did not tell Saunders not to walk in the water or give any cautionary notes, as he believed Saunders knew what Stalnaker had encountered. (Tr. 430, 443, 450). Price knew Saunders would encounter water but believed he would reach the evaluation points without traveling through the water. (Tr. 458).

Saunders entered the E-22 side of the bleeder around 2:00-3:00 a.m. and encountered water at E-21. (Tr. 429-431). He could not recall if it was clear, though water in the mine varied depending on the day and the depth. (Tr. 439, 441-443). He did not retreat when he reached this water and Young believed Saunders walked through water three feet deep. (Tr. 98, 218, 221-222, 224-225, 227). Saunders testified that at that point he was on a wooden bridge and the water reached his ankles; he could not recall if he could see the bridge. (Tr. 438). Saunders encountered more water at E-20, No. 2 (boot high); E-15, No. 1, and the E tailgate. (Tr. 430-432, 439). He stopped at the E-tailgate and could go no further through the water. (Tr. 432, 434-435). The water was waist high; Saunders would not work in water that deep and did not want to get any wetter. (Tr. 98-99, 227, 277, 431-432, 435). He made this decision himself and it was not based on anything management told him. (Tr. 435-437). He did not know if the water got deeper. (Tr. 98, 435). He could not reach two evaluation points because of the water. (Tr. 440-441). Saunders made a note about the water in the books for Greene. (Tr. 431-432).

Saunders retreated back the way he came into the bleeder without examining the areas beyond the deep water. (Tr. 99, 221, 433, 442). He got out around 10:00 a.m. (Tr. 99). Saunders

²⁵ Wendell Hawk was present at the hearing and testified. (Tr. 763). At the time of the hearing Hawk was employed as a pumper at Enlow Fork and had worked there for eight years. (Tr. 763).

reported to Giavonelli that he could not get the last two readings and showed him the notes indicating where the water was located. (Tr. 99, 103, 433-434, 655-666, 713). Giavonelli did not recall hearing where the water was located, just that Saunders could not reach the points. (Tr. 713). When he got outside, Saunders filled out the exam book. (Tr. 434).

After hearing these reports from the examiners and management, Young decided to go into the mine. (Tr. 109, 410). Young entered the mine at about 2:00 a.m. with Safety inspector Matt Roebucks, Apperson, and Stalnaker. (Tr. 114, 118-119). Young reached the E-tailgate No. 1 entry at 4:15 a.m. and encountered water stretching from the No. 47 crosscut to the No. 12 crosscut. (Tr. 109-111). The air pump at 49 crosscut was in knee-deep water and was not working because of a suction problem. (Tr. 93, 110, 117, 128, 260). Water was not pumping at the front of the sump. (Tr. 259). Young inspected other entries to see if the exam was completed and to check the water volume. (Tr. 110-111). He also checked the mandoor Stalnaker used and found the water was 2-feet deep, though the pump had been running 20 hours at that time. (Tr. 228-229, GX-14, appendix 3). Young did not hear water at the discharge lines. (Tr. 257-260). However, water in the area seemed to be running back towards the pump and several air lines were running. (Tr. 115, 258). The water levels had dropped at the No. 2 outlet but was still at such a hazardous level that Young would not travel through. (Tr. 115-116, 118).

After walking the perimeter, Young had seen enough. (Tr. 118). He did not look at the entire area. (Tr. 156, 165). Young was not going to walk through water as Brottish and Gross had already determined the water's location. (Tr. 118). They left the mine and Young issued a (d)(1) Citation and (d)(1) Order to Brottish. (Tr. 118, 128, 149, 158, 806-807). He did not see anything underground that changed his mind regarding the appropriateness of 104(d) issuances. (Tr. 211). The body of the citation was based on the highlighted map. (Tr. 167).

Young and Gross agreed that determining the root cause of a condition was important. (Tr. 198, 287-291, 412-413). Young did not know the exact cause of the water accumulation but believed it was caused by a failure to check the bleeder and equipment after a 12-hour power outage earlier in the week. (Tr. 134, 271-272, 292-293, 514-516). The outage could have caused the air pumps to lose prime and stop functioning and that would have allowed water to accumulate for days. (Tr. 271, 514, 515-516). Respondent believed that "a majority of the time," the pumps came back on with the power. (Tr. 516-517). But Young believed Respondent knew this was a problem area and should have checked after the outage. (Tr. 271). The water could also have been caused by overly filled holding tanks outside preventing the pump from turning on. (Tr. 284, 517).

There may also have been a problem with the bubbler system as evidenced by the fact that it had to be bypassed to work. (Tr. 189, 232, 241, 251, 272). That day, Demidovich and the other mechanics went to the surface pump several times starting at 9:00-10:00 a.m. (Tr. 551, 556, 761). Multiple trips were required because the pump would run for a while and then stop and the air volume would have to be increased to get it running again. (Tr. 555). Demidovich called Mon Valley Integration ("MVI"), a contractor, to look at the bubbler at 1:00 a.m. (Tr. 525-527, 541, 552-553, 555). MVI employee William Batten worked for five hours that day to

troubleshoot the bubbler.²⁶ (Tr. 526-527). When Batten arrived and conducted a visual examination, the pump had already been overridden and was running. (Tr. 530, 532-533, 546). He did not know at that time there was a problem with the bubbler, but the air readings did not correspond to the observed high water. (Tr. 531-532, 542, 544).

Batten eventually determined that the bubbler tube was damaged and that it needed to be repaired. (Tr. 534). The bubbler tube contained holes that prevented pressure from building and gave an incorrect reading. (Tr. 539, 542, 744-745). If the bubbler system gave a low reading it would send incorrect data to the monitoring system and prevent an alarm. (Tr. 745-746). The remote monitoring system relied entirely on the bubbler for data about water levels and would reflect any inaccurate data provided by the bubbler. (Tr. 582-584). The remote monitoring system would still show the power, the tank level, and pump faults. (Tr. 750-751).

It was not clear when the bubbler had begun malfunctioning. (Tr. 557). Demidovich first learned about the problem on February 5, when the water accumulation was found but it could have been broken a month earlier. (Tr. 557). The bubbler records for the end of January and start of February showed the pump had never run. (Tr. 561). It also showed that the surface tanks were empty because the pump was not running. (Tr. 562).

While he acknowledged possible problems with the bubbler, Young testified that it only dealt with the sump, not the entire area. (Tr. 232). Young did not know if the other air pump system was working or if the water came from the sump or elsewhere. (Tr. 236).

Regardless of the physical cause of the violation, Young believed what mattered was that a violation existed based on the facts (including the size, area, and location of the condition). (Tr. 234, 237, 291). In Young's opinion, the root cause of the violation was Respondent's failure to maintain the bleeder system in a manner safe for travel despite being placed on notice and receiving two previous citations. (Tr. 237-238). If Respondent removed all the water or it evaporated before exposure, he would not issue a violation regardless of the water source. (Tr. 236-237).

Young issued a 104(d) citation (GX-1) for failure to maintain the bleeder perimeter in a safe manner for exams as required by the ventilation plan at E-15 and between E-19 and E-21. (Tr. 119-120, 125, 148, 194-195, 208, 356). Brottish confirmed as accurate the depths and locations listed in the citation. (Tr. 824-825). However, MSHA does not have a specific depth of water in total or over the bridge that violates the standard, it was somewhat subjective. (Tr. 210-211, 217). An agency policy given to operators states that water over a bridge was a violation. (Tr. 218). Young only cited when, like here, he could not see his feet in the water. (Tr. 218).

The citation was marked as highly likely to result in injury because of the depth of the water, the condition of the travel ways, the pump lines, the crib blocks, the previous citations, and the conditions Gross observed. (Tr. 121). A miner could fall, hit his head and drown, break an arm or leg, or, if he had a weak heart, go into shock and die before being found. (Tr. 121-

²⁶ William Batten was present at the hearing and testified. (Tr. 524). At the time of the hearing he was an electrical technician at MVI. (Tr. 524). He was an MSHA electrician for 10 years and attended technical college. (Tr. 524-525).

122). Miners would be wearing a 10-12 pound belt and would wear an SCSR (weighing a few pounds), a methane detector, cordless cap lamp, hammers, channel locks, and various items. (Tr. 122). The lack of uniformity in the mine floor would contribute to a tripping hazard. (Tr. 724). Young may have marked the condition as less likely if Respondent began fixing it before anyone was exposed. (Tr. 232). Brottish and Gross did not trip while they walked the bleeder. (Tr. 174). Giavonelli was not aware of anyone being injured in any of the Enlow Fork Bleeders at any time and did not expect miners to trip each time the mine flooded. (Tr. 660, 725).

The citation was marked as fatal because if a miner fell, he may not be able to get his head above water and would die from drowning. (Tr. 122, 230). Young recalled an instance in which a miner fell into water after having a heart attack and the coroner's report listed the cause of death as drowning. (Tr. 230-231). The cited area had pipes and supports that a miner might strike in a fall. (Tr. 123). The bridge was only three to four feet wide (not rib to rib) and had only a steel wire to mark the edge, no handrail. (Tr. 124-125). The water under the bridge was up to 42 inches. (Tr. 123). The sump was ten or eleven feet deep and had a foot or two of sediment in the bottom. (Tr. 123). If a miner fell in the sump, the water level would be over his head. (Tr. 123).

The citation was marked as S&S because Young believed it met all the factors and believed an injury was reasonably likely. (Tr. 126). The citation was marked as affecting two people because Stalnaker and Saunders had traveled the area that day, although normally only one did. (Tr. 125).

The citation was marked as high negligence because Young believed the operator knew or should have known of the condition and there were no mitigating circumstances. (Tr. 126, 239-240, 243). Respondent knew about the violation when Stalnaker informed his shift foreman about the hazardous amount of water at 4:30 a.m. (Tr. 126-127, 131-133). No one else knew about the water until Stalnaker left the bleeder. (Tr. 130-131). However, Stalnaker and Saunders were both Respondent's agents. (Tr. 128). Young did not believe Respondent exercised the necessary degree of care because both examiners went through the water and Stalnaker used disallowed chest waders in the area. (Tr. 264). Young was also concerned because something was wrong every time inspectors entered the area; it was not maintained for safe travel. (Tr. 274, 288). In this regard, on November 20, 2012, the line was cut, on December 10, 2012, the tanks were full, and on February 5 the alarm did not work. (Tr. 288).

Brottish noted that authorized miners could stay in a hazardous area to assess or correct a violation. (Tr. 829-831). However, he also testified that those repairs must follow proper procedure and be conducted cautiously. (Tr. 831). MSHA believed the examiners should have stopped and pumped out the water before continuing on or correcting the problems. (Tr. 147-148, 186).

Young stated he would change the negligence level if Respondent could produce facts to support a finding of mitigation but none of those offered by Respondent occurred before the miners traveled through the hazardous water. (Tr. 235, 240, 243). Brottish provided what he believed was mitigation to Young on several occasions, including things done since the December citation. (Tr. 802-803, 805-806, 832, 835-836). Young told Respondent that nothing

they listed was mitigation based on the confluence of factors and the fact that Respondent was on notice. (Tr. 243, 269, 806). Young testified that something was not mitigation if it failed to prevent or limit exposure. (Tr. 146, 232-233, 238, 243, 253-255). The timeline was key to Young, measures taken after someone travels through the hazard there were not mitigation. (Tr. 148, 192, 232-233, 238, 243, 253-255, 262-264, 273-274). The suggested mitigation included the following:

Brottish explained to Young that the power had been out on February 1 and that it may have led to the water accumulation. (Tr. 803, 832-833). Young did not consider this mitigation because this was a problem area and Respondent had been put on notice. (Tr. 133-134). Also, Respondent knew of the power outage and had time after February 1 to ensure the pump system was working properly; however Respondent did not check on the pump system. (Tr. 133-136, 833). Gross also believed this was not mitigation because the power outage was not placed in the book. (Tr. 363). Brottish later learned that Greene went back to the area around the time of the power outage. (Tr. 135, 266-267, 833-834). Young did not believe Greene's earlier access of the area was mitigation because it did not prevent miners from entering the water. (Tr. 267-268).

Brottish also argued that Respondent got sump reports each shift starting no later than December 10. (Tr. 804, 810-811, 832-833). Young believed Respondent should have had someone monitoring the sump and checking the air pumps in addition to the checks on the discharge lines; further, given the scope of the issue Respondent should have checked the water level and made repairs every day or every third day if necessary. (Tr. 270-271).

Young also did not consider the existence of the surface pump to be mitigation because it was only run when the underground air system was overwhelmed. (Tr. 136). Young believed it was reasonable to start the sump pump at the cited time but did not believe that turning it on was mitigation because someone had already traveled through the water in the unsafe travel way instead of backing out and marking the hazard. (Tr. 89, 129-133, 244-249). Both Stalnaker and Saunders entered the water to complete the exam before the pump was activated. (Tr. 131-133, 249). Pumping would only be mitigation if the water came down before the first examiner went through. (Tr. 245-248). Similarly, Young did not believe that two pumping systems constituted mitigation. (Tr. 265). While he had stated in his deposition two systems might be mitigation, he also stated that there could be thirty systems and it would not matter if the systems were not properly maintained. (Tr. 266).

Respondent also claimed that the bubbler was broken. (Tr. 240). Brottish explained the bubbler gave a false indication that the water was low in the sump. (Tr. 803, 832-833). Young believed it was not mitigation if the bubbler broke before Stalnaker entered the area because Respondent did not find the problem; the fact that something was broken was not mitigation. (Tr. 254, 263).

On a related point, Respondent's witnesses claimed that there was a remote monitoring system but that the sump pump alarm did not work and did not register on the monitoring screens. (Tr. 239-240, 242, 275, 295, 811). The system said there was only 40 inches of water in the sump when the Order was issued. (Tr. 208, 255-256). While Young believed this could give someone a false sense of security, he believed that if the alarm was not working properly that

proper attention was not being paid. (Tr. 208, 252). Young further testified that the fact that the alarm did not show in the offices was not mitigation; the alarm was in place but not adequate to address the situation or prevent recurrences. (Tr. 256, 275).

Brottish also believed that there was a broken discharge line in the area and he made a note to repair it later. (Tr. 792, 802). Young did not believe this was mitigation if it occurred before February 5 because it meant the system had failed and Respondent did not maintain safe travel; it may have constituted mitigation if something was done to prevent, correct, or limit exposure before miners entered the water. (Tr. 261-263). Further, Gross noted that if there was a broken pipe causing the condition, it should have been listed in the book. (Tr. 396-397). Young believed that some of the equipment issues may have mitigated the condition if this was the first time the issue arose. (Tr. 253).

Young did not believe calling contractors to correct the situation constituted mitigation. (Tr. 260-262, 285). Young saw no evidence Respondent called MVI before MSHA was involved; Respondent needed to call before the examiners entered the water to be mitigating. (Tr. 260-261). Similarly, Young believed Respondent calling Burns Trucking to haul away the water was not mitigation because most of the water was hauled after the citations were issued. (Tr. 285).

Brottish also argued that Respondent had no way of knowing about the condition and took immediate action to correct the problem when it learned about it. (Tr. 809). Young agreed that an operator cannot correct a condition it does not know about; however Respondent had been previously put on notice about the area and it also knew about the power loss. (Tr. 233).

Brottish also found that Enlow Fork had received only seven 75.370(a) citations which was 3.68% of their total citations, while the national average was 5.28%. (Tr. 814). Previous years showed a similar trend. (Tr. 814).

Young testified that the condition was an unwarrantable failure and was aggravated conducted constituting more than ordinary negligence and that Respondent did not act or did not act properly. (Tr. 137-138). Young also believed the condition was obvious and extensive and the examiner knew it when he entered the area. (Tr. 137-138). Several witnesses confirmed that the problem had to exist for at least three of four shifts for that volume of water to build up. (Tr. 137, 268, 281-282). Credible testimony also established that similar issues had occurred in the recent past and Respondent was on notice that it needed to do more. (Tr. 137-138, 835). Young noted that mine management was aware of the condition as soon as the examiner reported it. (Tr. 138). He further testified that while Respondent started the sump pump, this only dealt with water in the corner and gave Respondent no indication of what existed in the other areas of the bleeder where the two miners traveled and could not complete the exam safely. (Tr. 138-139). Finally, Young noted the conduct was aggravated because miners walked through the water after a state inspector told them not to travel in boot deep water. (Tr. 139).

The first citation was abated on February 8, 2013. (Tr. 153). Thus, it took three days of pumping in a difficult to reach area to fix the problems and get the water out. (Tr. 153-154, 233). The day after the Citation and Order were issued, Giavonelli went back into the area, listed all of

the conditions he saw, and marked them on a map (RX-X). (Tr. 684-686). He started from the E-21 outlet and walked to E-15 from 9:00 a.m. to 1:00 p.m. (Tr. 686-688, 696). The water was still present but in many places it was clear. (Tr. 688-690, 697). He found one location where the water was 12 inches over the top of a walkway which sat 22 inches above the bottom. (Tr. 686-687, 715). There was also water near the sump 32 inches deep and above the knee that Giavonelli had to walk through. (Tr. 693, 716, 723). There were various other places with small amounts of water and a spot near a mandoor where water was at least 28 inches deep. (Tr. 687, 694). Giavonelli found a broken discharge line which he repaired. (Tr. 687). He did not see any additional issues and did not see any location where the water was at the roof. (Tr. 689-690, 693). All of the air pumps were running, and the sump pump was off because it was not necessary. (Tr. 697-698).

On February 6, Demidovich, Jobes, and Batten spent the day attempting to figure out what was wrong with the bubbler. (Tr. 534, 567). The next day, they dropped the new tubes down the shaft to the sump while Craig Yoho worked underground and communicated via radio. (Tr. 535-536, 567-569, 596, 743-745). An electronic display and a new hand dial were also added to the surface pump after the instant event. (Tr. 596-597, 603-605). On February 8, Demidovich corrected the problem that was causing the pump to repeatedly start and then shut off. (Tr. 569-570). Batten continued to make adjustments for a few more days. (Tr. 538). During the abatement period, Young did not issue any danger orders on the area. (Tr. 154).

In addition to the water accumulations, Young and Gross discovered in the investigation that the exams for the E tailgate overcast and E tailgate No. 2 entry had not been completed for air quality, error measurement, or signature.²⁷ (GX-3, tab 3, p. 45, RX-F). (Tr. 81-83, 105-106, 113, 175-176, 345-347, 358-359, 372-374, 400, 782). An Order was issued for this condition. (Tr. 683-684, GX-2). Young and Gross were not sure why the book was not filled out. (Tr. 83, 86, 89, 399-400). They later learned that the book was not filled out because the examiners could not reach the area. (Tr. 177-178). Respondent had 24 hours, or until midnight on February 6, to complete the exam and have it signed by the foreman. (Tr. 178-179, 680, 819). Presumably, the examiner could make corrections to the book if he believed he missed something in that time. (Tr. 179).

Giavonelli nevertheless signed the book despite the fact that the dark, murky water and tripping hazards were not listed as hazards. (Tr. 84-85, 87, 99, 671, 677). Giavonelli knew that the run was not complete but claimed he signed it only to signify that he read the pages and knew there was an issue. (Tr. 671-672, 681-682). Giavonelli did not know why the examiners did not list any hazards. (Tr. 725). He believed it was apparent to everyone the run was not completed because of the water. (Tr. 672). The book was important because it is supposed to inform inspectors and miners about hazards. (Tr. 103-104). It also allowed examiners to report hazardous conditions to management. (Tr. 104). Young also reviewed the fan charts and saw no ventilation hazards. (Tr. 85-86).

When Young spoke with Stalnaker and Saunders about the books, they explained that they forgot to fill them out. (Tr. 100). A few days later Stalnaker called Young to explain that he

²⁷ Henry and Brottish recalled that Young was always very thorough when reviewing exam records; sometimes he would ask for additional books. (Tr. 782-783, 822).

kept notes underground and then filled the book in later on the surface. (Tr. 100-102, 306). On the day at issue, Stalnaker only filled the final three entries in the book. (Tr. 317, 319). Stalnaker gave his notes to Saunders to finish the run. (Tr. 102, 306, 319). Young explained that the failure to fill in the readings could be a technical violation, but the water hazard should have been listed. (Tr. 102). Stalnaker also explained that he was wet and miserable and “that is just the way you fill the book out.” (Tr. 102). Young did not place much stock in this explanation. (Tr. 103). He believed two people saw a hazard but did not record it and a mine foreman signed the book and did not note the problem even though he knew about the hazard. (Tr. 103). Young believed Stalnaker was a good miner who made an honest mistake, but that it was still a violation. (Tr. 276).

At the hearing, Stalnaker explained, that he did not consider placing a note about the water in the book because he had walked forty blocks and taken two readings that were dry. (Tr. 307). He could have taken a reading at the No. 3 outlet, but the date board was in the water. (Tr. 307, 383). In retrospect, he admitted he should have put the condition in the book. (Tr. 307). He also admitted he was complacent because the area had a history of water and he was not surprised to find it there. (Tr. 311). If he thought there was an imminent danger, he would not have tried to travel through the water at all. (Tr. 316).

Saunders never admitted to Young that the condition was a hazard and he did not put it in the book. (Tr. 132-133, 434). Saunders told Young that he stopped going through the area because he did not want to get any wetter, but still did not enter any hazards into the book. (Tr. 277). Saunders was already soaked and could not finish the last few evaluation points. (Tr. 277-280). Saunders knew Stalnaker had not completed an examination of all the evaluation points either. (Tr. 278) Young believed this meant it was too dangerous to finish the run and that, under the law, Saunders should have listed the water as a hazard. (Tr. 277-280). Young agreed with Saunders’ decision to back out but believed he should have filled in the book. (Tr. 277). Saunders maintained at all times that the water at 36-inches can be hazardous, but that he felt that in the cited situation it was not particularly dangerous. (Tr. 277-278, 280, 433, 441-442). He did not trip, fall, or have any trouble getting through the water. (Tr. 439-440). Greene agreed at hearing that he had never fallen or been injured during an exam and felt comfortable in the area. (Tr. 489-490).

Young also spoke with Brottish and Apperson about the incomplete books and whether the exam was completed. (Tr. 107, 113, 224). Young also told Brottish and Apperson that they needed to get the water level down and complete the run or they would get another citation. (Tr. 107). Brottish and Apperson assigned a fireboss, Andy Yablonsky, to complete the task.²⁸ (Tr. 107-108). Young spoke to Yablonsky and told him the areas he needed to examine in the bleeder. (Tr. 108-109). Yablonsky started around 9:30-10:00 p.m. and completed it just around the time Young was entering the mine. (Tr. 109, 179-182, 671, RX-F). Yablonsky finished the run and Respondent did not receive a citation for failure to complete the exam. (Tr. 182-183, 677, 819).

²⁸ For the purposes of hearing, the fireboss will be referred to as Andy “Yablonsky.” At times in the transcript he is referred to as “Yablonski.” Further, Respondent’s pre-hearing report refers to him as “Yackuboskey.” It is unclear which name is correct, but “Yablonsky” will be used at all times in the interest of consistency.

An Order was issued for this condition (GX-2). (Tr. 683-684). This Order was marked as reasonably likely because miners other than Saunders, Stalnaker, Giavonelli, and Price who entered the area might not be aware of the water. (Tr. 139-140). The books are the only way other foremen know about conditions in the mine. (Tr. 142). Mental notes are not enough. (Tr. 140-141). When a foreman signs a book listing no hazards, he indicates that there are no problems. (Tr. 141-142).

The violation was marked as fatal for the same reasons as the first citation. (Tr. 143). A miner entering the bleeder without knowledge of the water could trip in the murky water and fall and hit his head, which could cause a drowning fatality. (Tr. 143).

The violation was marked as S&S because there was a violation of a mandatory health and safety standard, there was a discrete safety hazard because the conditions were not placed in the book as required, and it was reasonably likely that a reasonably serious injury would result. (Tr. 144). Two people were affected for the same reasons as the first citation. (Tr. 143).

This violation was higher negligence than the first condition because two examiners conducted partial exams, walked through water, and yet entered no hazards. (Tr. 144). Also, the foreman knew about the water and signed the book indicating no hazards. (Tr. 144-145). If MSHA had not caught the missing entry in the book, no one would have finished the exam or gotten the pump in the corner running. (Tr. 145). Respondent's monitoring was inadequate and a pumper should have been in the area around the clock to ensure the system worked. (Tr. 145).

The violation was also marked as aggravated conduct. (Tr. 145). There were people making an exam and there was an obvious and extensive condition. (Tr. 145). Two miners traveled in the hazard. (Tr. 146, 191-192). Further, there was a pattern of people walking through water to complete exams and then claiming that a pumping problem was mitigation. (Tr. 191-192, 207). The water had to be there more than a shift to grow so large. (Tr. 145). No one did anything beyond start the surface pump for two shifts. (Tr. 145). This pump would only have cleaned the corner. (Tr. 146). This was the third time the pumps had failed since November 20 and Respondent was on notice regarding the need for increased efforts. (Tr. 146). Young did not know how many other citations were issued in the last five years under the instant standard. (Tr. 283-284). He doubted there were many as Enlow Fork's books were usually good. (Tr. 284).

C. Citation No. 7024068

1. Contentions of the Parties

With respect to Citation No. 7024068, the Secretary asserts that Respondent violated 30 CFR § 75.370(a)(1), that this violation was "Highly Likely" to result in "Fatal" injuries to two miners, that the violation was S&S, and that it resulted from "High Negligence" and an unwarrantable failure to comply. (GX-1)(*Secretary's Post-Hearing Brief* at 14-26). The Secretary believes that the proposed penalty of \$14,373.00 is appropriate. (*Id.* at 31-33).

Respondent argues that no injury was reasonably likely to occur as a result of the violation and that, as a result, it was not S&S. (*Respondent's Post-Hearing Brief* at 25-26 and

34-35). It argues in the alternative that any injury that would occur would result only in “Lost Workdays/Restricted Duty” rather than death. (*Id.* at 30-33). It also argues that its actions did not display “High Negligence” or an unwarrantable failure to comply. (*Id.* at 21-25 and 36-46).

2. The Secretary Has Carried His Burden Of Proof By A Preponderance Of The Evidence That Respondent Violated 30 CFR § 75.370(a)(1)

On February 5, 2013, Young issued Citation No. 7024068 under 104(d)(1) of the Act for a violation of 30 CFR § 75.370(a)(1). Section 8 of that Order, Condition or Practice, reads as follows:

The operator failed to comply with their approved mine ventilation plan, in that, the bleeders were not maintained for safe travel in the E tailgate to E-21 panel bleeder district. Obvious and extensive accumulations of water were permitted to accumulate from 12 to 42 inches in depth, rib to rib, for a total distance of 2350 feet at the listed locations.

1. In the number 3 entry of E tailgate from 46 crosscut to 50 crosscut and in the inby bleeder entry from 50 crosscut, north for just over 2 blocks inby (a distance of 500 feet). Water measured from 12 to 42 inches in depth.

2. In the inby bleeder entry (travelable entry), from 20 feet outby E-19 number 3 entry to 200 feet inby E-21 number 3 entry (a distance of 1800 feet), water measured 12 to 36 inches in depth.

The mine floor in these [areas] can be irregular, contain rib sloughage and other various other tripping hazards, which can be hidden by the depth of the water. Page 4, Line AA, of the approved mine ventilation plan (5958-B13, MAY 29, 2012), states that, "the means for maintaining the bleeders safe for travel will include compressed air lines routed underground, used in conjunction with air pumps to remove water as necessary to permit safe travel through he [sic] perimeter of the bleeder system."

This constitutes more than ordinary negligence on the part of the mine management, in that, it would have taken at least several days for the water to flood to this level. Part of this same area was cited twice last quarter and the mine operator was placed on "notice" that increased attention to the pumping water was necessary in these areas. This high negligence demonstrates a lack of due diligence by the miner operator to provide a safe work environment by not maintaining the water in the bleeders to a safe level. This unique aggravated circumstances [sic] puts the miners at a high risk to be injured. This a [sic] lack of reasonable care on the part of the mine operator to provide a safe work environment for their employees demonstrates indifference in complying with the regulations.

This is being issued in conjunction with 104(d)(1) Order Number 7024069.

Standard 75.370(a)(1) was cited 16 times in two years at mine 3607416 (16 to the operator, 0 to a contractor). This violation is an unwarrantable failure to comply with a mandatory standard.

(GX-1)

On February 8, 2013, the citation was abated, after the water was pumped down sufficiently to provide for safe travel. (GX-1).

On February 11, 2013, Young issued an amendment to the citation, following further investigation and plotting the area on a strip map. This amendment provided:

The starting location of the accumulation of water in the E tailgate number 3 entry should have been at 47 crosscut, not 46 crosscut. This correction reduces the distance of water accumulations in the E-tailgate area from 500 feet in length to 400 feet in length. The total distance of water accumulations is reduced from 2350 feet in length to 2250 feet in length.

(GX-1).

The cited standard, 30 CFR § 75.370(a)(1) (“Mine ventilation plan; submission and approval”), provides the following:

The operator shall develop and follow a ventilation plan approved by the district manager. The plan shall be designed to control methane and respirable dust and shall be suitable to the conditions and mining system at the mine. The ventilation plan shall consist of two parts, the plan content as prescribed in § 75.371 and the ventilation map with information as prescribed in § 75.372. Only that portion of the map which contains information required under § 75.371 will be subject to approval by the district manager.

30 CFR § 75.370(a)(1).

In the instant matter, it is uncontested that Respondent had an approved ventilation plan that required, *inter alia*, walkways in the bleeder be maintained in a manner safe for travel. (GX-1)(Tr. 56). It is likewise uncontested that the E-Tailgate through E-21 bleeder district contained large accumulations of water. Water at the 46 crosscut stretched 600-700 feet and ranged in depth from 12-42 inches. (Tr. 79-80, 125-126, 156-157, 167, 169, 347-348, 351-353, 377, 382, 385-389, 788, 799). Water from E-19 to E-21 stretched 1,800 feet and ranged in depth from 12-36 inches. (Tr. 79-80, 125-126, 167-169, 173, 354, 356, 366, 379-380, 391-394, 420, 791-792, 801). Witnesses credibly testified that this water was murky, cold, contained debris and tripping hazards, and constituted a hazard to miners traveling in the area. (Tr. 121, 172, 312, 354-356, 392-395, 348, 411-412). Further, Respondent conceded that in the instant matter, “there was a violation of the ventilation plan.” (*Respondent’s Post-Hearing Brief* at 21). In light of these facts, I find that the violation occurred.

3. The Violation Was Highly Likely to Result in Fatal Injury to Two Miners And Was Significant And Substantial In Nature.

Inspector Young marked the gravity of the cited danger in Citation No. 7024068 as being “Highly Likely” to result in “Fatal” injuries to two persons. (GX-1). Young also determined that the violation was S&S. (GX-1). These determinations were supported by a preponderance of the evidence at the hearing.

As noted *supra*, the first element in determining whether a violation is S&S is whether there was an underlying violation of a mandatory safety standard. *Mathies* at 3-4. As demonstrated above, Respondent violated 30 C.F.R. §75.370(a)(1) in the instant matter. Therefore, the first *Mathies* element is met.

In its brief, Respondent argues that a 30 C.F.R § 75.370(a)(1) violation based “solely” on a tripping hazard cannot be S&S because that standard is not directed at tripping hazards, but rather at ventilation issues. (*Respondent’s Post-Hearing Brief* at 33, citing *Oak Grove Resources*, 34 FMSHRC 594, 610 (Mar. 2012)(ALJ Moran)). Respondent argues that a citation can only be S&S if a specific hazard implicated by the cited standard is raised by the violation. Respondent further notes “[t]his goes to the first element in *Mathies*...” (*Id.* at 33).

It is unclear exactly how this particular argument, “goes to the first element in *Mathies*...” As shown *supra*, the first element of *Mathies* is whether there was an underlying violation of a mandatory safety standard. Here, the facts support, and Respondent conceded, that Respondent violated 30 C.F.R. §75.370(a)(1). Whether the standard was primarily intended to prevent any given hazard has no bearing on the question.

Regardless of whether this argument concerns the first element of *Mathies*, it is unpersuasive on its merits. Nothing in the Mine Act, Title 30 of the Code of Federal Regulations, or Commission and judicial case law limits S&S designations in the manner urged by Respondent. The only issues in determining whether a violation of a mandatory safety standard is S&S are whether it contributes to a discrete safety hazard and that hazard is reasonably likely to contribute to a reasonably serious injury. *Mathies, supra*. There is no additional requirement that the “true” or “real” purpose of the standard be analyzed. If an operator’s conduct violates the cited standard, then by necessity that conduct implicates the hazards considered in that standard. In the instant matter that means that if Respondent violated 30 C.F.R. §75.370(a)(1), and it is uncontested that it did, then the violation must at least concern the hazards that 30 C.F.R. §75.370(a)(1) was promulgated to address.²⁹ In this regard, Commission ALJs have, in the past, accepted citations as S&S for trip and fall hazards, even when the standard cited dealt with ventilation issues. *See e.g. Consolidation Coal Co.*, 15 FMSHRC 1408 (July 1993)(ALJ Weisberger).

²⁹ That is not to imply that any violation contributes to a discrete safety hazard (the question asked in the second prong of *Mathies*). For example, many violations are merely technical and do not raise hazards. Nonetheless, even a technical violation with no contribution to an actual hazard in a given instance still concerns the hazard addressed by the violated standard.

Even if it were necessary to determine the purpose of the cited standard, Respondent's interpretation of 30 C.F.R. §75.370(a)(1) is far too narrow. The purpose of the standard is clear from the first sentence: to require operators to make and follow an approved ventilation plan. While that plan is primarily designed to ensure proper ventilation, it is clearly not limited to that purpose. In fact, it is undisputed that Respondent's ventilation plan required maintenance of walkways to ensure safe travel. By admittedly failing to maintain those walkways, Respondent violated the plan and implicated this standard. Respondent's argument erroneously focused on certain goals in the plan, rather than the overall purpose of the standard. As a result, its argument is unpersuasive and I reject it.

Respondent's argument relies entirely on Judge Moran's statement in *Oak Grove Resources* that, "the Court finds despite the record evidence establishing a significant slipping and tripping hazard, such conditions cannot form the basis for a 'S&S' ... because that is not the focus of that standard." (*Id.* at 34 citing *Oak Grove Resources* at 610). I respectfully decline to follow the reasoning in *Oak Grove Resources* to the extent it mirrors Respondent argument, for the reasons discussed above. I find that the tripping hazard present in this case can form the basis of an S&S designation.

The second element of *Mathies*, a discrete safety hazard – that is a measure of danger to safety – contributed to by the violation – was also met. Credible testimony established that the bleeder entry contained deep water with various tripping hazards, including uneven floor, and debris. (Tr. 724). Two miners walked through the water and got extremely wet in the process and one of them had his methane detector fail as a result of the water. (Tr. 91-94, 98-99, 127, 221-227, 277, 280-281, 299-300, 304, 322, 422, 431-435, 660, 773-774). The water was cold and so murky that a miner could not see his feet or tripping hazards as he walked through the water. (Tr. 121, 172, 312, 354-356, 392-395, 348, 411-412). Tripping miners could suffer broken bones or head injuries. (Tr. 121-122, 143, 230). Given the depth and temperature of the water, the various structures and equipment in the area, and the heavy equipment the miners carried, the miners also faced hazards of shock or drowning. (Tr. 121-123). In short, the cited condition contributed to several discrete safety hazards and, therefore, the second element of *Mathies* is met.

The third element of the *Mathies* test – a reasonable likelihood that the hazard contributed to will result in an injury – was also met. Specifically, a miner slipping or falling in the bleeder could be injured in the fall. (Tr. 121-122). Injuries could occur to the limbs or the head. (Tr. 121-122). Further, the deep water in the area would contribute to a drowning hazard. (Tr. 121-122). In fact, the record fully supports the Secretary's determination that an injury would be "Highly Likely" to result from a slip and fall in the bleeder entry. Also, Young credibly testified that the water contained bacteria that could cause cellulitis – a blood infection – should a miner be cut by debris or machinery. The depth of the water, the size and length of the accumulations, the fact that two miners actually entered the water, and the fact that management ordered miners to attempt to complete the entire exam despite the existence of water, all support a finding of "Highly Likely."

In its brief, Respondent presents several arguments for why an injury was unlikely to result from a trip and fall accident in the bleeder. (*Respondent's Post-Hearing Brief* at 25-26 and 35). However, none of these arguments was persuasive.

First, Respondent argues that the area was controlled access and only the weekly examiner traveled in the area. (Respondent's Post-Hearing Brief at 25). This point was uncontested. (Tr. 69-70). Inspector Young credibly testified that this citation was marked as affecting two miners because two inspectors, Stalnaker and Saunders, actually entered the area in an attempt to complete the required exam. (Tr. 146, 191-192). However, the fact that only two miners entered the area in no way minimizes the hazards those miners faced. Any examiner in the area (Stalnaker, Saunders, Greene, or any other member of management) faced tripping hazards and deep water in the bleeders. The fact that access was limited only to those examiners does not change the hazard.

Respondent next argues that "Inspector Young decided to give the Operator three days to abate the water condition with no additional requirements other than Section 104(c)." (Respondent's Post-Hearing Brief at 25). It is unclear how Respondent believes this limited the likelihood of injury to miners traveling in the water on February 5. This argument fails.

Additionally, Respondent argues that 11 people traveled in the bleeders, including Gross, and none tripped. (Respondent's Post-Hearing Brief at 25 and 35). Further, Respondent noted that no previous injuries were observed in the bleeder entry, despite frequent water inundations. (*Id.*). As the Commission noted in *U.S. Steel Mining Company, Inc.*, "[t]he fact that injury had been avoided in the past or in connection with a particular violation may be 'fortunate, but not determinative,'" to the question of whether a citation was S&S. *U.S. Steel Mining Company, Inc.*, 18 FMSHRC 862, 867 (Jun. 1996) quoting *Ozark-Mahoning Co.*, 8 FMSHRC 190, 192 (February 1986). It is fortunate that none of the miners or inspectors in this matter were injured by the tripping hazards in the bleeder system, but that does not change the fact that such an injury was highly likely. That likelihood was supported by both inspectors' credible testimony.

Next, Respondent argues that the two examiners exposed to deeper water retreated rather than complete their exams. (Respondent's Post-Hearing Brief at 26). While it is true that two miners, Stalnaker and Saunders, eventually retreated from the mine, as noted repeatedly at hearing, this retreat only occurred after the miners had already been exposed to the cited danger and because they chose not to go further, likely because of the danger involved. (Tr. 88-89, 92-95, 98, 218, 221-227, 300, 304-305, 322, 432-435, 447-448, 457, 493, 660). The inspectors credibly testified that the water Stalnaker and Saunders traveled in was hazardous. (Tr. 98, 218, 221-227, 314-316, 438). The miners might not have been exposed to all of the hazards in the area, but they were undoubtedly exposed to some of them. It was possible that Stalnaker would have finished the run, had his gas detector not been damaged by the water. (Tr. 452). In sum, the fact that Stalnaker and Saunders eventually retreated in no way limited the likelihood of injury.

Further, Respondent argues that after 5:00 a.m., Respondent began to pump down the water and therefore reduced the likelihood of injury. (Respondent's Post-Hearing Brief at 26). Respondent also noted that when remedial efforts were already underway when the inspector arrived, an injury was unlikely. (*Id.* at 35 citing *Knox Creek Coal*, 36 FMSHRC 1128, 1139 (May 28, 2014)). Respondent was correct that remedial efforts began (albeit with limited success) before the inspector arrived in the area. (Tr. 84, 128-129, 226, 234, 239, 272, 308-310, 322, 586-589, 593, 636, 711, 832-833). However, the remedial efforts did not occur until after Stalnaker had already been exposed to the dangerous conditions.

This situation is inapposite to that in *Knox Creek Coal*, cited by Respondent. In that case, the trailing cables on a continuous miner were nicked and the insulated inner conductors were exposed. *Knox Creek Coal*, 36 FMSHRC at 1137. However, in that case the machine was shut down and the cables were undergoing repair. *Id.* at 1139. The Commission found that the only likelihood of injury would be if miners were “willfully grossly neglectful in completing repairs.” *Id.* In the instant matter, the cited area, unlike *Knox Creek Coal*, was not “shut down.” Instead, Respondent ordered another miner, Saunders, into the area to be exposed to the hazards long before the pumps could have possibly eliminated all of the water. Further, Saunders was not sent into the area to cautiously repair the water condition, he was sent to complete the ventilation examination. (Tr. 88-89, 97, 427-428, 448-453, 457, 498-499, 647, 703-704, 774). As such, Respondent’s remedial actions here in no way limited the likelihood of injury.

Next, Respondent argues that there was an alternative route and bridging by which the bleeder examination could be conducted without entering the hazardous area. (*Respondent’s Post-Hearing Brief* at 26). Leaving aside the fact that Inspector Young testified that such an examination would not walk the entire entry and therefore would not be legally complete, the facts do not support this assertion. Specifically, Stalnaker was attempting to enter the alternate route to complete the examination when his mutli-gas detector got wet, forcing his retreat. (Tr. 300, 314-315, 422). Stalnaker testified that the water was halfway up through the man door, a door that was three feet from the bottom. (Tr. 349, 788-789). Even if the alternate entries were dry, miners had already traveled through deep, hazardous water to reach those alternate entries. With respect to the bridged walkways, Gross credibly testified that the water was a foot above the walkway and so murky his feet could not be seen. (Tr. 172, 354-356, 392, 394-395, 792, 801-802). The same hazards existed on the walkway as on the bottom. Therefore, the likelihood of the hazard was in no way limited.

Additionally, Respondent argues that the entry was five feet wide, kept clear by the regular examiner, and had supports every six feet for miners to use for handholds. (*Respondent’s Post-Hearing Brief* at 26). The record supports a finding that the water was rib to rib in the area. (Tr. 172, 348, 411-412). Therefore, the width of the entry did not limit the likelihood of injury as there were no dry spots to walk through. While examiners were tasked with clearing debris from the entry, the uneven bottom itself could have been a tripping hazard. (Tr. 395, 792, 801). This hazard was exacerbated because the water was murky, meaning miners could not tell if the ground was uneven or if some tripping hazard had arisen since the last weekly examination. (Tr. 172, 354-356, 392-395, 411, 775,). Further, the supports did not change the fact that examiners walked through the area and were reasonably likely to trip in the murky water. Indeed, the supports (which were not primarily designed as handholds) provided yet another item against which a miner might strike his limbs or head when falling. The likelihood of injury, therefore, was not limited.

Finally, Respondent argued that the examiners were experienced and used care to avoid injury. (*Respondent’s Post-Hearing Brief* at 26). The Commission has held that the exercise of caution is not an element in determining whether a violation is S&S, noting, “[w]hile miners should, of course, work cautiously, that admonition does not lessen the responsibility of operators, under the Mine Act, to prevent unsafe work conditions.” *Eagle Nest, Inc.*, 14 FMSHRC 1119, 1123 (July 1992). The Commission has also consistently emphasized that, in

evaluating the risk of injury, the vagaries of human conduct cannot be ignored. *See, e.g., Great Western Electric*, 5 FMSHRC 840, 842 (May 1983); *Lone Star Industries, Inc.*, 3 FMSHRC 2526, 2531 (November 1981); *Thompson Bros. Coal Co.*, 6 FMSHRC 2094, 2097 (Sept. 1984). As a result, whether or not the miners were experienced or used care to avoid injury is immaterial and does not, in any way, limit the hazard that existed.

The fourth and final element of *Mathies*, a “reasonable likelihood that the injury in question will be of a reasonably serious nature,” was also met. Young credibly testified that a miner slipping and falling in the bleeder could suffer broken bones. (Tr. 121-122). The Commission has consistently recognized that broken bones and other injuries likely to result from a slip-and-fall are sufficiently serious in nature to support an S&S designation. *See e.g. Maple Creek Mining, Inc.*, 27 FMSHRC 555, 562-63 (Aug. 2005) (affirming a judge's conclusion that serious injuries such as leg or back injuries would arise from the failure to maintain an escapeway in a safe condition); *Buffalo Crushed Stone Inc.*, 19 FMSHRC 231, 238 n.9 (Feb. 1997) (concluding that slipping on a walkway would result in reasonably serious injuries such as a finger or a wrist fracture); and *Southern Ohio Coal Co.*, 13 FMSHRC 912, 918 (June 1991) (affirming a judge's conclusion that a trip and fall would result in reasonably serious injuries such as “sprains, strains, or fractures”). Therefore, the broken bone hazard in the instant matter is sufficiently serious to meet the fourth element of *Mathies* and the violation is S&S.

However, the record establishes that even more serious injuries were reasonably likely to occur from the cited condition. Inspector Young credibly testified if a miner fell and struck his head or was weighed down by equipment and fell into the water he would very likely drown. (Tr. 122, 230). The cited area had plenty of pipes, supports, and other debris that could be struck in a fall. (Tr. 123). The cold water increased the chances that the miner would go into shock. (Tr. 121-122). Young recalled a specific instance in which a miner had a heart attack after falling into water and drowned. (Tr. 230-231). The risk of drowning was increased in this instance because Stalnaker used illegal waders while traveling in the area. Waders were not permitted because they fill with water and drag miners under the surface of the water. (Tr. 455, 500, 704). In fact, in this case water entered Stalnaker's waders and broke his multi-gas detector. (Tr. 300, 422). Several other Commission ALJs have found that death is reasonably likely under certain slip-and-fall circumstances. *See e.g. Independence Coal Company, Inc.*, 32 FMSHRC 654, 664 (Jun. 2010)(ALJ Miller)(Judge found tripping hazards in an escapeway to be reasonably likely to result in fatal injury) and *Palmer Coking Coal Company*, 22 FMSHRC 887 (Jul. 200)(ALJ Manning)(Judge found tripping hazards over freezing water to be reasonably likely to result in fatal injury). It is reasonably likely that a miner, particularly a miner in waders, falling in the area could suffer a fatal injury in the deep water.

In addition to the drowning risk, Inspector Young credibly testified that the murky water was full of chemicals and bacteria. (Tr. 69). He noted that there was a risk of cellulitis and MRSA as a result of these substances. (Tr. 68). Respondent's own witnesses explained that the water was full of dangerous materials. (Tr. 312). In fact, the water that the miners walked through had to be trucked away from the mine because of the environmental dangers it posed and processed before being released into the environment. (Tr. 284-285, 761). The water therefore posed additional dangers to the health of miners.

In its brief, Respondent argues that the cited condition would not result in fatal injury. However, none of Respondent's arguments were persuasive.

First, Respondent argues that eleven different people entered the bleeder during the investigation of the cited condition and no one was injured. (*Respondent's Post-Hearing Brief* at 31). Similarly, Greene could not recall ever falling in the bleeder and Giavonelli could not recall anyone else falling or being injured. (*Id.*). It is fortunate that no one was injured in this instant matter. However, as discussed with respect to the third *Mathies* element, Respondent's fortune does not change the likelihood of an injury. Miners were likely to suffer a fatal injury from one of the various hazards in the bleeder system and Respondent was lucky that a death did not occur. However, such luck could, eventually, run out. *See e.g. Lone Star Industries, Inc.*, 3 FMSHRC 2526, 2532 (Nov. 1981)(Operator had "20-year history of apparently fatality-free" history of unsafe train operation that eventually ended with the death of a miner).

Next, Respondent argues that fatal injury could only occur if an unlikely series of events were to occur. (*Respondent's Post-Hearing Brief* at 31). Specifically, Respondent asserts,

First, the person would have to encounter a tripping hazard. Second, they would have to fail to bypass the hazard. Third, they would have to fail to catch themselves on a handhold. Also, it is common sense that tripping in water when a person is already in the water is less severe because of the buoyancy of the water. Fourth, they have hit their head. Finally, the potential injury would have to render the miner unconscious.

(*Id.* at 31-32). Respondent's argument attempts to show that a serious trip and fall is unlikely by unnaturally splitting the action into discrete units. Adding additional steps in the sequence (for example describing the way in which the toe must come in contact with a tripping hazard and then the way in which the foot must wrench around the tripping hazard) does not make the ultimate injury less likely. Respondent's argument does not take into account that tripping and falling into water would happen in only a few seconds and the miner would not have time to take the discrete steps suggested by Respondent. I conclude that fatal injury is reasonably likely for the reasons discussed *supra*; imaginative explanations of the act of tripping do not change those determinations.

Finally, Respondent argued that the facts in the instance matter were substantially similar to those in *Oak Grove Resources, LLC*, *supra* where the ALJ found the likely injuries were lost workdays/restricted duty. (*Respondent's Post-Hearing Brief* at 32). It argues that the fact that Young's previous citations were also lost workday/restricted duty further support this designation. (*Id.*). Once again, I respectfully decline to follow the reasoning in *Oak Grove Resources* to the extent it mirrors Respondent's argument, for the reasons discussed above. In the instant matter, I fully credit Young's testimony and find that a fatal injury was reasonably likely.

In short, I find that a preponderance of the evidence supports the Secretary's finding that the condition listed in Citation No. 7024068 was Highly Likely to result in Fatal injuries to two miners and that it was S&S.

4. Respondent's Conduct Constituted "High" Negligence and an Unwarrantable Failure to Comply.

With respect to Citation No. 7204068, I find that Respondent knew or should have known about the condition and that there were no mitigating circumstances as argued by Respondent. As a result, a finding of "High Negligence" is warranted.

With respect to knowledge, well-settled Commission precedent recognizes that the negligence of an operator's agent is imputed to the operator for penalty assessments and unwarrantable failure determinations. See *Whayne Supply Co.*, 19 FMSHRC 447, 451 (Mar. 1997); *Rochester & Pittsburg Coal Co.*, 13 FMSHRC 189, 194-197 (Feb. 1991); and *Southern Ohio Coal Co.*, 4 FMSHRC 1459, 1463-1464 (Aug. 1982). An agent is defined as someone with responsibilities normally delegated to management personnel, has responsibilities that are crucial to the mine's operations, and exercises managerial responsibilities at the time of the negligent conduct. *Martin Marietta Aggregates*, 22 FMSHRC 633, 637-638 (May 2000). Further, "in carrying out... required examination duties for an operator, an examiner... may appropriately be viewed as being 'charged with responsibility for the operation of . . . part of a mine,' and, therefore, the examiner constitutes the operator's agent for that purpose." *Rochester and Pittsburg Coal Co.*, 13 FMSHRC at 194 quoting 30 U.S.C. §802(e).

In the instant matter, Stalnaker was a miner examiner, member of management, and an agent of Respondent. (Tr. 128, 297-298). Stalnaker entered the area and discovered the hazardous water. (Tr. 91, 227, 299). At that moment, Respondent had knowledge of the condition. Rather than immediately retreating and reporting the condition, Stalnaker tried to wade through the water and only retreated when he damaged his equipment. (Tr. 91, 277, 299, 316). Once he left the area after donning unauthorized waders, Stalnaker informed two other members of management, Price and Giavonelli, about the water. (Tr. 88-89, 92-95, 100, 103, 300, 304-309, 321-322, 447-448, 455-457, 493, 635-636, 660, 711). Giavonelli then ordered the pumps on. (Tr. 128-129, 226, 234, 239, 272, 308-310, 322, 588-589, 636, 711, 804, 832-833). Without giving those pumps time to actually clear the area, Price contacted Saunders, another member of management, and ordered him to walk through the area from a different direction. (Tr. 88-89, 97, 427-428, 448-453, 457, 498-499, 647, 703-704, 774). Saunders, knowing of the hazard, attempted to wade through the water as well. (Tr. 98, 218, 221-227, 438, 480). In short, no fewer than five members of underground management were aware of the condition (and caused exposure to the condition) before the citation was issued. Beyond this specific knowledge, Respondent should have known that the area often filled with water and should have taken action to prevent the hazards created by the high water. Therefore, Respondent was negligent. The question that remains is the degree of that negligence.

In its brief, Respondent argues that its negligence was substantially mitigated in this matter. However, none of those arguments are persuasive.

First, Respondent argues that when it first learned about the condition after Stalnaker reported the condition, the pump was turned on. (*Respondent's Post-Hearing Brief* at 22). Respondent's argument leaves out one crucial detail about Stalnaker's actions: Exposure. After Stalnaker discovered the condition and before he reported it, he walked through the water and

exposed himself to the hazards. The danger had already been realized and, in fact, exacerbated. Perhaps if Stalnaker had noticed the water and immediately ceased his examination until the hazard was removed, the negligence would be lower. But, that is not what happened here.

The fact that Respondent started the pump after Stalnaker made his report did not mitigate the negligence. Then, before the pump had time to remove even a fraction of the water in the area, Price dispatched Saunders into the same area from a different direction. (Tr. 88-89, 97, 427-428, 448-453, 457, 498-499, 647, 703-704, 774). Price knew that Saunders would get wet and even apologized for it. (Tr. 450). While turning the pump on was appropriate, it does not mitigate subsequent willful exposure to the hazard.

In its brief, Respondent addresses this issue. It asserts that Young's testimony that something was not mitigation if it happened after exposure is not correct. (Respondent's Post-Hearing Brief at 24). It notes that the case law indicates instead that the issue is whether the mitigation occurred before the issuance of the citation. (*Id. citing Enlow Fork Mining Co.*, 19 FMSHRC 5, 17 (Jan. 1997)). Respondent claims that Young's definition of mitigation would mean that there was never would be mitigation because mitigating circumstances never exist before a violative condition is discovered. (*Id.*).

Respondent fails to appreciate the issue is not that the examiners were exposed to a hazard, but instead the willfulness of Respondent's action. As Respondent correctly pointed out, miners are often exposed to unknown hazards and actions taken after discovery of that hazard constitute mitigation. In this case, there was no hidden or unknown danger. Respondent discovered the hazard and then members of management were willfully and negligently exposed. Rather than being unaware of a condition, Respondent ignored a known danger about which Young had previously warned management in December 2012 when he explained that more effort was needed to keep the level down in the bleeder. Only after the water level became dangerously high did Respondent begin to correct the condition. Consider a situation in which a miner knowingly walks under an unsupported roof during an examination and then, after completing the exam, begins the process of supporting the roof. In that situation, the fact that the roof was later supported, before any citation was issued, does not mean that walking under unsupported roof was in any way mitigated. The risk had already been run. That is analogous to the situation here. Therefore, actions taken after exposure cannot be mitigation.

The second possible mitigating circumstance Respondent raises is that the accumulation of water occurred, in part, because the bubbler was broken and the water would have remained low if it was working. (*Respondent's Post-Hearing Brief* at 23). Respondent asserts that the pump and the monitoring system had been installed to correct the problem and that the failure of that system to activate was mitigation. (*Id.*). Respondent lists additional mechanical problems including the fact that the monitor screen showed 40 inches of water, broken discharge lines, and the power outage. (*Id.* at 14-16). The brief notes that Young had considered mechanical failure mitigation in the past. (*Id.* at 23). Respondent contends management did not have any reason to doubt the system in place. (*Id.*).

Regardless of the efficacy of the monitoring and bubbler system, Respondent's system cannot serve as a mitigating circumstance because Stalnaker and Saunders traveled through the

water. Saunders was ordered into the water by other members of management. Efforts made to limit the water in the area were appropriate, but the purpose of these systems is to avoid exposure to hazards. If miners are exposed to hazards anyway, those efforts cannot be effective. Whatever mitigation occurred as a result of the installation of the system was completely negated by the willfully negligent actions of Stalnaker, Price, and Saunders.

Beyond that, the evidence clearly shows that Respondent's system was wholly inadequate to the challenge of keeping water out of the bleeder. Respondent's witnesses testified that the mine could not keep up with the water even if only one of the two dozen air pumps in the area went down. (Tr. 478-480, 510). If the system was disrupted, the sump would fill in two or three hours and then overflow. (Tr. 477-478). The monitoring system, which may or may not have been totally installed at the time at issue, only monitored the bubbler. (Tr. 582-584, 745-746). When the bubbler broke, the monitoring system no longer produced accurate data. (Tr. 582-584, 745-745). The system essentially only worked in laboratory conditions and was completely ineffective in the dynamic environment of a working mine. Actions are not mitigation when they are inadequate to the task of preventing, correcting, or limiting exposure. *See e.g. Cemex de Puerto Rico*, 36 FMSHRC 1386, 1427 (May 2014)(ALJ Andrews) and *Maple Creek Mining, Inc.*, 26 FMSHRC 539, 555 (Aug. 2005)(ALJ Bulluck). As a result, the various systems and equipment failures did not constitute mitigation.

Next, Respondent argues that it conducted additional monitoring in the area, including monitoring the discharge pipe, daily surface pump examinations (with records), and Greene's additional examinations. This argument is rejected for the same reasons as the previous argument. Stalnaker and Saunders willfully traveled through the hazards, so any efforts to limit exposure to hazards were in vain. Further, the actions taken clearly did not give Respondent any indication that water was collecting in the area at dangerous levels and therefore were grossly inadequate. As a result, the additional examinations did not constitute mitigation.

Additionally, Respondent argues that it did not know about the cited condition until February 5, which was the last day of the weekly examination period. (*Respondent's Post-Hearing Brief* at 15). Substantial evidence supports this assertion. However, given the willfully negligent conduct of management and the fact that Respondent should have known that the bleeder was prone to flooding, the lateness of the discovery cannot constitute mitigation.

Respondent also argued that it had two different contractors, MVI and Burns Trucking, come to the mine after the discovery of the condition to pump water and correct problems with the pumping System. (*Respondent's Post-Hearing Brief* at 15-16). Once again, these actions came after management willfully exposed miners to a known hazard and therefore are not mitigation.

As none of the actions presented by Respondent constituted mitigating circumstances, the "High Negligence" designation is appropriate.

The Commission has recognized the close relationship between a finding of unwarrantable failure and a finding of high negligence. *San Juan Coal Co.*, 29 FMSHRC 125, 139 (Mar. 2007) *see also Consolidation Coal Company*, 22 FMSHRC 340, 353 (2000) (holding

that if there is mitigation, an unwarrantable failure finding is inappropriate). Having found that the instant violation resulted from “High negligence,” it is appropriate to consider whether the six *IO Coal* factors establish aggravated conduct. 31 FMSHRC at 1346. I will consider each of those factors in turn:

a. Extent Of The Violative Condition

The water accumulations in the instant bleeder system were very extensive. Water at the 47 crosscut stretched 400 feet and ranged in depth from 12-42 inches. (Tr. 79-80, 125-126, 156-157, 167, 169, 347-348, 351-353, 377, 382, 385-389, 788, 799). Water from E-19 to E-21 stretched 1,800 feet and ranged in depth from 12-36 inches. (Tr. 79-80, 125-126, 167-169, 173, 354, 356, 366, 379-380, 391-394, 420, 791-792, 801). The water was rib to rib in these areas. (Tr. 172, 348, 411-412). In its brief, Respondent concedes that the accumulations were extensive in length. (*Respondent’s Post-Hearing Brief* at 39).

Despite this concession, Respondent contends that, for the purposes of the unwarrantable failure analysis, the condition was not extensive. Specifically, it notes that some of the water was not particularly deep. (*Respondent’s Post-Hearing Brief* at 39). The brief draws attention to the fact that the water was only 6 inches deeper than on December 10 and Respondent’s actions then were not aggravated conduct. (*Id.*). The record establishes that the water in some locations was only a few inches deep. (Tr. 395-396). However, this in no way changes the fact that the water stretched for nearly half a mile and some of the locations were three and a half feet deep.

b. The Length of Time of the Violation Existed

It is unclear from the record exactly how long the condition existed. Young testified that the water would had to have existed for several shifts to reach the cited extensiveness. (Tr. 271, 514-516). At the very least, Young believed that the condition that led to the accumulation (the power outage, the broken discharge line, broken pumps, or any other factor) had to have happened a considerable time before the cited condition was found. Common sense would support this determination: there were thousands of gallons of water in the bleeder and it would have to be collecting very rapidly to appear even in a few days. In fact, it took three days to pump the water back out of the area. However, Greene testified he had been in the bleeder the Monday (February 4) before the citation was issued. (Tr. 495-496, 519-520). Respondent’s witnesses credibly testified that water could accumulate very quickly in the area. (Tr. 498-499, 505-506, 519). In light of the Secretary’s burden, I find that the accumulation likely occurred sometime after Greene’s last examination, which was less than 48 hours from the time the citation was written.

c. Whether the violation is obvious or poses a high degree of danger

As discussed at length in the discussion on gravity, the cited condition posed a high level of danger. Miners, especially those wearing waders, faced trip-and-fall and drowning danger. (Tr. 121-123, 230, 455, 500, 704, 724). Further, miners traveling through the water ran the risk bacterial infection. It is significant that miners were willfully and negligently exposed to this

high degree of danger. In its brief, Respondent argues that the cited condition did not pose a high degree of danger for largely the same reasons given with respect to gravity. (*Respondent's Post-Hearing Brief* at 45-46). These arguments are rejected for the same reasons discussed *supra*.

With respect to obviousness, the accumulations were massive and the examiner had to travel through them to complete the examination. There was no way anyone could enter the area without seeing the cited condition. There is no question the condition was obvious.

In its brief, Respondent argued that the condition could not be obvious because it was in a "remote area," namely a bleeder entry that was only traveled by certified examiners on weekly examination. (*Respondent's Post-Hearing Brief* at 40 citing *Carmeuse Lime, Inc.*, 29 FMSHRC 266, 270 (March 2007)(ALJ Zielinski). Respondent misapprehends the nature of the obviousness determinations both in *Carmeuse* case in particular and Commission case law in general. In *Carmeuse*, Judge Zielinski held, *inter alia*, "the condition was not obvious, and was located in a somewhat remote area." 29 FMSHRC at 266. However, he went on to explain:

I conclude that the condition was not obvious because of its nature and location. Ex. G-4. Aside from the fact that persons rarely traveled the walkway, the condition was located almost seven feet above the walkway surface, and it is not likely that a person would look up and see it. There is no evidence that the condition had been reported in any other workplace examination reports.

Id. at FN 7. The question of obviousness in *Carmeuse*, therefore, did not turn solely on the act that the area was "somewhat remote." According to Judge Zielinski's reasoning, it was perhaps more important that the condition was hard to see from the walkway and that the condition had never been seen in the area before. In the instant matter, Respondent was clearly aware of previous water issues in the area and it was impossible to enter the area without noticing it. Therefore, the condition was obvious and also posed a high degree of danger.

d. Whether the operator had been placed on notice that greater efforts were necessary for compliance or that this condition was an issue.

Respondent was on notice that additional efforts were needed in the cited area. Specifically, Young had issued two citations for excessive water in the same bleeder system less than three months before the instant problem arose. (Tr. 63-65, 73-74, 183-184, 202). Beyond the notice these citations would naturally give, Young specifically wrote that Respondent was on notice. (Tr. 67-68, 71). Further, in December 2012, he discussed this notice and the water problem in the bleeder with members of mine management. (Tr. 66-67, 694).

It strains credulity but Respondent argues that previous "moderate" citations could not serve as notice that additional efforts were necessary. (*Respondent's Post-Hearing Brief* at 42 citing *Cyprus Emerald Resources Corporation*, 11 FMSHRC 2570 (Dec. 1989)(ALJ Koutras). Once again, Respondent misunderstands the holding in the cited case. It is true Judge Koutras in *Cyprus Emerald Resources Corporation* expressed concern that four previous citations relied

upon by the Secretary in that matter to show notice were only “moderately” negligent. However, he ultimately stated:

In any event, I cannot conclude that the prior citations *which were issued for different conditions, and at different locations far removed from the scene of the conditions* which prevailed at the time of the inspection on August 31, 1988, may serve to support a finding of aggravated conduct. In my view, in order to support an unwarrantable failure order, which is a severe sanction, an inspector must make an informed judgment, on a case-by-case basis, with respect to the prevailing conditions which he believes justifies such an order.

11 FMSHRC at 2585 (emphasis added).

In short, Judge Koutras was most concerned that the previously cited conditions were so different from the condition at issue that they could not serve as notice for unwarrantable failure issues. In the instant matter, the previous citations were issued in the same location in the same bleeder for the identical condition. Perhaps more importantly, notice in this matter relies less on the fact that there were previous citations and more on the fact that Young gave an explicit message to Respondent that additional efforts were needed when those citations were issued. Whether Respondent could imply notice from previous enforcement is not at issue when Respondent has actual notice. Therefore, Respondent had meaningful notice that additional efforts were needed.

Respondent further argues that the additional precautions it took after receiving notice, including the remote monitoring system of the bubbler, meant that the “notice” factor should not be held against the company. (*Respondent’s Post-Hearing Brief* at 43 *citing Big Ridge*, 35 FMSHRC 1531). It argued that equipment defects intervened, but that it had acted to correct the problems cited. (*Id.*). It argued “at some point, the clock should be re-started or at least not progressed,” on notice. (*Id.*). As discussed previously, Respondent’s actions in setting up the remote monitoring and bubbler system were wholly inadequate to the challenge posed by this bleeder. Every time the bleeder was inspected, equipment defects and accumulations were observed. While it is true that at some point, efforts made after notice should “restart the clock” on notice, the inadequate efforts made by Respondent were not sufficient to do so in this case.

e. The operator’s efforts in abating the violative condition

Respondent acted to abate the condition in the hours and days after the discovery of the cited condition. This point is essentially uncontested.

However, in its brief, Respondent attempts to stress that their abatement efforts were so substantial and important that it would essentially negate all of the other unwarrantable failure factors. In its brief Respondent argues that the time the condition existed, the extent of the condition, the obviousness of the condition, notice of greater effort, and knowledge had to be considered in light of abatement efforts taken. (*Respondent’s Post-Hearing Brief* at 38-43). For instance, Respondent stated that with respect to length of time, obviousness and extent, “the real issue is that Consol responded to the water problem by taking aggressive action to abate the

conditions.” (*Id.* at 40). However, Respondent cites no authority for the proposition that abatement is the ultimate issue in unwarrantable failure determinations. Further, Respondent failed to reckon with the fact that, before any abatement occurred or could be effective, miners were willfully and negligently exposed to the cited condition. I find no reason to believe that abatement after miners are exposed to a hazard alone makes an unwarrantable failure determination inappropriate.

f. Operator’s knowledge of the existence of the violation

“It is well-settled that an operator’s knowledge may be established, and a finding of unwarrantable failure supported, where an operator reasonably should have known of a violative condition.” *IO Coal Co.*, 31 FMSHRC at 1356-1357 (*citing Emery*, 9 FMSHRC at 2002-2004). A supervisor’s knowledge and involvement is an important factor in an unwarrantable failure determination. *See Lopke Quarries, Inc.*, 23 FMSHRC 705, 711 (July 2001) *citing (REB Enterprises, Inc.*, 20 FMSHRC 203, 224 (Mar. 1998) and *Secretary of Labor v. Roy Glenn*, 6 FMSHRC 1583, 1587 (July 1984). In fact, a supervisor’s actual knowledge can be imputed to the Respondent for purposes of determining an unwarrantable failure, in addition to the penalty. *Wayne Supply Co., supra; Rochester & Pittsburgh Coal Co., supra; and Southern Ohio Coal Co., supra.* As discussed *supra*, the preponderance of the evidence shows that Stalnaker knew about the condition when he encountered it in the bleeder. In the hours that followed, several other members of management learned about the condition. Despite this knowledge, miners were willfully exposed to the condition.

In its brief, Respondent argues that knowledge is unimportant when a condition exists for a short period of time and Respondent took appropriate corrective action. (*Respondent’s Post-Hearing Brief* at 41 *citing Oak Grove, supra* *12). For the reasons described *supra*, Respondent’s corrective actions are insufficient to negate all the other unwarrantable failure factors. Further, I find that the time the condition existed is unimportant given Respondent’s actual knowledge of the condition and the willful exposure to the hazards.

In light of the extent of the condition, its obviousness and high degree of danger, the notice of greater efforts needed in the area, Respondent’s actual knowledge of the cited condition, and the fact that Respondent’s actions were best characterized as “High” negligence, I find that this violation as an unwarrantable failure to comply on the part of Respondent.

D. Order No. 7024069

1. Contentions of the Parties

With respect to Citation No. 7024069, the Secretary asserts that Respondent violated 30 CFR § 75.364(h), that this violation was “Highly Likely” to result in “Fatal” injuries to two miners, that the violation was S&S, and that it resulted from “High Negligence” and an unwarrantable failure to comply. (GX-1)(*Secretary’s Post-Hearing Brief* at 27-31). The Secretary believes that the proposed penalty of \$14,743.00 is appropriate. (*Id.* at 31-33).

Respondent argues that no injury was reasonably likely to occur as a result of the violation and that, as a result, it was not S&S. (*Respondent's Post-Hearing Brief* at 30-35). In the alternative, it argues that if any injury occurred it would result in "Lost Workdays/Restricted Duty" rather than death. (*Id.* at 30-33). It also argues that its actions did not display "High Negligence" or an unwarrantable failure to comply. (*Id.* at 26-29 and 36-46).

2. The Secretary Has Carried His Burden Of Proof By A Preponderance Of The Evidence That Respondent Violated 30 CFR § 75.370(a)(1)

On February 5, 2013, Young also issued Order No. 7024069 under 104(d)(1) of the Act for a violation of 30 CFR § 75.364(h). In the Condition or Practice section, he stated:

The operator failed to record at the completion of any shift during which a portion of a weekly examination is conducted, a record of obvious and extensive hazardous conditions found during a weekly examination conducted on 02/05/2013 on the midnight shift of the E tailgate through E-21 bleeder district. The record book on the surface showed that no violations or hazards existed and obvious and extensive accumulations of water were found during 103(g) complaint investigation number 47336. Water measuring 2350 feet in total length by 12 to 42 inches in depth from rib to rib were found in this bleeder system. The record book on the surface was signed by one examiner and the mine foreman/superintendent. The second examiner also failed to sign for his portion of the exam by the end of the shift on which it was made. None of the three persons, who signed the record and had knowledge of these hazards, entered the hazards into the record book.

This constitutes more than ordinary negligence on the part of the mine management, in that, hazards are required to be reported and corrected immediately to protect the health and safety of the miners. This high degree of negligence demonstrates a lack of due diligence by the mine operator to provide a safe work environment by not recording hazardous conditions. This unique aggravated circumstances [sic] puts the miners at a high risk to be injured. This a [sic] lack of reasonable care on the part of the mine operator to provide a safe work environment for their employees demonstrates indifference in complying with the regulations.

This is being issued in conjunction with 104(d)(1) Citation Number 7024068.

This violation is an unwarrantable failure to comply with a mandatory standard.

(GX-2).

The Order was terminated on February 7, 2013, after Respondent's management reviewed with all certified mine examiners who examine the E-22 bleeder district that all violations and observed hazards shall be recorded in the record book. (GX-2).

On February 11, 2013, Young modified this Order to note a change in time (to use military time) and to reduce the total distance involved from 2,350 feet to 2,250 feet. (GX-2).

The cited standard, 30 CFR § 75.364(h) (“Weekly examination”), provides the following:

At the completion of any shift during which a portion of a weekly examination is conducted, a record of the results of each weekly examination, including a record of hazardous conditions and violations of the nine mandatory health or safety standards found during each examination and their locations, the corrective action taken, and the results and location of air and methane measurements, shall be made. The results of methane tests shall be recorded as the percentage of methane measured by the examiner. The record shall be made by the person making the examination or a person designated by the operator. If made by a person 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. The record 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. §75.364(h).

In the instant matter, it is uncontested that four of Respondent’s foremen (Stalnaker, Saunders, Price, and Giavonelli) knew about the water in the bleeder. This condition was a hazard and, as a result, should have been recorded in the book. However, the hazardous water was not noted in the record book when Giovanelli signed the book. (Tr. 84-85, 87, 99, 671, 677). Further, Respondent conceded that “there was a violation of the standard...” (*Respondent’s Post-Hearing Brief* 26). In light of these facts, I find that the citation was properly issued.

3. The Violation Was Highly Likely to Result in Fatal Injury to Two Miners And Was Significant And Substantial In Nature.

Inspector Young marked the gravity of the cited danger in Order No. 7024069 as being “Highly Likely” to result in “Fatal” injuries to two persons. (GX-1). Young also determined that the violation was S&S. (GX-1). These determinations were supported by a preponderance of the evidence at the hearing.

As noted *supra*, the first element in determining whether a violation is S&S is whether there was an underlying violation of a mandatory safety standard. *Mathies* at 3-4. As demonstrated above, Respondent violated 30 C.F.R. §75.364(h) in the instant matter. Therefore, the first *Mathies* element is met.

As with the previous citation, Respondent argues that a 30 C.F.R § 75.364(h) violation based “solely” on a tripping hazard cannot be S&S because that standard is not directed at tripping hazards, but rather at ventilation issues. (*Respondent’s Post-Hearing Brief* at 33 citing *Oak Grove Resources, supra*). Respondent asserts that “all of the factors” outlined in its brief

with respect to Citation No. 7024068 are incorporated for Order No. 7024069. For these reasons fully discussed above, those arguments are once again rejected here.

The second element of *Mathies*, a discrete safety hazard – that is a measure of danger to safety – contributed to by the violation – was also met. Because the condition was not listed in book, miners would not be aware of the hazards cited in Citation No. 7024068. As a result, the failure to list the cited hazard contributed to the chances miners would be exposed to those hazards. Further, failure to list the cited condition meant that Respondent would not take notice or fully appreciate that its previous efforts to control water in the area were grossly inadequate. Therefore, Respondent would not take additional efforts to control the area. This meant that more miners in the future would face exposure to water in the bleeder system.

The third element of the *Mathies* test – a reasonable likelihood that the hazard contributed to will result in an injury – was also met. If miners entered the area, they would be exposed to the hazards discussed with respect to Citation No. 7024068. Specifically, these hazards would include trip-and-fall, fractures, drowning, and bacterial infection. (Tr. 121-122, 143). Such an injury would be more than reasonably likely; I find that the injury would be highly likely.

In its brief, Respondent argues that the hazard contributed to in this situation, the exposure of miners to hazards in the bleeder, was unlikely to occur and unlikely to result in injury. (*Respondent's Post-Hearing Brief* at 30). Specifically, Respondent argues that the cited area was controlled access and abatement was underway. (*Id.*). Any person who had any reason to read the record book or to enter the Bleeder, including Greene, was already aware of the water from word of mouth. (*Id.*). Also, by February 5, Yablonsky's entries noting the water were already in the book. (*Id.*).

While remedial efforts with respect to the underlying condition were started before Inspector Gross discovered the condition, remediation of the inadequate examination did not occur until later. Specifically, the examination was not completed and the water condition was not added to the books until after Young told Respondent he would issue citations. (Tr. 81-83, 105-107, 113, 175-176, 345-347, 358-359, 372-374, 400, 782). Young actually spoke to Yablonsky before the examiner entered the bleeder. (Tr. 108-109). Therefore, completion of the examination and the examination book occurred only after the condition was cited, near the end of the day on February 5.

Further, whether some or all of Respondent's employees had actual knowledge of the water condition is immaterial. Without the examination record, Respondent's miners had to rely entirely on word-of-mouth. Respondent provided no legal support for its contention that the Mine Act permits informal, ad hoc pre-shift reports. Certainly Greene, the regular examiner, should not have to rely solely on an informal conversation with Stalnaker to learn about the nature and extent of an extremely hazardous condition.³⁰ Greene should have been able to read

³⁰ It is true that by the time Greene returned to the mine, Yablonsky had completed his examination and noted the cited condition in the book. However, as noted supra, Yablonsky was only sent in after a further citation was threatened. (Tr. 107-109). Without this threat, no note would have been included, as various Respondent's witnesses testified they did not believe there was a hazard. (Tr. 132-133, 307, 434).

the book to determine the hazards he would encounter. Further, reliance on informal reporting would not provide a means to later verify what information the various miners received when they learned about the water accumulation. The fact that Saunders was eventually sent into the area also shows that Respondent cannot predict who would need to be sent into the area, as originally only Stalnaker was supposed to examine the bleeder. Further, once Saunders entered the area, he was obviously not told about the nature, extent, or danger of the condition because he simply walked through the water hazard. Miners should have been informed about the water accumulation in the record book.

Perhaps more importantly, because the water was not included in the examination book Respondent would not have a record of the accumulation. This would mean that MSHA inspectors would not know that the condition existed and that hazards continued to occur in this bleeder. Without the 103(g) complaint, MSHA never would have known about the water in the bleeder.³¹ (Tr. 105). Further, Respondent would not have a record that their efforts to keep water out of the bleeder were wholly inadequate and therefore would have no reason to plan future efforts to improve the plan. Eventually, the bleeder would flood again and miners would, once again, be exposed to hazards. Therefore, I find the fact that some miners may have been aware of the existence of the cited condition (to some degree) does not change the fact that an injury from the inadequate examination was highly likely.

The fourth and final element of *Mathies*, a “reasonable likelihood that the injury in question will be of a reasonably serious nature,” was also met. As discussed with respect to Citation No. 7024068, serious, or even fatal, injury was likely to result from the water accumulations. Respondent argues, for the same reasons described in Citation No. 7024068, that fatal injury was unlikely. (*Respondent’s Post-Hearing Brief* at 30-33). Those arguments are rejected for the same reasons given above.

In short, a preponderance of the evidence supports the Secretary’s finding that condition listed in Citation No. 7024068 was “Highly Likely” to result in “Fatal” injuries to two miners and that it was S&S.

4. Respondent’s Conduct Constituted “High” Negligence and an Unwarrantable Failure to Comply.

With respect to Order No. 7204069, I find that Respondent knew or should have known about the condition and that there were no mitigating circumstances. As a result, a finding of “High Negligence” is warranted.

Several members of management knew that the examination had not been properly completed and that the water accumulation was not listed, including Stalnaker, Saunders, and Giavonelli. Nevertheless, Giavonelli signed the exam book knowing that water was present and that it was not listed. (Tr. 671-672, 681-682). Therefore, Respondent was negligent. Once again, the question remains as to the degree of negligence.

³¹ Also it is questionable if Respondent would have taken adequate measures to control the water condition in the bleeder system since no one deemed it enough of a hazard to record the problem.

In its brief, Respondent argued that its negligence was substantially mitigated in this matter. However, none of those arguments are persuasive.

Respondent argues that this condition was merely a technical paperwork violation. (*Respondent's Post-Hearing Brief* at 27). Respondent notes that the record was incomplete but that everyone knew there was water in the bleeder and that it was being pumped. (*Id.*). Stalnaker did not complete the record because he did not finish the exam. (*Id.*). Saunders could not complete the final two sections and did not add the water to the record because he believed it was not a hazard. (*Id.* at 28). Giavonelli signed the document but he knew there were areas that weren't examined and that there was extensive water in the area. (*Id.*). Therefore, Respondent argued that there was no negligence, just a minor paperwork error.

As discussed with respect to gravity, the issue is not whether some miners had actual knowledge of the water accumulation. A record of the hazards in the bleeder was required. Without that record, it was impossible to know what miners were aware of the nature and scope of the condition. Even those who knew that water was present did not recognize it as an obvious hazard. Specifically, Saunders said he did not believe that the water was a hazard despite the fact that it was cold, murky, contained tripping hazards, and was so deep that he did not continue to travel through it to complete his exam. Respondent should have ensured that the water accumulation was placed in the record book so that Saunders and others would recognize it as a hazard before being exposed to the hazard.

Further, a record would have ensured that management was aware and remembered the inadequacy of the existing systems to handle the water. By recording the condition, Respondent would have been aware that additional efforts were needed to keep the bleeder clear. Finally, a record ensured that MSHA inspectors were aware of the cited condition. This was especially important because Young had placed Respondent on notice regarding this bleeder. As the two inspectors noted, without the 103(g) complaint, they never would have known there was water in the bleeder because it was not recorded. (Tr. 105). This was not a mere paperwork error, rather this went to the heart of miner safety in the bleeder.

The next possible mitigating circumstance raised by Respondent is that Respondent had no previous citations for the cited condition. (*Respondent's Post-Hearing Brief* at 29). It is true that Respondent did not have any previous citations for inadequate examinations in the bleeder. However, Respondent had a history of failing to notice and address water conditions in the bleeder. Whether or not Respondent was cited, it had consistently failed to ensure the area was safe for travel. As a result, history supports a finding of high negligence and the lack of any prior citations is in no way mitigation.

Respondent also argues that management had ensured abatement before issuance of the citation. (*Respondent's Post-Hearing Brief* at 29). As noted with respect to gravity, Respondent began pumping the water in the bleeder before Citation No. 7204068 was issued. However, the examination was only completed after Young told Respondent he was issuing citations. (Tr. 107). Further, Yablonsky only completed the exam and noted the water after speaking with Young. (Tr. 108-109). This condition was not abated before issuance and there was no mitigation.

Respondent further notes that Stalnaker was not the usual examiner and that he reported the condition immediately. (*Respondent's Post-Hearing Brief* at 29). Stalnaker was a foreman and regularly conducted examinations. Respondent provided no legal support for its argument that one examiner filling in for another should be held to a lower standard. Regardless of Stalnaker's lack of familiarity with the area, he still should have recognized a massive water accumulation as a hazard. Further, although Stalnaker may have immediately orally reported the condition to Price and Giavonelli, he never reported the condition in the one way required by the cited standard: he never placed the condition in the book. Therefore, this is not mitigation.

Respondent next argues that the time given to complete the examination had not run when Young wrote the order. (*Respondent's Post-Hearing Brief* at 29). Presumably, Respondent means that the examination could still be completed and all the hazards listed before the time period had run. However, at the time the citation was issued, Giavonelli had already signed the record book, that noted no hazards. (Tr. 84-87, 99, 671, 677). Respondent unpersuasively argues that Giavonelli only signed the exam record to indicate that he had read it and recognized that the exam was not completed. (*Respondent's Post-Hearing Brief* at 29). It also notes that Giavonelli was not required to correct any problems when countersigning the book. (*Id.*). This argument is misplaced, as Respondent, as well as Giavonelli, apparently misunderstand the importance of signing the record book. In pertinent part, the standard states:

At the completion of any shift during which a portion of a weekly examination is conducted, a record of the *results* of each weekly examination, including a record of hazardous conditions and violations of the nine mandatory health or safety standards found during each examination and their locations... shall be made... The record 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. §75.364(h)(emphasis added). Inspector Young clearly explained that when a foreman signs a book listing no hazards, he indicates that there are no problems. (Tr. 141-142). Put simply, Giavonelli signing the record indicated that the examination was complete. It did not indicate that he was reading an incomplete report. A miner looking at the record could only assume that the examination was complete and no hazard was found. Further, whether or not Giavonelli was required to correct errors made in a record book when countersigning, he still should not have signed a record he knew to be incomplete and inaccurate. Nothing about the record book or the countersigning of the record book mitigates the negligence here. In fact, by creating a false impression about the area, the countersigned record book exacerbated the problem.

Additionally, Respondent argues that the failure to adequately examine the area was mitigated by the fact that Respondent had started to pump in the area. (*Respondent's Post-Hearing Brief* at 29). This is completely irrelevant to the issue. The dangers associated with an inadequate examination are not completely eliminated by correcting the underlying condition. Even if Respondent had acted entirely properly with respect to the underlying condition (and, as noted in the discussion regarding Citation No. 7204068, it did not), that does not change the fact that the hazard should have been recorded. Miners and MSHA need to be aware of the exact

nature and extent of the conditions in the area. Also, management needed to be aware and remember that their efforts to control water in the area were inadequate.

Finally, Respondent noted that the area was controlled access and that only management would enter the area. (*Respondent's Post-Hearing Brief* at 29).³² As is clearly demonstrated by the fact that both Saunders and Stalnaker attempted to walk through the water, management can be exposed to hazards. While fewer people entered this area than perhaps other areas of the mine, this is reflected in the finding that only two persons are affected. It in no way affects Respondent's negligence.

As none of the actions presented by Respondent constituted mitigating circumstances, the "High Negligence" designation is appropriate.

The facts and the arguments of the parties regarding the unwarrantable failure designation in Order No. 7204069 are identical to those in Citation No. 7204068. (*See Respondent's Post-Hearing Brief* at 36-46). Therefore, the findings regarding unwarrantable failure in Citation No. 7204068 are incorporated here by reference. I find the preponderance of the evidence shows that this violation as an unwarrantable failure to comply on the part of Respondent.

APPROPRIATE CIVIL PENALTY

The principles governing the authority of the Commission's 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 the authority to assess all civil penalties provide in the Act. 30 U.S.C. 820(i). The Act delegates the duty of proposing penalties to the Secretary. 30 U.S.C. §§ 815(a), 820(a). Thus, when an operator notifies the Secretary that it intends to challenge a penalty, the Secretary petitions the Commission to assess the penalty. 29 C.F.R. §2700.28. The Act requires that in assessing civil monetary penalties, the Commission and its judges shall consider the six statutory penalty criteria:

[1] the operator's history of previous violations, [2] the appropriateness of such penalty to the size of the business of the operator charged, [3] whether the operator was negligent, [4] the effect on the operator's ability to continue in business, [5] the gravity of the violation, and [6] the demonstrated good faith of

the person charged in attempting to achieve rapid compliance after notification of a violation

30 U.S.C. § 820(i)

The Secretary seeks civil penalties in the amounts of \$14,373.00 for Citation No. 7024068 and \$14,743.00 for Order No. 7024069. Given all of the evidence and my findings above, I find that these penalties are appropriate

³² Certainly Respondent does not mean to imply that the safety of management personnel is less important than the safety of its rank and file miners.

In assessing a \$29,116.00 penalty, I have given full consideration to the Section 110(i) criteria. Specifically, I note that Respondent had a history of water accumulations in this particular bleeder and received several citations for that condition. Respondent is a large operator and the Enlow Fork is a very large mine and therefore the penalty is appropriate to the size of the business. The parties stipulated that this penalty amount would not affect Respondent's ability to stay in business. As noted above, with respect to both citations Respondent's actions constituted high negligence and an unwarrantable failure to comply. Further, the dangers cited with respect to each violation were highly likely to result in fatal injuries to two miners. Finally, although I find Respondent's actions were insufficient to constitute mitigation, I considered Respondent's efforts in abating the condition once the Citation and Order were issued.

ORDER

It is **ORDERED** that Citation No. 7024068 and Order No. 7024069 are **AFFIRMED**. It is further **ORDERED** that Consol Pennsylvania Coal Company, LLC, **PAY** the Secretary of Labor the sum of \$29,116.00 within 30 days of the date of this Decision.³³ Upon receipt of payment, this case is hereby **DISMISSED**.

/s/ Janet G. Harner
Janet G. Harner
Administrative Law Judge

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³³ 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

July 30, 2015

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

v.

CAM MINING, LLC,
Respondent.

CIVIL PENALTY PROCEEDING

Docket No. KENT 2009-856
A.C. No. 15-18911-178540

Mine: Mine #28

DECISION APPROVING SETTLEMENT
AND
ORDER TO PAY

Before: Judge Feldman

The captioned civil penalty proceeding is before me based upon a petition for assessment of civil penalty filed pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977 (the Act), 30 U.S.C. § 815(d). After this matter was assigned to me on May 17, 2012, further activity in this docket was held in abeyance pending Commission resolution of the novel question of the evidentiary requirements necessary for demonstrating a repeated flagrant violation under section 110(b)(2) of the Act, as amended by the Mine Improvement and New Emergency Response Act of 2006, 30 U.S.C. § 820(b)(2).

The parties have now filed a joint motion to approve settlement and dismiss this matter. The parties' agreed-upon settlement terms for the single order at issue, Order No. 8216179, include deleting the 110(b)(2) repeated flagrant designation and reducing the civil penalty from \$140,000.00 to \$4,000.00. Specifically, the parties agree to delete the flagrant designation because there are disagreements about the condition of the cited belt at the time of the violation, the length of time the cited condition existed, and whether the alleged predicate violations relied on by the Secretary to support a repeated flagrant violation were of sufficiently similar conditions. Having deleted the flagrant designation, the parties agree that the violation should be issued as a 104(d)(1) order.

I have considered the representations and documentation submitted in this matter and I conclude that the proffered settlement is appropriate under the criteria set forth in Section 110(i) of the Act. **WHEREFORE**, the motion to approve settlement **IS GRANTED**, and pursuant to the parties' agreement, CAM Mining, LLC, **IS ORDERED** to pay the \$4,000.00 civil penalty within 30 days of this Order in satisfaction of the single order at issue.¹ Upon receipt of timely payment, the captioned matter **IS DISMISSED**. In reaching this conclusion, I have not considered paragraphs three and four of the motion because they are irrelevant.

/s/ Jerold Feldman
Jerold Feldman
Administrative Law Judge

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Charleston, WV 25321-0273

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¹ Payment should be sent to the Mine Safety and Health Administration, U.S. Department of Labor, Payment Office, P.O. Box 790390, St. Louis, MO 63179-0390. Please include the Docket No. and A.C. No. noted in the above caption on the check.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

July 30, 2015

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

v.

CAM MINING, LLC,
Respondent.

CIVIL PENALTY PROCEEDING

Docket No. KENT 2009-1008
A.C. No. 15-18911-182680

Mine: Mine #28

DECISION APPROVING SETTLEMENT
AND
ORDER TO PAY

Before: Judge Feldman

The captioned civil penalty proceeding is before me based upon a petition for assessment of civil penalty filed pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977 (the Act), 30 U.S.C. § 815(d). After this matter was assigned to me on February 4, 2010, further activity in this docket was held in abeyance pending Commission resolution of the novel question of the evidentiary requirements necessary for demonstrating a repeated flagrant violation under section 110(b)(2) of the Act, as amended by the Mine Improvement and New Emergency Response Act of 2006, 30 U.S.C. § 820(b)(2).

The parties have now filed a joint motion to approve settlement and dismiss this matter. The parties' agreed-upon settlement terms for the single order at issue, Order No. 8216882, include deleting the 110(b)(2) repeated flagrant designation and reducing the civil penalty from \$144,300.00 to \$40,000.00. Order No. 8216882 was issued for accumulations of float coal dust in a power box. The parties agree to delete the flagrant designation because the alleged predicate violations relied upon by the Secretary to support the flagrant violation were not issued for accumulations in power boxes and because the mine developed a cleaning program for power boxes in 2009 upon recognition that the existing program was insufficient. Having deleted the flagrant designation, the parties agree that the violation should be issued as a 104(d)(1) order.

I have considered the representations and documentation submitted in this matter and I conclude that the proffered settlement is appropriate under the criteria set forth in Section 110(i) of the Act. **WHEREFORE**, the motion to approve settlement **IS GRANTED**, and pursuant to the parties' agreement, CAM Mining, LLC, **IS ORDERED** to pay the \$40,000.00 civil penalty within 30 days of this Order in satisfaction of the single order at issue.¹ Upon receipt of timely payment, the captioned matter **IS DISMISSED**. In reaching this conclusion, I have not considered paragraphs three and four of the motion because they are irrelevant.

/s/ Jerold Feldman
Jerold Feldman
Administrative Law Judge

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¹ Payment should be sent to the Mine Safety and Health Administration, U.S. Department of Labor, Payment Office, P.O. Box 790390, St. Louis, MO 63179-0390. Please include the Docket No. and A.C. No. noted in the above caption on the check.

ADMINISTRATIVE LAW JUDGE ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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July 1, 2015

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

v.

JEPPESEN GRAVEL,
Respondent.

CIVIL PENALTY PROCEEDING

Docket No. CENT 2014-298-M
A.C. No. 13-02285-344601

Mine: Jeppesen Pits

ORDER ON MOTION FOR SANCTIONS

Before: Judge Rae

This case is before me upon a petition for assessment of a civil penalty under section 110(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(c).

On April 24, 2015 I issued an Order compelling Respondent to answer the Secretary's first and second set of discovery requests in this docket. His answers were due two weeks from the date of my Order. Respondent provided 23 exhibits including his income tax returns for the past two years in response. The Secretary has now filed a Motion for Sanctions for Jeppesen's failure to respond to discovery. He seeks sanctions for Respondent's failure to respond fully to his interrogatories, requests for admission, and requests for production of documents. Respondent has responded to this motion by email stating they "do not want to go with sanctions."

For the reasons set forth below, I DENY the Secretary's motion but limit the evidence the Respondent shall be permitted to produce at trial.

This docket involves eighteen 104(a) citations issued for alleged violations existing as a result of the Respondent's alleged failure to abate certain conditions after MSHA had issue prior citations and withdrawal or removal from service orders under 104(b) of the Mine Act.

Jeppesen is a *pro se* litigant who through his various pleadings and responses to motions appears to be relatively unsophisticated from a legal standpoint. He operates a small mine in which he claims he is the sole employee and has limited financial means.

The Secretary has propounded three sets of discovery – 28 interrogatories (not including subparts, in violation of Federal Rule of Civil Procedure 33), 38 requests for admission, and 12 requests for production of documents/videos in all. Each of the discovery requests seeks multiple answers, admissions and documents for each of the 18 non-significant and substantial alleged violations. In addition to propounding the third request for production after my Order of April 24th, the Secretary sent a letter by email to Jeppesen on May 28, 2015 informing the Respondent that pursuant to my previous Order, the Secretary is entitled to this information. The Secretary

further informed the Respondent that they did not consider his responses to their discovery sufficient and that the Secretary would be compelled to file a motion for sanctions should he not fully comply. In fact, the Secretary is not entitled to any relief with respect to this last request for production as it was served after my Order to Compel and the Secretary has not filed a Motion to Compel this information. That is not to say I would grant it, however.

The Secretary has also filed with the Court a Prehearing Report containing 500 pages of pre-trial exhibits including copious inspector's notes on each violation, glossy colored photographs, quarterly employee reports, a U.S. District Court consent judgement against Jeppesen, a previous ALJ decision approving settlement of several of the prior citations issued for the same conditions herein¹ and a prior ALJ's decision against Jeppesen.

FMSHRC Rule 56(c) provides that upon a judge's own motion, the judge may limit discovery to protect a party or person from oppression or undue delay, burden or expense. *See* 29 C.F.R. § 2700.56(c). Federal Rule of Civil Procedure 26(c) states that a Court may issue an order to protect a person from undue burden or expense by limiting the scope of discovery. I find that the Respondent has complied, to the extent of his abilities, with the Secretary's discovery. I further find that requiring the Respondent to provide additional responses to the Secretary's overzealous requests would be unduly burdensome and oppressive. It would not lead to information not already at the disposal of the Secretary or necessary for presentation of his case. It would also lead to undue delay as the trial is scheduled to commence in less than two weeks.

I hereby **DENY** the Secretary's motion for sanctions. I do, however, acknowledge that Jeppesen has allegedly demonstrated a reluctance to cooperate with MSHA and the Secretary. I therefore **ORDER** that Jeppesen be limited to the introduction at trial of only that evidence that has been provided to the Secretary or the Court in response to discovery or my Notice of Hearing Order, absent good cause shown.

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

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Jay A. Jeppesen, Jeppesen Gravel, 719 8th Street, Sibley, IA 51249

¹ The Secretary filed a Motion for Partial Summary Judgement. He argued that because Jeppesen had settled several of the previous citations for the same condition or had failed to respond to admissions concerning the citations involved, they were entitled to a summary decision. I denied that motion.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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July 2, 2015

POCAHONTAS COAL COMPANY, LLC,
Contestant,

v.

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

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

v.

POCAHONTAS COAL COMPANY, LLC,
Respondent.

CONTEST PROCEEDING

Docket No. WEVA 2014-395-R
Order No. 3576153; 12/19/2013

Mine: Affinity Mine
Mine ID: 46-08878

CIVIL PENALTY PROCEEDING

Docket No. WEVA 2014-1028
A.C. No. 46-08878-350475

Mine: Affinity Mine

**ORDER DENYING THE SECRETARY’S MOTION FOR CERTIFICATION FOR
INTERLOCUTORY REVIEW &
ORDER DENYING MOTION TO STAY**

Before: Judge Miller

These cases are before me upon a notice of contest filed by Pocahontas Coal Company and a petition for assessment of a civil penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977. On June 23, 2015 the Secretary filed a Motion for Certification for Interlocutory Review of the court’s June 18, 2015 Order Denying the Secretary’s Motion to Reconsider. For reasons that follow, the Secretary’s Motion for Certification for Interlocutory Review is **DENIED**. The Secretary also filed a Motion to Stay the court’s June 18, 2015 Order Denying the Secretary’s Motion to Reconsider. The Motion to Stay is **DENIED**.

On April 13, 2015 the Secretary filed a Motion for Protective Order in which he asked the court to prevent the depositions of attorneys from the Office of the Solicitor who had been subpoenaed by Respondent. On May 22, 2015 the court issued an Order Granting in Part and Denying in Part the Secretary’s Motion for Protective Order and found that factual information considered by MSHA and the attorneys when selecting and grouping the 42 enforcement actions included in the NPOV, as well as facts involving who, what, where and when the selections were made, may be relevant, were discoverable, and were not privileged. The Secretary was given the opportunity to advise Pocahontas whether a person from MSHA was involved in the

selection of the 42 enforcement documents included in the NPOV, which would obviate the need for an attorney to supply the facts surrounding the selection. The Secretary indicated that it would serve no purpose to depose an employee of MSHA, as there was no one who could provide the information sought by the mine. Even so, the Secretary was ordered to provide a person with knowledge from MSHA to be deposed, and, following the deposition, to respond in writing to interrogatories regarding the selection of the citations that were listed on the NPOV that was issued to the mine. The order addressed all of the privileges raised by the Secretary and allowed Respondent a deposition and interrogatories regarding only the facts surrounding the selection of the citations. On June 5, 2015 the Secretary filed a Motion to Reconsider the court's May 22, 2015 order, and attached an affidavit from an MSHA employee who was involved, in some respect, with the selection of the 42 enforcement documents. On June 18, 2015 the court denied the Secretary's Motion to Reconsider and set new discovery timelines. Subsequently, on June 23, 2015 the Secretary filed this Motion for Certification for Interlocutory Review.

The Secretary argues that the court should certify for interlocutory review its June 18, 2015 order because that ruling involves controlling questions of law and immediate review may materially advance the final disposition of these proceedings. Specifically, the Secretary argues that three controlling questions of law were raised by the June 18, 2015 order:

- (1) whether the facts that the ALJ found to be discoverable are inextricably intertwined with privileged information covered by the attorney-client, attorney work product, and deliberative-process privileges;
- (2) whether the Secretary's issuance of a POV notice is subject to review for "abuse of discretion;" and, if so,
- (3) whether the facts that the ALJ found to be discoverable are relevant to whether the Secretary abused that discretion.

Sec'y Mot. for Certification for Interlocutory Rev. 3-4. The Secretary asserts that immediate review of these questions may save that amount of time that it would take the parties to complete the deposition and interrogatories which the court ordered. While the Secretary concedes that pre-trial discovery rulings are not normally subject to interlocutory review, he argues that Commission precedent demonstrates that interlocutory review may be appropriate when there is a "manifest abuse of discretion" on the part of the judge" or where "unprecedented litigation of enormous impact and concern to all parties . . . raises complex procedural and substantive issues of first impression." *Id.* 2, 4 (quoting *Asarco, Inc.*, 14 FMSHRC 1323, 1328 (1992) and *In re: Contests of Respirable Dust Sample Alteration Citations*, 14 FMSHRC 987, 1004 (1992)). Further, the Secretary asserts that how the Commission applies the pattern of violations rule, and what discovery is allowed in these types of proceedings, will have an enormous impact on how the Secretary enforces the Act. Finally, the Secretary argues that his prosecutorial discretion is, at most, reviewable only under the "abuse of discretion" standard, and the issues concerning discovery of the bases for the exercise of his discretion are important enough to warrant interlocutory review.

During a status conference on June 25, 2015 the Secretary asked for an immediate ruling on his motion for interlocutory review and Pocahontas indicated that it intended to file a

response within the time allowed by Commission rules. Pocahontas was informed that it may file a response for the record, but that a decision may be issued before the time has elapsed for the filing of a response. Also, at the conference on June 25, 2015, the parties agreed to a date of July 2, 2015 for the deposition of Mr. VanDyke, the MSHA employee whose declaration was attached to the motion for reconsideration and who was involved in the selection of the 42 citations and orders listed in the NPOV. Further, the court set a deadline of July 10, 2015 for Respondent to submit written interrogatories to discover the facts surrounding the selection of the documents listed on the NPOV, and a deadline of July 17, 2015 for the Secretary to respond in writing to those interrogatories. The parties will have until August 17, 2015 to supplement the record so that the court can address the motions for summary decision filed by each party.

The Commission's Procedural Rules state that "[i]nterlocutory review by the Commission shall not be a matter of right but of the sound discretion of the Commission." 29 C.F.R. § 2700.76(a). Interlocutory review "cannot be granted unless . . . [t]he Judge has certified, upon . . . the motion of a party, that [her] interlocutory ruling involves a controlling question of law and that in [her] opinion immediate review will materially advance the final disposition of the proceeding." *Id.* at § 2700.76(a)(1)(i).

I find that interlocutory review of the June 18, 2015 order is not merited on the facts of this case. As the Secretary correctly points out, pre-trial discovery rulings are usually not the subject of interlocutory review. While the Secretary argues that the Commission, in *In re: Contests of Respirable Dust Sample Alteration Citations*, 14 FMSHRC 987 (1992) ("Dust Cases"), recognized a narrow exception to this usual practice, I find that the Secretary's reliance on the case is misplaced. In *Dust Cases* the Commission, in a footnote, stated that its decision to grant the petitions for interlocutory review of the discovery related orders was "grounded in the recognition that . . . [the case was] an unprecedented litigation of enormous impact and concern to all parties that raise[d] complex procedural and substantive issues of first impression." *Id.* at 1004 n. 19. *Dust Cases* involved a dispute between the Secretary and approximately 500 operators who were alleged to have altered respirable dust samples. There, roughly 4,700 citations were at issue, and both the Secretary and the mine operators sought interlocutory review of three discovery related orders addressing hundreds of documents sought by the operators from the Secretary. Unlike *Dust Cases*, the Secretary here seeks interlocutory review of matters that involve far less material being sought through discovery, only one mine operator is involved, and, in the court's opinion, the case does not rise to the same level of complexity that was present in *Dust Cases*. Accordingly, I find that this matter does not meet the exception outlined in *Dust Cases*.

While the Secretary argues that the standard of review in this matter affects the scope of discovery, and that issues concerning discovery of the bases for the exercise of his prosecutorial discretion are important enough to warrant interlocutory review, I disagree. No matter the standard of review, the scope of discovery in Commission proceedings remains the same. Here, as the court has previously explained, the scope of discovery includes facts which go to the issue of whether the Secretary acted in an arbitrary and capricious manner. Both the original May 22, 2015 order and subsequent June 18, 2015 order made clear that only facts related to who selected and grouped the citations and orders included in the NPOV, what information they considered, when they considered it, where they considered it, and what facts they presented to the

Administrator so that he could make the final determination, were discoverable. The Secretary's internal deliberations involving opinions, thoughts, conclusions and legal theories leading up to the decision to issue the NPOV are privileged, and will remain privileged based on the information before the court. Accordingly, the Secretary's privileges remain intact through the many orders issued in this case restricting discovery and limiting it to only facts. Those orders remain in effect while the final deposition and interrogatories are completed by the parties.

The factual information sought by Pocahontas is limited, and any time preparing for and participating in the deposition and interrogatories will be minimal compared to the time it will take the Commission to address these issues. This case has been ongoing for nearly two years, and the parties have inched along through discovery and are now at a point where the motions for summary decision can reasonably be evaluated. Both parties believe that all of the information that will be presented at hearing on the NPOV is contained in the depositions already taken. One last step, regarding the choice of the 42 enforcement documents listed in the NPOV, remains for discovery. Given the limited information sought, the remaining discovery should take little time. The deposition of the MSHA representative should take only a few hours and the interrogatories will address only the facts that remain unanswered after that deposition. While a hearing on the notice has not been ruled out, the parties agree that all of the information that the court needs to make a decision regarding the NPOV will be contained in the record following the deposition and interrogatories that are both set to be complete in the coming weeks.

The Secretary has been slow in providing information during discovery and, as a result, has managed to drag on this dispute far too long. The September 16, 2015 hearing date is not particularly far off and still is nearly two years from the initial notice of pattern to the mine. The parties need to complete discovery 20 days prior to the hearing date. If the parties intend to have the validity of the NPOV decided on motions for summary decision, they must complete discovery and supplement the record with additional information so that the court can render a decision on the validity of the NPOV before the hearing date. At the end of the day, the court's order only requires the Secretary to turn over facts so that the court has all of the information necessary to determine if the Secretary did abuse his discretion in choosing this mine for a pattern of violations. Once that decision has been made, the court can turn its attention to looking at the notice itself and determining whether the notice demonstrates a pattern as alleged by the Secretary. While I do not disagree with the Secretary that this case in general presents novel and important issues, it is the court's opinion that interlocutory review of these issues will not materially advance the final disposition of these proceedings and, as a result, is inappropriate. The fact that a case involves a pressing issue does not necessarily justify interlocutory review of a court's order on that issue. *See Oak Grove Resources, LLC*, Docket Nos. SE 2013-301 et al., Unpublished Order dated June 23, 2015.

Accordingly, based on my above findings, the Secretary's Motion for Certification for Interlocutory Review is **DENIED**. For all of the reasons listed above, the Secretary's Motion for Stay is also **DENIED**.

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

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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July 16, 2015

MARK L. LUJAN,

Complainant,

v.

SIGNAL PEAK ENERGY, LLC,
Respondent.

TEMPORARY REINSTATMENT:

Docket No. WEST 2015-765-D
MSHA Case No. DENV-CD 2014-17

Mine ID: 24-01950
Mine: Bull Mountain Mine No. 1

ORDER OF DISMISSAL FOR LACK OF JURISDICTION

On July 10, 2015, the Commission received a request for temporary reinstatement from Mark L. Lujan. On July 20, 2015, the court received the company's response and motion to dismiss. The company essentially argues the Commission is without jurisdiction. Because I agree, I will grant the company's motion without waiting for Mr. Lujan's reply.

Mr. Lujan formerly worked as a miner for Signal Peak Energy, LLC at the company's Bull Mountain Mine No. 1, an underground bituminous coal mine located in south central Montana. Mr. Lujan contends that he was illegally discharged by the company on June 18, 2013. On September 24, 2014, Mr. Lujan filed a discrimination complaint with the Secretary of Labor's ("Secretary") Mine Safety and Health Administration ("MSHA"). On November 24, 2014, MSHA sent Mr. Lujan a letter informing him that it did not find sufficient evidence to establish a violation of section 105(c). 30 U.S.C. § 815(c). Mr. Lujan then filed an "appeal" of MSHA's determination. The appeal was docketed by the Commission as a section 105(c)(3) (30 U.S.C. § 815(c)(3)) discrimination complaint (Docket No. WEST 2015-252-D), and the case was assigned to the court. Time was provided for Mr. Lujan to obtain counsel, but his efforts proved unsuccessful. On June 30 and July 1, 2015, a hearing on Mr. Lujan's discrimination complaint was held in Denver, Colorado. At the hearing, the company was represented by counsels and Mr. Lujan represented himself. A decision on Mr. Lujan's discrimination complaint is pending. In the meantime, and as noted above, on July 10, 2015, the Commission received Mr. Lujan's request for temporary reinstatement. Mr. Lujan's request was docketed by the Commission as a temporary reinstatement proceeding filed pursuant to section 105(c)(2) of the Act. 30 U.S.C. § 815(c)(2).

Mr. Lujan's request must be denied and the case must be dismissed for lack of jurisdiction. Section 105 (c)(2) provides for the Secretary, not the affected miner, to bring an application for temporary reinstatement. 30 U.S.C. § 815(c)(2). Section 105(c)(2) states, "[I]f the **Secretary** finds that such complaint [i.e., the miner's complaint to MSHA that he or she has suffered discrimination] was not frivolously brought, the Commission . . . **upon application of the Secretary**, shall order the immediate reinstatement of the miner pending final order on the complaint." 30 U.S.C. §815(c)(2) (*emphasis added*). There is no comparable provision in section 105(c) or elsewhere in the Act authorizing a miner to bring such an application on his or her own behalf.¹ Therefore, because the case is not sanctioned by the Act, I lack the statutory authority to hear it, and Mr. Lujan's application must be and is **DENIED**. The case is **DISMISSED**.

/s/ David F. Barbour
David F. Barbour
Administrative Law Judge

Distribution: (1st Class Mail)

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¹ As the Sixth Circuit noted in *N. Fork Coal Co. v. Fed. Mine Safety & Health Review Comm'n*, 669 Fd.735, 744 (6th Cir. 2015), "[T]emporary reinstatement is not appropriate when a miner pursues an individual 'action' under §815(d)(3)." (Citations omitted.)

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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July 20, 2015

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

v.

REMINGTON, LLC,
Respondent.

CIVIL PENALTY PROCEEDING

Docket No. WEVA 2012-533
A.C. No. 46-09230-275179

Mine: Winchester Mine

ORDER OF DISMISSAL

Before: Judge Moran

On January 16, 2015, the Secretary filed his motion to approve settlement in this matter. That motion sought a 50% reduction of the proposed penalties for each of the two section 104(a) citations in the docket, which were both marked as significant and substantial with the likely expected injury as fatal. An accident involving a loaded tractor-trailer coal truck was related to both citations. That truck lost power while going up a haul road. It then began rolling backwards and overturned, injuring the driver, who suffered a lost time injury. Based on the statement in the citation, the results could easily have been more serious, as the truck operated in congested areas and traveled a steep haul road that provides access to the mine for all persons who work there, including miners and vendors. Because the motion inadequately explained the basis for the settlement, the Court, pursuant to its responsibilities under Section 110(k) of the Mine Act, required the Secretary to justify the large reduction. The Secretary did not comply. Instead, it retreated to its unchecked authority to vacate citations, dropping entirely the citation for failing to inspect equipment prior to its operation. Although present law allows the Secretary to vacate a citation, the Court is of the view that, in these circumstances, for the reasons which follow, that decision was antithetical to the purpose and spirit of the Federal Mine Safety and Health Act.

The background to this case is as follows. The Secretary's authorized representative, Inspector Douglas W. Johnson, investigated the event and then issued the two citations the day after the accident.¹ Both citations involved the same tractor-trailer truck and the overturning accident that resulted in the lost time injury to the truck driver.

Inspector Johnson cited Respondent ("Remington") for violations of 30 C.F.R. § 77.1606 and 30 C.F.R. § 77.404. The former standard, entitled "Loading and haulage equipment; inspection and maintenance," provides that "[m]obile loading and haulage equipment shall be

¹ The record does not indicate when MSHA was called, nor when the inspector first arrived at the mine.

inspected by a competent person before such equipment is placed in operation [and that] [e]quipment defects affecting safety shall be recorded and reported to the mine operator.” Thus, the focus of the standard is upon the inspection of equipment for defects prior to its use. The latter standard, 30 C.F.R. § 77.404, entitled “Machinery and equipment; operation and maintenance,” requires that “[m]obile and stationary machinery and equipment shall be maintained in safe operating condition and machinery or equipment in unsafe condition shall be removed from service immediately.” The focus of this standard is the requirement for maintaining equipment in safe condition and removing such equipment when it is not safe.

Citation No. 8120822, citing conduct violating 30 C.F.R. § 77.1606(a), described that the truck lost power going up a haul road and then rolled backwards and turned over, injuring the truck driver who sustained a lost time injury. The Secretary has now vacated this citation, which relates that *upon an examination, it was determined that 6 of 10 brakes on the trailer and coal truck were not functioning properly. Beyond the brake defects, there was another significant defect: the seat belt tether was not connected to the body of the truck cab.* As the Inspector stated in the citation, those defects should have been observed by the pre-operation examiner and corrected before the truck was put into operation. As noted, adding to the seriousness of this accident, the citation recorded that the haul road where the accident occurred “is used by all persons, including miners and vendors traveling to and leaving the mine site.”

Citation No. 8120824, which alleges a violation of 30 C.F.R. § 77.404(a), provides additional details, stating what is plain, that the truck was not being maintained in safe operating condition, thus violating the standard. Adding to the information provided in Citation No. 8120822, the investigation determined

that the right front and right rear tandem brake shoes were not contacting the drums, as evidenced by the fact that a person could turn the wheels by hand[] as well as easily move a feeler gauge between the brake shoes and the drum.

Further, it was determined [th]at all four brake units on the trailer were functionally inoperable. The left front brake stroke was measured to be 2 and 3/4ths inches. A feeler gauge would easily pass between the shoes and the drum on all four brakes. When tested after the trailer was turned upright by pulling the trailer empty, all four wheels rolled easily. Therefore, 6 of 10 brakes on the tractor trailer unit were not working.

It should be noted that none of the statements in either citation were challenged in the motion to approve the settlement or in the decision to vacate Citation No. 8120822. Instead, in a manner which could be construed as inconsistent with the purpose of the Mine Act, the Secretary only cryptically advises that “[u]pon further review of the facts and the available evidence [for that citation, he has] determined that the Citation shall be vacated,” citing *RBK Construction*, 15 FMSHRC 2099 (Oct. 1993).²

² It is worth observing that, some 22 years ago, the Commission in *RBK Construction* arrived at the conclusion that the Secretary has carte blanche authority to vacate, but only by
(continued...)

When the Court reviewed the Secretary's Motion to Approve Settlement, it noted the following claim in the motion:

The Operator asserts that policies were properly in place for any independent contractors working on its property regarding the proper examination and maintenance of equipment. Additionally, all such independent contractors were required to undergo training before working on the mine's property. Given the steps taken by the mine operator to ensure that independent contracting companies on its property work in a safe manner, questions exist as to whether the citation was properly issued as highly likely or moderate negligence.

Except for minimal non-substantive, grammatical changes in the rationale, and with absolutely no substantive changes to the text of the rationale, the settlement justification for the second Citation, No. 8120824, simply repeated the language presented to justify Citation No. 8120822.³

² (...continued)

analogy to a case involving the Occupational Safety and Health Review Commission, in which the Supreme Court made a conclusion to that effect. *See Cuyahoga Valley Ry. Co. v. United Transp. Union*, 474 U.S. 3 (1985). But, of course, the Occupational Safety and Health Act has neither the uniquely deadly history of the mining industry nor a provision in that Act akin to the Mine Act's Section 110(k). A fair reading of the Mine Act is that Congress intended greater enforcement oversight for the Federal Mine Safety and Health Review Commission to meet the solemn responsibility to protect the safety and health of our Nation's miners. That the Secretary of Labor proceeds in these settlements with an antipathy towards openness and transparency, opposed to the need to explain to MSHA or to the miners who are exposed to safety and health hazards, of the reasoning for its settlements or decisions to vacate citations and orders, is a basis for revisiting that present authority to vacate.

³ It should be noted that, prior to ultimately offering up the most minimal justification for the penalty reductions, the Secretary begins each settlement with truculence, advising that

[i]n reaching this settlement, the Secretary has evaluated the value of the compromise, the likelihood of obtaining a still better settlement, the prospects of coming out better, or worse, after a full trial, and the resources that would need to be expended in the attempt. The Secretary has determined that the public interest and the effective enforcement and deterrent purposes of the Mine Act are best served by settling the citations as indicated above [and that] [c]onsistent with the position the Secretary has taken before the Commission in *The American Coal Company*, LAKE 2011-13, the Secretary believes that the pleadings in this case and the above summary give the Commission an adequate basis for exercising its authority to review and approve the Secretary's settlement under Section 110(k) of the Mine Act, 30 U.S.C. § 820(k).

The translation of this is that, despite the clear language of Section 110(k), the Secretary does not believe it owes an accounting to anyone to explain its penalty reductions of any size.

(continued...)

The full text of the rationales for the two citations demonstrates that they merely repeat themselves:

[For Citation No. 8120822:]The Operator asserts that policies were properly in place for any independent contractors working on its property regarding the proper examination and maintenance of equipment. Additionally, all such independent contractors were required to undergo training before working on the mine's property. Given the steps taken by the mine operator to ensure that independent contracting companies on its property work in a safe manner, questions exist as to whether the citation was properly issued as highly likely or moderate negligence. As a compromise, the Operator agreed to accept a penalty reduction with the paper remaining as issued.

[For Citation No. 8120824:]The operator asserts that policies properly were in place for any independent contractors working on its property regarding the proper examination and maintenance of equipment. Additionally, all such independent contractors were required to undergo training before working on the mine's property. Given the steps taken by the mine operator to ensure that independent contracting companies on its property work in a safe manner, questions exist as to whether the citation was properly issued as highly likely or moderate negligence. As a compromise, the Operator agreed to accept a penalty reduction with the paper remaining as issued.

The above information was the only support given for the 50% penalty reduction sought in the Secretary's Motion to Approve Settlement.

The Court, fulfilling its responsibilities under section 110(k) of the Mine Act, denied the motion on March 26, 2015. *Remington, LLC*, 37 FMSHRC 674 (Mar. 2015) (ALJ). In its denial, the Court noted:

Examining the Secretary of Labor's offered language for Citation No. 8120822, it may be broken down into 2 asserted justifications:

1. The Operator's policies were properly in place for any independent contractors working on its property regarding the proper examination and maintenance of equipment.
2. All such independent contractors were required to undergo training before working on the mine's property.

From that, the Secretary asserts that "[g]iven *the steps taken* by the mine operator to ensure that independent contracting companies on its property work in a safe manner, questions exist as to whether the citation was properly issued as highly

³ (...continued)

Beyond not informing the Commission, the Secretary takes the position that neither its client, the Mine Safety and Health Administration, the inspectors who enforce the safety and health standards, nor the miners themselves are entitled to any explanation for penalty reductions.

likely or moderate negligence.” (emphasis added). Yet, the Secretary’s motion does not contend that the gravity or negligence findings should be modified. The only change is the 50% reduction in the penalty.

Therefore, it becomes necessary to analyze exactly what were “the steps taken by the mine operator to ensure that independent contracting companies on its property work in a safe manner.” This means, of course, steps taken in advance of the alleged violation. However, the motion does not identify at all the policies that were in place regarding the proper examination and maintenance of equipment, nor are any details provided about the training that “all such independent contractors were required to undergo [] before working on the mine’s property.”

Set against the detail-free rationale are the allegations of the citation, which relate that an accident occurred with a loaded tractor-trailer coal truck in which the driver sustained a lost-time injury. That citation asserts that following an accident, it was found that 6 of 10 brakes on a tractor-trailer coal truck were not functioning properly. This was especially significant, as the truck lost power, began rolling backwards, and turned over and, as noted, with the driver being injured. In addition, there was another significant defect beyond the brake defects in that the seat belt tether was not connected to the body of the truck cab. As the Inspector stated in the citation, those defects should have been observed in the pre-operative check of the vehicle. Adding to the seriousness, the citation noted that the haul road where the accident occurred “is used by all persons, including miners and vendors traveling to and leaving the mine site.”

The citation concludes with the Inspector’s statement that the operator “failed to provide adequate oversight to ensure the safety of persons on the mine property.” In abating the violation, the truck was removed from service and additional training was provided to truck operators.

In the Court’s view, the Secretary’s motion fails to identify the steps taken in advance to ensure that there are proper examinations of equipment, nor does the motion provide detail about the training provided for independent contractors prior to working on the mine’s property. The claim that “policies were properly in place” for proper examinations is not supported in the motion and the facts alleged in the citation refute that claim. Thus, it is disconcerting for the Secretary to tout “the steps taken by the mine operator to ensure that independent contracting companies on its property work in a safe manner.”

The second citation alleges a violation of 30 C.F.R. § 77.404, entitled “Machinery and equipment; operation and maintenance,” which requires that “[m]obile and stationary machinery and equipment shall be maintained in safe operating condition and machinery or equipment in unsafe condition shall be removed from service immediately.” The citation involves the same tractor-trailer truck and accident identified in Citation No. 8120822. The focus of this alleged violation is the requirement for maintaining equipment in safe condition and

removing such equipment when it is not safe. The body of the citation essentially provides additional details concerning the statement in Citation No. 8120822, that 6 of the 10 brakes on the tractor trailer were not working. The post-accident investigation revealed that the truck's brake shoes were not contacting their drums, and that this was easily determinable. For the trailer itself, "all four brake units [on it] were functionally inoperable," and those defects were likewise easy to detect. The citation also added to the information provided in the first citation that the "truck operates in congested areas and travels [a] steep haulroad (sic)." For the abatement, the citation relates that "[t]he truck and trailer have been removed from service and additional truck inspection and maintenance programs have been implemented." (emphasis added).

The Motion's assertion that the operator had proper examination and maintenance procedures in place is negated by the statements in the citation that show that they were plainly ineffective. Policies claimed to be "properly ... in place" cannot support a 50% reduction in a penalty, where those policies, properly in place or not, miss obvious defects. The citation makes this point, asserting that the operator failed to provide adequate oversight or programs to ensure that contractor equipment is being maintained in safe operating condition. In its rawest form, the Motion essentially seeks the large reduction for an examination and maintenance program which was demonstrably ineffective. Accordingly, merely repeating the inadequately supported justification offered for Citation No. 8120822 does not work for Citation No. 8120824 either. Therefore, the rationale for this 50% reduction is also unsupported. It seems obvious that, based on the citation's statement, which was not challenged in the Motion, the equipment was not being properly maintained and the defects were, as the citation alleges, easily detectable. Further, the Secretary cannot claim as the basis for its penalty reduction, that the training, alleged to have been provided for proper examination and maintenance, was properly in place where there was a need to implement additional truck inspection and maintenance programs.

In sum, an inspection program to ensure that defects affecting safety are detected, a training program to ensure that those who make such inspections are competent, and related training to ensure that unsafe equipment is immediately removed from service cannot be cited as the basis for a penalty reduction, let alone a reduction on the order of 50%, where such programs utterly fail to detect obvious defects and patently unsafe equipment. Accordingly, the Secretary's Motion is DENIED.

The Secretary is directed to either provide the required information to support the claims about the nature of the mine operator's policies that were in place and the details of the training provided prior to the accident and to then explain how those translate into a justification for a 50% penalty reduction, or to prepare for hearing. The Secretary is further directed to advise the Court of his intentions within two weeks from the issuance of this decision. The Court also directs the Secretary to advise it as to whether the contractor, Powers Trucking

Company, was cited for these alleged violations, and if so, the status of such matters.

Id. at 675-77.

In a disappointing reaction to this Court's decision denying the Secretary's settlement motion, the Secretary has, as noted, only filed a motion to dismiss. Whereas the Court identified its concerns over the lack of justification for the twin 50% reductions of the two citations involved, the Secretary, citing its unreviewable ability to vacate citations/orders per *RBK Construction*, provided none of the supportive information and instead opted to vacate Citation No. 8120822. This action occurred *four years* after the citations were issued *and then only after* the Court required additional supportive information to justify the half-off reduction for each of the two citations. Under the new arrangement, Remington, LLC, agreed to pay the original, full proposed penalty for the other Citation, No. 8120824. That Respondent would go along with this outcome is not surprising; it would now pay approximately the same reduced total dollar amount as originally proposed and gain a bonus in the bargain in that now only one, instead of two violations, would appear on its history of violations, a manifestly improved outcome.

Although it is presently true that the Secretary can opt to vacate, the Court still considers it useful and enlightening to set forth the circumstances that brought forth that approach in this case. This docket originally, and by "originally," the Court means since June 9, 2011, cited Remington for an alleged violation of 30 C.F.R. § 77.1606(a) (citation No. 8120822) and another for 30 C.F.R. § 77.404(a), (citation No. 8120824). One needs to appreciate that these two cited standards address different safety concerns. In the case of 30 C.F.R. § 77.1606(a), the section cited, entitled, "Loading and haulage equipment; *inspection* and maintenance," provides: "[m]obile loading and haulage equipment shall be inspected by a competent person before such equipment is placed in operation [and additionally requires that] [e]quipment defects affecting safety shall be recorded and reported to the mine operator." Thus, the focus of the standard is upon the *inspection* of equipment for defects prior to its use. In contrast, 30 C.F.R. § 77.404(a) entitled "Machinery and equipment; *operation* and maintenance," requires that "[m]obile and stationary machinery and equipment shall be maintained in safe operating condition and machinery or equipment in unsafe condition shall be removed from service immediately." The focus of this alleged violation is the requirement for *maintaining equipment in safe condition and removing such equipment when it is not safe*.

For Citation No. 8120822, the Secretary relates in his motion to dismiss that, "[u]pon further review of the facts and available evidence [four years after the citation was issued], the Citation shall be vacated," thereby dropping the charge alleging a violation of the *inspection* of equipment requirement for defects prior to its use. Perforce, dropping this citation means that the Secretary no longer had any issue with Respondent's inspection duties in this instance, a troubling invocation of his prosecutorial discretion, as this matter involved an accident in which a loaded tractor-trailer haul truck lost power, rolled backwards and overturned, injuring the truck driver. That the Secretary "[u]pon further review of the facts and available evidence" would now decide that he had no issue with the inspection duty is a curious development, since the citation alleged that 6 of 10 brakes on a tractor-trailer coal truck were not functioning properly and, an additional defect, the seat belt tether was not connected to the body of the truck cab. Pointedly, none of these defects have been withdrawn by the Secretary as being inaccurate — not in the

original settlement motion, nor in his decision to vacate the citation. In his original settlement motion for Citation No. 8120822, the Secretary said nothing to contradict the core allegation of the alleged violation: a failure to properly inspect loading and haulage equipment. Settlement Motion at 3.

In contrast, the citation stated that the cited conditions, brakes and seat belt problems, “should have been observed by the pre-operation examiner and corrected before the truck was put into operation.” Significantly, for this now-vacated citation, the MSHA inspector added, again without contradiction in this record, that “[t]he brake failure directly led to the accident and the lost time injury that the driver sustained.”

No one has claimed that the two citations were duplicative, either, which is not surprising since, as noted above, the focus of 30 C.F.R. 77.404(a) (the standard allegedly violated in the non-vacated citation) is upon *maintaining* mobile equipment in safe condition and removing such equipment immediately when it is not safe.

With his presently unfettered right to vacate, the Secretary has concluded that Respondent failed to properly maintain its truck, but that there was no failure to properly inspect it, and by that decision that there were no equipment defects affecting safety and therefore, with no defects, there was no duty to record them.

At bottom, the Secretary by his action has concluded that the truck was not being properly maintained, but somehow the obvious defective conditions were outside of the inspection responsibilities of 30 C.F.R. § 77.1606(a), with that standard’s obligation to inspect *before* equipment is placed in operation. Ostensibly, by vacating Citation No. 8120822, he must have concluded that all of the defects found by the MSHA investigation occurred *after* the truck was placed in operation. But it is plain what has really transpired here: a recalcitrant Secretary of Labor, steadfastly protesting that he need not tell the Commission anything other than that a matter has been settled, despite section 110(k) of the Mine Act, rather than explain the basis for reducing both violations by 50%, simply collaborated with the mine operator to drop one citation entirely and have the other paid fully, as originally assessed. The effect was the Secretary reached the same result it sought originally, but now without having to explain the reductions. As noted above, this result is a win for the mine operator, as it ends up paying nearly the same total penalty as presented in the original motion to approve the settlement and with the bonus in the bargain that only one violation, instead of two, will now appear on its history of violations.⁴

⁴ Perhaps embarrassed at the Secretary’s tactic, Respondent felt compelled to speak to the turn of events. In its Notice of Withdrawal of its Contest on Citation No. 8120824, Remington states:

Remington has contended throughout this contest that the Secretary’s decision to cite Remington for the conduct of Powers Trucking Company was duplicative, contrary to MSHA’s own policy regarding the issuance [of] citations to both independent contracting companies and production operators, and not in furtherance of mine safety or the aims of the Mine Act.

(continued...)

It would appear that the Secretary considers himself a victor by taking this approach in response to the Court's reasonable request for additional information to explain the half-off reduction in the two citations. However, just because under the present state of case law the Secretary can vacate a citation without explaining the basis for the decision, does not mean that he should do so.⁵ In this Court's view, the practical effect, invoked from the comfy safety of an

⁴ (...continued)

Moreover, Remington has contended that, even assuming the issuance of citations to Remington was appropriate, the gravity and negligence findings on both 8120822 and 8120824 were inappropriate given the facts of this situation. Powers Trucking Company was an independent contractor responsible for complying with MSHA regulations including [performance of] pre-operational checks of its equipment and the maintenance of that equipment in safe operating condition. Remington provides training to such companies prior to the commencement of work, alerting the company to any hazards on the site and reinforcing the fact that compliance with MSHA regulations, in addition to being required by law, is required as a condition of performing work on Remington's property. There were no issues, accidents, or citations relating to the condition of equipment or the preoperational checks of equipment with regards [sic] to this independent contracting company which would have alerted Remington that greater oversight was warranted. This was another company with no prior compliance issues, and the pre-operational check of this truck may have been performed by that company at another location.

Resp't Notice at 2. The Court would comment that these protestations would be more convincing had the defects not been so obvious and extensive.

⁵ Abuse of prosecutorial discretion has been discussed by the Commission. *See, e.g., Phillips Uranium*, 4 FMSHRC 549, 553 (Apr. 1982); *Speed Mining*, 27 FMSHRC 935, 936-37 (Dec. 2005) ("[I]t is the Secretary's position that, based on prosecutorial discretion, her decision to cite an operator and/or an independent contractor is not reviewable by the Commission. However, in a recent decision, *Twentymile Coal*, 27 FMSHRC 260 (March, 2005), the Commission considered and rejected this position. The Commission took cognizance of the Secretary's reliance upon *Heckler v. Chaney*, 470 US 821, 830-32 (1985), and its progeny, also relied on by the Secretary herein, which preclude review under Section 701, (a)(2) of the Administrative Procedure Act. The Commission found such authority to be inapplicable. The Commission, 21 FMSHRC supra, at 265-266 set forth its holding as follows: 'As the Commission has previously recognized, Section 507 of the Mine Act expressly provides that Section 701 of the APA does not apply to Commission proceedings. *Old Ben*, 1 FMSHRC at 1483-84. Thus, we find such authority cited by the Secretary to be inapplicable. Furthermore, the Mine Act does not contemplate that the Secretary's enforcement decisions are unreviewable by the Commission. Section 113 of the Mine Act, 30 U.S.C. § 823, contains no limits on the Commission's review on questions pertaining to the exercise of the Secretary's enforcement discretion. To the contrary, the breadth of the Commission's review is broad. The Commission,

(continued...)

office, and not a mine, is to undermine the hard work done by mine inspectors, MSHA's enforcement efforts generally, and, potentially, the future safety of miners. So, while there is a winner in one sense, the Secretary of Labor, there are also several losers when an unreviewable approach is utilized. The approach taken here can hardly be deemed a plus for MSHA or for miners. When asked legitimate questions to defend a half-off penalty imposition, the Secretary, rather than being anxious to explain a safety-based explanation, has merely advised that it has decided to withdraw one of its citations. Under such an approach, there may be expected discouragement on the part of MSHA mine inspectors doing their enforcement job. After all, if legitimate citations can simply be vacated, as a natural human reaction, this can be expected to adversely affect inspectors in the performance of their jobs.

It is also noted that the Secretary, rather than vacating as here, has in the past vigorously enforced cases where these two standards were cited together. A few examples make this point. In *Kentucky Fuel Corp.*, 36 FMSHRC 159 (Jan. 2014) (ALJ), Judge Margaret Miller dealt with the same two standards, 77.404 and 77.1606, and both were directed to the same dozer. The Judge addressed Kentucky Fuel's argument that the two alleged violations were duplicative and that one should be vacated. Finding no merit to the contention, Judge Miller noted that in *Cumberland Coal Resources, LP*, 28 FMSHRC 545 (Aug. 2006), *aff'd*, 515 F.3d 247 (3d Cir. 2008), the Commission explained that "citations are not duplicative so long as the standards involved impose separate and distinct duties upon an operator." *Ky. Fuel Corp.*, 36 FMSHRC at 167 (quoting 28 FMSHRC at 553 (citing *W. Fuels-Utah, Inc.*, 19 FMSHRC 994, 1003-05 (June 1997), and *Cyprus Tonopah Mining Corp.*, 15 FMSHRC 367, 378 (Mar. 1993))). The Judge went on to observe that "one standard imposes a requirement that defects be repaired or the equipment be taken out of service, while the other standard requires that the equipment not be operated until they are repaired. These are separate and distinct requirements and require different actions from the operator in order to comply." *Id.*

Similarly, in *A&R Trucking*, 35 FMSHRC 3628 (Dec. 2013) (ALJ), Judge John Lewis upheld violations of 30 C.F.R. § 77.404(a) and 30 C.F.R. § 77.1606(a), where both citations pertained to the same truck. Even though no accident was involved in *A&R Trucking*, included among the factors considered, the Secretary took into account the road conditions in seeking penalties, as enhancing the risk of injury occurring. *Id.* at 3630-31. Unlike the Secretary's actions here, in *A&R Trucking*, *special assessments were sought in the amount of \$110,900.00 and \$25,800.00 for the violations of §§ 77.1606(c) and 77.404(a), respectively. Id.* at 3631.

Yet another example is *Reading Anthracite Co.*, 32 FMSHRC 399 (Apr. 2010) (ALJ), in which the Secretary cited both 30 C.F.R. § 77.1606 and 30 C.F.R. § 77.404 for safety issues relating to the same truck. In that instance the failures to comply with the cited standards played a role in the death of a miner, the truck's driver. *See generally id.*

In the face of the two citations that were issued here, and despite that an accident occurred resulting in a lost-time injury to the miner who was operating the defective truck, the

⁵ (...continued)

in its discretion, may grant review if a "substantial question of law, policy or discretion is involved" (30 U.S.C. § 823(d)(2)(A)(ii)(IV)), and the Commission's review authority extends to cases in which no party has filed a petition for review (30 U.S.C. § 823(d)(2)(B)).").

Secretary has in this instance taken an approach to enforcement at odds with cases such as those cited above.

The Court regrets that the Secretary, more concerned with asserting that he alone can compromise penalties, without accounting the reasons for such reductions to the Commission, MSHA, or our Nation's miners, has opted for this shuttered approach to mine safety and health. For now, the Court has no recourse to this misguided view. Accordingly, as the Secretary has vacated Citation No. 8120822, that citation is dismissed. Given Respondent's withdrawal of its contest of the penalty for Citation No. 8120824 and its agreement to pay the assessed penalty of \$4,329.00 for that citation, this case is **DISMISSED**.

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

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