July and August 2018

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ADMINISTRATIVE LAW JUDGE ORDERS

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Review was granted in the following case during the months of July and August 2018:

Secretary of Labor v. The Doe Run Company, Docket Nos. CENT 2015-318, et al. (Judge Lewis, July 20, 2018)

Secretary of Labor v. Peabody Midwest Mining, LLC., Docket No. LAKE 2017-450 (Judge Simonton, June 28, 2018)

Review was not denied in any case during the months of July and August 2018.

COMMISSION DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

July 12, 2018

MICHAEL WILSON, JUSTIN GREENWELL and BRANDON SHEMWELL	Docket No. KENT 2015-673-D
v.	
ARMSTRONG COAL COMPANY, INC.	
BRANDON SHEMWELL	Docket No. KENT 2016-96-D
v.	
ARMSTRONG COAL COMPANY, INC.	
JUSTIN GREENWELL	Docket No. KENT 2016-108-D
v.	
ARMSTRONG COAL COMPANY, INC.	

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

DECISION APPROVING SETTLEMENT

BY: Althen, Acting Chairman, and Jordan, Commissioner

These proceedings arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. ("Mine Act" or "Act"). They involve complaints of interference filed by Michael Wilson, Justin Greenwell, and Brandon Shemwell ("Complainants") against Armstrong Coal Company ("Armstrong") pursuant to section 105(c)(3) of the Act. 30 U.S.C. § 815(c)(3).

After a hearing on the merits, an Administrative Law Judge concluded that Armstrong had interfered with the Complainants' rights as miners' representatives with respect to the claims in Docket Nos. KENT 2016-108-D and KENT 2015-673-D, but found no unlawful interference with respect to Shemwell's claim in Docket No. KENT 2016-96-D. 39 FMSHRC 1072, 1094-96 (May 2017) (ALJ). Armstrong and Shemwell, respectively, filed petitions seeking review of the Judge's findings. The Commission granted review on June 15, 2017.

On November 1, 2017, Armstrong Energy and its affiliates (including the Respondent) initiated proceedings before the United States Bankruptcy Court for the Eastern District of Missouri ("Bankruptcy Court") under Chapter 11 of the United States Bankruptcy Code. 11

U.S.C. § 101 et seq. On February 2, 2018, the Bankruptcy Court entered an order confirming Armstrong's bankruptcy plan and authorizing Armstrong to settle certain outstanding causes of action, including the proceedings at issue.

Accordingly, the parties have filed a joint motion to approve settlement. Pursuant to the agreement, the terms of the settlement shall be confidential.

Having reviewed the terms of the proposed settlement agreement, the Commission grants the parties' joint motion for approval of settlement.[1] Armstrong is hereby ordered to make monetary payments to Complainants in accordance with the terms of the Settlement Agreement. These proceedings are dismissed.

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

/s/ Mary Lu Jordan
Mary Lu Jordan, Commissioner

[1] Acting Chairman Althen notes his colleagues' suggestion in their concurrence that the standard for review of a penalty settlement under section 110(k) of the Act, 30 U.S.C. § 820(k), governs a settlement by a miner of his/her own section 105(c)(3) case. A section 105(c)(3) case is litigated by an individual miner at his/her own cost and expense and "in his own behalf." He wonders, therefore, whether the Commission or a Judge could substitute their judgment concerning whether a settlement is fair and reasonable for the judgment of the complaining miner who wants to settle, thereby requiring him to continue his litigation. Separately, could the Commission or a Judge reject a private settlement as not in the "public interest" and compel a miner to continue his case at his cost and risk of loss? Because these questions are not at issue here, Acting Chairman Althen only expresses a concern. He would suggest full briefing and argumentation of these issues before a Judge or the Commission rejects a settlement because it was not "fair" to the miner who wants it or the settlement of the miner's action on his own behalf fails to achieve a public interest.

Commissioners Young and Cohen, concurring:

We join our colleagues in approving the settlement, without qualification. We write separately due to the unusual posture of this case.

Typically, the Secretary is a party in cases brought before us under the Act, and settlement motions presented to the Commission by the Secretary include language excepting proceedings under the Mine Act from terms limiting the operator's liability. While the Secretary is not a party to this settlement, parties in proceedings brought under section 105(c)(3) should recognize that the Commission has held that we have a duty to review and approve settlements of discrimination cases, including provisions unrelated to penalties. *Sec'y of Labor on behalf of Maxey v. Leeco, Inc.*, 20 FMSHRC 707 (July 1998).

The settlement agreement contains, among other provisions, a confidentiality clause. We note that even though this agreement is not within the scope of section 110(k) of the Act, 30 U.S.C. § 820(k), and the Secretary is not a party to the agreement, the Commission should review settlements of cases brought under section 105(c)(3) under the standard we have established for approval of settlements, i.e. whether the settlement is fair, reasonable, appropriate under the facts, and protects the public interest. *American Coal Co.*, 38 FMSHRC 1972, 1982 (Aug. 2016). The Commission thus should especially review non-monetary settlement terms, including non-admission-of-liability clauses and confidentiality clauses, to determine whether they may improperly limit the operation of the Act in contravention of the public interest.

In the present case, the operator has ceased operations, closed and sealed the mine, entered bankruptcy proceedings and sold the mine's assets. There is thus not a risk of potential harm to the public interest.

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

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

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

July 31, 2018

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	
v.	Docket No. WEST 2016-730-M
RAIN FOR RENT	

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

DECISION

BY THE COMMISSION:

This case arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act"), and concerns two citations issued by the Secretary of Labor's Mine Safety and Health Administration ("MSHA") to Rain For Rent.[1] One citation alleges a failure to procure an inspection of an air tank. The second citation alleges a failure to label a safety can.

After a hearing on the merits of the citations, a Commission Administrative Law Judge found that the Secretary had demonstrated violations of both standards. The Judge assessed civil penalties of $100 per citation. 39 FMSHRC 1448 (Jul. 2017) (ALJ). Rain For Rent filed a petition for discretionary review with the Commission, which we granted. After review of the issues raised in the petition, we affirm the Judge's decision.

I.

Factual and Procedural Background – Citation No. 8785486

In July 2016, MSHA Inspector Nicholas Basich was conducting an inspection at a sand and gravel mine in California. A Rain For Rent service truck was parked near the mine shop. A mechanic had arrived to work on the mine's water pumps. A compressed-air receiving tank and an air compressor were mounted on the bed of the truck. The mandatory safety standard at 30

[1] Rain For Rent is a contractor that provides temporary liquid handling solutions, including pumps, tanks, filtration and spill containment. Joint Stip. 1.

C.F.R. § 56.13015[2] requires compressed-air receiving tanks to be inspected by an inspector with a valid National Board Commission[3] in accordance with the applicable chapters of the National Board Inspection Code ("NBIC").

Basich searched the tank for an indication that it had been inspected, but found no sign that the requirements of the safety standard had been satisfied. After calling Rain For Rent's office, the mechanic was still unable to provide any record demonstrating compliance. As a result, Basich issued Citation No. 8785486, alleging a violation of section 56.13015.

Thereafter, a Rain For Rent employee removed the tank and discovered a metal plate affixed to it, bearing the name of the tank's manufacturer (Manchester Tank) and the year 2014. At the hearing, a photo of the metal plate was admitted into the record. Robert Kelly George, the vice president of environmental health and safety for Rain For Rent, testified that he believed the metal plate demonstrated that the tank had been inspected by the manufacturer in accordance with the requirements of the safety standard.[4] Tr. 93-94, 96. Inspector Basich did not observe the metal manufacturer's plate at the time of inspection, but testified nevertheless that its existence did not demonstrate compliance with the mandatory safety standard. Tr. 49-50.

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[2] Section 56.13015, 30 C.F.R. § 56.13015, states that:

> (a) Compressed-air receivers and other unfired pressure vessels shall be inspected by inspectors holding a valid National Board Commission and in accordance with the applicable chapters of the National Board Inspection Code . . . .
> (b) Records of inspections shall be kept in accordance with requirements of the National Board of Inspection Code . . . .

[3] The National Board is an organization "comprised of Chief Inspectors of States and Cities of the United States, and Provinces of Canada and is organized for the purpose of promoting greater safety to life and property by securing concerted action and maintaining uniformity in the construction, installation, inspection and repair of boilers and other pressure vessels and their appurtenances . . . ." Sec'y Ex. 4 at 3 (NBIC Manual).

[4] In California, a state serial number is stamped on a tank by a qualified inspector after an inspection. Tr. 29-30; Cal. Code Regs. tit. 8, § 462(g) ("Qualified inspectors making the first field inspection of air tanks . . . shall stamp on the tank a State serial number . . . which shall became a permanent means of identification. This assigned number . . . shall be stamped adjacent to the manufacturer's ASME Code stamping . . . .")

The Judge found that the record did not demonstrate that a person with a valid National Board Commission had performed an inspection. The Judge relied on the inspector's testimony that there was no evidence that the tank had been inspected since its manufacture by an individual with a National Board Commission.[5] 39 FMSHRC at 1452; Tr. 22, 29, 51-52. Accordingly, the Judge concluded that the Secretary had established a violation of section 56.13015.

II.

Disposition – Citation No. 8785486

Rain For Rent essentially makes two arguments regarding the citation on review: (1) the Judge impermissibly incorporated California state requirements into the safety standard without proper legal notice and in violation of Rain For Rent's due process rights; and (2) the Judge's finding is not supported by substantial evidence. We are not persuaded.

A. The Judge did not rely on California state law.

Rain For Rent argues that Inspector Basich issued the citation because the air tank lacked a state serial number stamp assigned in accordance with Cal. Code Regs. tit. 8, § 462(g). Rain For Rent contends that this California regulatory requirement was incorporated into the federal mandatory safety standard without due process of law.

Rain For Rent is wrong. The Judge did *not* find a violation of the standard because of a failure to satisfy the California Code.[6] Instead, the Judge held that Rain For Rent failed to provide any evidence demonstrating that a person with a National Board Commission had inspected the tank as required by the plain language of section 56.13015(a). 39 FMSHRC at 1452; 30 C.F.R. § 56.13015(a) ("pressure vessels shall be inspected by inspectors holding a valid National Board Commission").

The standard provided Rain For Rent with adequate notice that an inspection by a person with a valid Commission was required. *See Canyon Fuel Co*., 39 FMSHRC 1578, 1582 (Aug. 2017) (notice is established when the language of the standard provides unambiguous notice of its requirements) (citations omitted). In short, we reject Rain For Rent's due process argument.

[5] The Judge noted that the purpose of the NBIC is to maintain the integrity of pressure vessels *after* they have been placed into service, and the NBIC requires that inspections be conducted at the time of installation. Here, the installation occurred after the manufacturer's inspection. 39 FMSHRC at 1452 n.8.

[6] The Judge explicitly found California regulations to be inapplicable to this proceeding. 39 FMSHRC at 1452 n.7.

B. The Judge's decision is supported by substantial evidence.

Rain For Rent also argues that the Judge's decision lacks the support of substantial evidence.[7] Specifically, it maintains that the Judge erred by failing to recognize that a compliant inspection was performed by the manufacturer in 2014.

There is no evidence in the record that indicates that a person with a valid National Board Commission ever inspected the tank. George conceded that he was unaware of any inspection conducted by an inspector with a valid Commission during the time that Rain For Rent owned it. Tr. 134. Furthermore, Rain For Rent's reliance on the manufacturer's prior inspection as allegedly satisfying the safety standard requirements fails to appreciate the purpose of the NBIC. As the Judge noted, a manufacturer is governed by different inspection standards. 39 FMSHRC at 1452 n.8. The NBIC governs inspections of air tanks *after* they are placed into service and requires the inspection to be performed at the time of installation. *Id*. (citing Sec'y Ex. 4 at 3, 5). In contrast, the ASME (The American Society of Mechanical Engineers) Boiler and Pressure Vessel Code establishes the manufacturer's inspection requirements concerning the construction of the tank.[8] [9] Therefore, according to the NBIC, the existence of a metal plate signifying that

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

[8] George referred to the manufacturer's code as the "ASTM" standard and the Judge adopted the use of that term. 39 FMSHRC at 1451 (citing Tr. 86-88, 93; R. Ex. 1). However, the metal plate at R. Ex. 1 appears to contain the insignia of the *ASME*, which publishes the standards governing the construction of air receiving tanks. *See* Why "Demand The Mark" www.asme.org/shop/certification-accreditation/why-demand-the-mark (last visited May 31, 2018). Notably, Rain For Rent introduced no document authored by the ASTM (American Society for Testing and Materials), nor did it provide citation to an ASTM standard.

[9] The opening paragraphs of the NBIC refer to the relationship between the ASME code and the NBIC. Specifically, it states:

> The ASME Boiler and Pressure Vessel Code establishes rules of safety governing the design, fabrication and inspection during *construction* of boilers and pressure vessels.
>
> It is the purpose of the NATIONAL BOARD INSPECTION CODE to maintain the integrity of such boilers and pressure vessels *after they have been placed into service* by providing rules and guidelines for inspection after installation, repair, alteration and rerating, thereby helping to ensure that these objects may continue to be safely used.

Sec'y Ex. 4 at 3 (emphasis added).

Manchester Tank inspected the tank after constructing it does not prove that a person with a valid National Board Commission inspected the tank after it was placed into service.

Rain For Rent also contends that the absence of a record of inspection is not evidence that an inspection was not performed. Section 56.13015 has two subsections: one requires a proper inspection and the other requires that the operator maintain records. The citation at issue alleged a violation of the entire standard. Sec'y Ex. 2. It logically follows that, when an inspection is not performed, there are no records to be maintained. Accordingly, the absence of any record of inspection supports the Judge's finding of a violation.

Rain For Rent further maintains that the Judge erred by failing to follow his prior decision in *D&H Gravel*, 31 FMSHRC 272, 279-80 (Feb. 2009) (ALJ) (vacating a citation alleging a violation of section 56.13015(a) because the operator produced a manufacturer's inspection stamp). However, Commission Procedural Rule 69(d) provides that a Judge's decision does not constitute binding precedent. 29 C.F.R. § 2700.69(d). Accordingly, the Judge was not obligated to follow *D&H Gravel* or any other ALJ decision. Additionally, the Judge expressly recognized that in that case it did not appear that the question of whether the equipment was inspected by someone with a valid National Board Commission was raised by either party.[10] 39 FMSHRC at 1452.

For these reasons, we affirm the decision of the Judge with regard to Citation No. 8785486.

III.

Factual and Procedural Background – Citation No. 8785487

The inspector also observed two red, five-gallon safety cans in the bed of the Rain For Rent service truck during his July 2016 inspection. The safety cans were manufactured with multiple warning symbols and statements on their exteriors, e.g., a statement warning that the safety can is designed to contain flammable liquid. One of the safety cans in the truck contained diesel fuel. Someone had written the word "diesel" on that safety can. The other safety can in the truck contained gasoline. There was no writing on that can indicating that it contained gasoline.

The safety standard at 30 C.F.R. § 56.4402 requires that "[s]mall quantities of flammable liquids drawn from storage shall be kept in safety cans labeled to indicate the contents." Citation No. 8785487 alleges that the can containing gasoline lacked the required label.

The Judge affirmed the citation, concluding that the operator failed to label the can to indicate that it contained gasoline. 39 FMSHRC at 1455.

[10] The decision in *D&H Gravel* followed a hearing on 22 citations in which the operator defended himself *pro se*.

IV.

Disposition – Citation No. 8785487

Rain For Rent contends that the Judge made multiple errors. For instance, Rain For Rent maintains that the standard's requirement that safety cans be "labeled to indicate its contents" is ambiguous. Therefore, it states that it reasonably relied on guidance from the Occupational Safety and Health Administration ("OSHA"). Moreover, it asserts that in MSHA's Program Policy Letter No. P13-IV-01 (Aug. 13, 2013) ("the PPL"), MSHA certified that compliance with OSHA labeling standards results in compliance with MSHA standards.

While the PPL states that OSHA's Hazardous Communication Standard, 29 C.F.R. § 1910.1200, is compatible with MSHA's HazCom standards at Part 47, it further specifies that some aspects of OSHA's regulations "may not be compatible with other existing MSHA standards." Moreover, the safety standard at section 56.4402 is found in Part 56 of the MSHA regulations (not Part 47). The PPL also reminds mine operators that they "must comply with all existing MSHA standards concerning physical hazards as they are defined in those [other MSHA] standards." Accordingly, the PPL does not provide an exception to the specific requirements of section 56.4402.

Rain For Rent further argues that section 56.4402 is overly vague and therefore it lacked notice as to how to comply. In determining whether a safety standard provides adequate notice, the Commission generally applies an objective standard, asking "whether a reasonably prudent person familiar with the mining industry and the protective purposes of the standard would have recognized the specific prohibition or requirement of the standard." *Ideal Cement Co.*, 12 FMSRHC 2409, 2416 (Nov. 1990). Because section 56.4402 requires that a safety can be labeled to identify its contents, a reasonably prudent miner would ensure that the safety can was marked in a way that identified its contents with a reasonable degree of specificity, e.g., "gas" or "gasoline." We further conclude that a reasonably prudent miner would understand that warnings indicating that the contents are flammable and should not be ingested are not sufficient to identify the type of flammable liquid within.

Finally, Rain For Rent asserts that the safety can was labeled by color. George testified that the operator's policy requires diesel fuel to be in a yellow can and gasoline to be in a red can.[11] However, this defense is significantly undermined by the fact that the diesel fuel in the truck was also contained in a red can.[12]

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[11] Rain For Rent alleges that the supply catalog excerpt at R. Ex. 3 denotes that the red safety can in use "was designated as red for storage of gasoline pursuant to the manufacturer." R. Br. at 19. We note that the manufacturer's catalog actually states that the "Type I red safety can[s] (for flammable liquids) . . . are . . . approved for safe handling and storage of gasoline *and other flammable liquids.*" R. Ex. 3 at 11 (emphasis added).

[12] George maintained that a written label was added to the red can containing diesel fuel to denote that the contents of that can varied from the default color code. Tr. 100.

In any event, as the Judge found, Rain For Rent's color policy did not provide sufficient information to satisfy the safety standard. As he explained:

> Having two red cans with different contents could cause confusion where one can is not labeled. Written labels which indicate the contents of a safety can are intended to help avoid the guesswork of what might be in a can and help guard against the misuse of the can's contents as a result of a lapse in attention, or fatigue. The lack of the word "gas" or "gasoline" in this instance could result in such misuse.

39 FMSHRC at 1455-56 (footnote omitted).

The safety standard requires the can to be labeled. We conclude that the Judge did not err in finding that the safety can lacked an appropriate label. Accordingly, we affirm the decision of the Judge.

V.

Conclusion

The Judge's decision upholding Citation Nos. 8785486 and 8785487 is affirmed.

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

/s/ Mary Lu Jordan
Mary Lu Jordan, Commissioner

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

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

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

August 2, 2018

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) v. THE AMERICAN COAL COMPANY and UNITED MINE WORKERS Of AMERICA and UNITED STEEL, PAPER and FORESTRY, RUBBER MANUFACTURING, ENERGY, ALLIED INDUSTRIAL and SERVICE WORKERS INTERNATIONAL UNION	Docket No. LAKE 2011-13

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

DECISION

BY THE COMMISSION:

This civil penalty proceeding, arising under the Federal Mine Safety and Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act" or "Act"), is before us for a second time on interlocutory review. At issue is whether the Commission's Administrative Law Judge erred in denying a motion to approve a settlement between The American Coal Company ("AmCoal") and the Secretary of Labor.

In our first decision on review, we affirmed in all respects the Judge's denial of the proposed settlement. *American Coal Co.*, 38 FMSHRC 1972, 1986 (Aug. 2016). We noted that the Secretary had chosen this proceeding as a "test case" for advancing his position that the Commission's authority to review settlements of contested civil penalties under section 110(k) of

the Mine Act, 30 U.S.C. § 820(k),[1] is much more limited than that described in *Black Beauty Coal Co.*, 34 FMSHRC 1856, 1860-64 (Aug. 2012).[2] We reaffirmed our settlement authority stated in *Black Beauty* and concluded that the Judge did not abuse his discretion in denying settlement approval when, contrary to the Commission's procedural rules and precedent, the Secretary refused to provide any facts to support the penalty reduction agreed to in settlement. We remanded the matter to the Judge, and the Secretary ultimately submitted an amended motion to approve settlement.

In this decision, we consider a different question: whether the Judge applied an incorrect legal standard in denying the amended settlement motion. For the reasons discussed below, we conclude that the Judge erred, vacate his denial, and remand for further proceedings consistent with this opinion.

I.

Factual and Procedural Background

This case involves 32 contested citations issued to AmCoal in 2010. In 2013, the Secretary filed a motion to approve a proposed settlement that involved a 30% across-the-board penalty reduction for each citation, while preserving all citations as written. The Judge issued a decision denying the motion because the motion had failed to provide any factual support for the penalty reduction. Rather than provide such facts, the Secretary essentially represented to the Judge that the proposed settlement was in the public interest and compatible with the enforcement goals of the Department of Labor's Mine Safety and Health Administration ("MSHA").

We granted interlocutory review of the Judge's denial. In our decision, noting the rare split-enforcement model that the Commission shares with MSHA and the unique settlement review authorized by section 110(k), we stated that "although Congress gave the Secretary most of the enforcement powers under the Act, it expressly chose to give to the Commission the authority to assess penalties and approve settlements." 38 FMSHRC at 1979. We explained that the Commission applies the standard of whether a proposed penalty reduction is fair, reasonable, appropriate under the facts, and protects the public interest in evaluating whether a settlement should be approved. We further stated that factual information supporting the penalty agreed to

[1] Section 110(k) provides:

> No proposed penalty which has been contested before the Commission under section 105(a) shall be compromised, mitigated, or settled except with the approval of the Commission. No penalty assessment which has become a final order of the Commission shall be compromised, mitigated or settled except with the approval of the court.

30 U.S.C. § 820(k).

[2] *See AmCoal*, 38 FMSHRC at 1972-73 (Memorandum from Heidi Strassler, Assoc. Solicitor for Mine Safety and Health, to Regional Solicitors, May 2, 2014).

through settlement must be submitted in accordance with Commission Procedural Rule 31, 29 C.F.R. § 2700.31, and Commission precedent. Because the Secretary had not provided facts to support the proposed penalty reduction, we concluded that the Judge had not abused his discretion in denying the settlement motion. Accordingly, we affirmed the denial and remanded for further proceedings.

The Secretary then filed a petition for review of the Commission's decision with the United States Court of Appeals for the D.C. Circuit. On March 17, 2017, the Secretary filed a motion to withdraw his petition from the D.C. Circuit, and the court granted the motion.[3]

The Secretary subsequently submitted an amended motion to approve the settlement to the Judge.

In the motion, the Secretary provided additional information. This information did not include additional facts specifically tied to the six penalty criteria listed in section 110(i) of the Mine Act, 30 U.S.C. § 820(i),[4] for each of the 32 citations. Rather, the Secretary made general allegations, including that there was a substantial risk that the court could reduce the degree of negligence or gravity with respect to 14 of the 32 citations, and that one additional citation ran the risk of being vacated because of a legal dispute between the operator and the Secretary regarding the standard cited. The Secretary further stated that after trial, if each of the citations at risk received a worst-case outcome, the resulting penalties would reflect an approximately 50% reduction from the penalties originally proposed by the Secretary, based on the penalty tables contained in 30 C.F.R. Part 100. Given this, the Secretary asserted that an across-the-board 30% reduction reflected an appropriate compromise. The Secretary further submitted that he considered the fact that the proposed settlement preserved all of the citations as written to be a significant advantage for future enforcement purposes.

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[3] Prior to the Secretary's withdrawal of the appeal, the Commission was informed that the Department of Justice ("DOJ") had initiated a process to consider whether it was appropriate for the Department of Labor to pursue that petition and, if so, what position the United States should take in the matter. The DOJ requested the Commission to provide its views on the matter. On January 27, 2017, the Commission submitted to the DOJ its views, which were consistent with its first interlocutory decision.

[4] Section 110(i) provides in part:

> In assessing civil monetary penalties, the Commission shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

30 U.S.C. § 820(i).

On May 2, 2017, the Judge issued an order denying the Secretary's motion. 39 FMSHRC 1173 (May 2017) (ALJ). The Judge concluded that the Secretary had again failed to provide adequate facts to support the 30% across-the-board reduction for each citation agreed to in settlement. *Id.* at 1178. The Secretary subsequently sought interlocutory review of the Judge's denial.

On May 19, 2017, the Judge issued an order denying the Secretary's motion for interlocutory review. 39 FMSHRC 1187 (May 2017) (ALJ). The Judge reiterated his finding that a "one-size-fits-all 30% reduction is not likely to be satisfactory because each violation is fact-specific." *Id.* at 1188. The Judge emphasized his view that the facts required are facts about the alleged violations. The Judge also explained that only "*legitimate* disputes of fact" are usually sufficient to support a proposed reduction. *Id.*

The Secretary again filed a petition for interlocutory review with the Commission, which AmCoal subsequently joined. The Commission granted interlocutory review and heard oral argument. As they did below, the United Mine Workers of America ("UMWA") and the United Steel, Paper and Forestry, Rubber Manufacturing, Energy, Allied Industrial and Service Workers International Union intervened in this proceeding and participated in oral argument.

On review, the Secretary and AmCoal argue that the Judge applied an erroneous legal standard in concluding that the Secretary failed to provide facts in support of the proposed settlement. They submit that such facts are not limited to facts related to the section 110(i) penalty criteria or to the alleged violations. The Secretary and operator further contend that the Commission's Procedural Rules do not preclude a settlement of multiple penalties for a uniform percentage reduction for each penalty and that the Judge's denial essentially makes such reductions impermissible. Finally, AmCoal argues that the Commission should not require a settling party to concede "legitimate" questions of fact during the settlement approval process, as the Judge required. The intervenor unions respond that the Commission should affirm the Judge's order as a proper exercise of his discretion.

II.

Disposition

Our disposition of the first interlocutory appeal of this proceeding, as law of the case, is the basis upon which this decision stands. *See Dolan v. F&E Erection Co.*, 23 FMSHRC 235, 240 (Mar. 2001). We briefly reiterate only those portions of the decision necessary for disposition of the instant review.

Section 110(k) of the Mine Act sets forth in relevant part that a proposed penalty that has been contested shall only be settled if approved by the Commission or court. *See* n.1, *supra*.

The legislative history of section 110(k) describes the Congressional intent behind this provision. The Senate Report states that the "compromising of the amounts of penalties actually paid" had reduced "the effectiveness of the civil penalty as an enforcement tool." S. Rep. No. 95-181, at 44 (1977), *reprinted in* Senate Subcomm. on Labor, Comm. on Human Res., *Legislative History of the Federal Mine Safety and Health Act of* 1977, at 632 (1978) ("*Legis. Hist.*"). The Committee noted that settlement efforts were "not on the record, and a settlement need not be

approved by the Administrative Law Judge." *Id.* In order to solve this problem, Congress emphasized the need for transparency in the penalty settlement process, so that miners, Congress, and other interested parties could "fully observe the process." *Id.* at 633. The requirements of section 110(k) were "intend[ed] to assure that the abuses involved in the unwarranted lowering of penalties as a result of off-the-record negotiations are avoided." *Id.* Thus, Congress expressed its "inten[t] that the Commission and the Courts will assure the public interest is adequately protected before any reduction in penalties."[5] *Id.*

Based on the language of section 110(k) and its legislative history, the Commission has explained that "Congress authorized the Commission to approve the settlement of contested penalties in section 110(k) '[i]n order to ensure penalties serve as an effective enforcement tool, prevent abuse, and preserve the public interest.'" *AmCoal*, 38 FMSHRC at 1976 (quoting *Black Beauty*, 34 FMSHRC at 1862). In "effectuating this Congressional mandate, the Commission and its Judges consider whether the settlement of a proposed penalty is fair, reasonable, appropriate under the facts, and protects the public interest." *Id.* at 1976.

The Commission and its Judges "must have information sufficient to carry out this responsibility." *Id.* at 1981. Consequently, through its procedural rules, the Commission has required parties to submit facts supporting a penalty amount agreed to in settlement. *Id.* In particular, Commission Procedural Rule 31 requires that a motion to approve penalty settlement must include for each violation "the penalty proposed by the Secretary, the amount of the penalty agreed to in settlement, and facts in support of the penalty agreed to by the parties." 29 C.F.R. § 2700.31(b)(1).

The Commission reviews a Judge's denial of a proposed settlement under an abuse of discretion standard. *Sec'y of Labor on behalf of Shemwell v. Armstrong Coal Co.*, 36 FMSHRC 1097, 1101 (May 2014). An abuse of discretion may be found where "there is no evidence to support the Judge's decision or if the decision is based on an improper understanding of the law." *Id.* (citation omitted).

As the Commission has repeatedly observed, a Judge's "'front line oversight of the settlement process is an adjudicative function that necessarily involves wide discretion.'" *Id.* (citations omitted). Judges must have sufficient information to fulfill their duty of determining if a settlement of a penalty is fair, reasonable, appropriate under the facts, and protects the public interest. Moreover, such information permits a Judge to fulfill the duty of articulating reasons for the approval so that the process of compromising penalty amounts is transparent, as Congress

[5] We have recognized that the Commission has "the job of determining whether a reduced penalty in settlement serves the public interest." *AmCoal*, 38 FMSHRC at 1983. The Commission's responsibility for performing this job is not satisfied by conclusory statements in settlement motions that reduced penalties "serve the public interest." *See, e.g., Asarco, Inc.*, 18 FMSHRC 2081, 2082-84 (Dec. 1996) (denying settlement motion where the parties merely represented that the settlement was consistent with the statutory criteria and in the public interest).

intended. A Judge who properly determines that a settlement motion lacks sufficient information may permissibly request further facts from the parties.[6] *See Black Beauty*, 34 FMSHRC at 1863.

The Commission's settlement procedures have resulted in a near perfect approval rate for motions to approve settlement. In fact, as the Secretary agreed, Oral Arg. Tr. 19, from fiscal year 2015 through approximately seven months of fiscal year 2018, 99.8% of proposed settlements have been approved.[7]

Against this backdrop, we review the Judge's denial of the proposed settlement in his May 2 and May 19 orders. The Judge identified the "essential problem" with the Secretary's amended motion to approve settlement as a failure to "provide a penalty-factor related explanation to support the uniform 30% reduction for each citation." 39 FMSHRC at 1178. The Judge added that "even if plausible facts were presented and the Secretary admitted those facts presented genuine disputes," it would be unlikely for each citation to end up with a 30% reduction. 39 FMSHRC at 1188.

We conclude that the Judge made prejudicial errors in the determinations supporting his denial of the proposed settlement, which amounted to an abuse of discretion.

First, the Judge did not refer to the standard we articulated for evaluating penalty reductions in settlement in our first interlocutory decision, i.e., whether the proposed penalty reduction is fair, reasonable, appropriate under the facts, and protects the public interest. Neither is there any indication that the Judge attempted to apply that standard.

Second, the Judge erred by applying the criteria in section 110(i) of the Mine Act in an overly rigid manner, resulting in determinations that conflict with Commission precedent. The Judge stated that the facts supporting the settlement "must be tied to the six statutory criteria in [s]ection 110(i)," and concluded that the Secretary provided "*no facts* to support the reduction sought." 39 FMSHRC at 1176, 1177.

[6] It appears that some Commission Judges have a practice of seeking additional information from parties when evaluating a proposed settlement, and that this procedure works effectively. Oral Arg. Tr. 21-22, 31-32, 34-35, 50, 75-76. If a party believes that a Judge has overstepped his or her authority or otherwise committed an abuse of discretion in requesting such facts, a party may appeal that matter to the Commission on an interlocutory basis. *See Solar Sources, Inc.*, Unpublished Order dated May 16, 2018 (granting interlocutory review of 39 FMSHRC 2052 (Nov. 2017) (ALJ)).

[7] Indeed, during oral argument, counsel for the intervenors pointedly reiterated the description of the Secretary's and AmCoal's position in challenging the Commission's authority to require factual support of settlement as a "solution . . . in search of a problem." Oral Arg. Tr. 55.

The Judge recognized that the Commission has previously explained that standards for factual support for a penalty reduction in settlement may be found in section 110(i).[8] *AmCoal*, 38 FMSHRC at 1981; *Black Beauty*, 34 FMSHRC at 1864. However, we have also stated that "parties may submit facts supporting a settlement that fall outside of the section 110(i) factors but that support settlement." 38 FMSHRC at 1982. We explained that "section 110(k) 'contains no explicit restrictions on what a Commission Judge may consider when reviewing a settlement proposal,'" and that the lack of restrictions does not mean that the Commission's review is unbounded. *Id.* (quoting *Black Beauty*, 34 FMSHRC at 1865). "Rather, it means that there may be considerations beyond the six statutory criteria of section 110(i) that are relevant to whether a settlement proposal is fair, reasonable, appropriate under the facts, and protects the public interest." *Id*. Thus, the Judge erred in restricting the factual submissions to facts relating to only the section 110(i) criteria.

In this regard, the Judge erred in discounting that the operator had agreed to accept all of the citations as written. The Secretary makes a valid point that the fact that the proposed settlement preserves all of the citations as written could assist the Secretary in future enforcement efforts against this operator by ensuring that the paper record reflects the Secretary's views regarding gravity and negligence stated in the citations. The Judge improperly rejected the value of accepting the citations as written on future enforcement actions as "pure blather." 39 FMSHRC at 1191.

The Commission has recognized that "[t]he 'affirmative duty' that section 110(k) places on the Commission and its judges to 'oversee settlements,' . . . necessarily requires the judge to accord due consideration to the entirety of the proposed settlement package, including both its monetary and nonmonetary aspects." *Shemwell*, 36 FMSHRC 1103 (quoting *Madison Branch Mgmt*, 17 FMSHRC 859, 867-68 (June 1995)). Although the Judge appropriately determined that the submission of additional substantive facts to support the proposed penalty reductions was necessary,[9] he erred in not giving any weight to the non-monetary value of accepting the citations as written.[10]

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[8] The amended motion to approve settlement provided stipulations of fact relating to three of the section 110(i) criteria, that is, AmCoal's history of prior violations, AmCoal's size, and the effect on AmCoal's ability to stay in business. Mot. to Approve Settlement and Dismiss Proceeding at ¶ 10.

[9] We emphasize that our conclusion that the Judge appropriately determined that the submission of additional substantive facts was necessary applies only to the confines of the instant proceeding.

[10] Commissioner Cohen asserts that while facts which fall outside the section 110(i) factors may be relevant, Rule 31(b)(1) also requires the parties to identify substantive facts that support the penalty agreed to by the parties for each violation. The Secretary represented here that after a hearing a judge might reduce the level of negligence or gravity with respect to 14 of the 32 citations, and might vacate another citation because of an undisclosed legal dispute with the operator, and that in a worst case scenario, the total penalties might be reduced by

(continued…)

Third, after determining that additional facts pertinent to the six statutory criteria were necessary to support the penalty reduction, the Judge erred by not permitting the operator to submit those facts. The Judge noted that the operator's counsel offered to provide facts to support the settlement motion. 39 FMSHRC at 1188.[11]

However, there is no requirement that facts supporting a proposed settlement must necessarily be submitted by the Secretary. Facts supporting a penalty reduction in a settlement motion may be provided by any party individually or by parties collectively as long as there is a certification by the filing party that any non-filing party has consented to the granting of the settlement motion. *See* 29 C.F.R. § 2700.31(b)(2).

Fourth, in rejecting the operator's offer to submit factual support for the proposed settlement, the Judge stated that the "settlement must express from the Secretary that the Respondent's assertions present *legitimate* questions of fact which can only be resolved through the hearing process." 39 FMSHRC at 1188 (emphasis in original); *see also* 39 FMSHRC at 1188 ("even if plausible facts were presented and the Secretary admitted that those facts presented

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[10] (… continued)
approximately 50% using the Part 100 penalty tables. S. Br. at 4. These representations did not provide the Judge with sufficient detail to permit the Judge to have an understanding of why the penalties were being reduced. The Secretary's boilerplate recitations of having evaluated the value of the compromise, the prospects of coming out better or worse after a trial, and "maximizing his prosecutorial impact" add nothing. As succinctly stated by counsel for the intervenor UMWA, "by requiring the Secretary to provide some basic justification based on substantive fact, it creates a record so that interested parties like Congress, like the mine workers, like the steel workers can observe the process and make sure that we haven't reverted to the state of affairs that existed prior to enactment of the current legislation in section 110(k)." Oral Arg. Tr. 63. By bundling 32 citations into a single proposed settlement and reducing each penalty by the same percentage, the Secretary seems to be trying to avoid the scrutiny which Congress has required of the Commission. *See* S. Rep. No. 95-181 at 45, *Legis. Hist.* at 633.

Commissioner Cohen further notes that the Commission's recognition of the importance of substantive facts in a settlement agreement (and the Secretary's ability to provide them) is illustrated by the issuance this day of a decision in another case involving the denial of a proposed settlement, *The Ohio County Coal Co.*, No. WEVA 2018-0165. In the *Ohio County Coal* settlement motion, the Secretary proposed to reduce the penalty for Citation No. 9090883, a violation of 30 C.F.R. § 75.202(b) caused by a miner working under unsupported roof, based on a reduction in the level of the operator's negligence from "moderate" to "low." The Secretary explained that the operator was contending that the violation was caused by an hourly employee and that it was unaware of the violation, an alleged fact supported by the MSHA inspector's notes that the foreman was not present when the violation occurred. Based on the Secretary's description of these disputed facts, the Commission in *Ohio County Coal* is reversing the Judge and approving the proposed settlement.

[11] Indeed, AmCoal's counsel repeated this offer that the operator was "ready" and "willing" to provide such facts, including during oral argument before us. Oral Arg. Tr. 27.

genuine disputes, it would be highly questionable if . . . each citation ended up with . . . [a] 30% reduction"); 39 FMSHRC at 1176 ("facts which are in dispute need to be identified.").

Facts alleged in a proposed settlement need not demonstrate a "legitimate" disagreement that can only be resolved by a hearing. The Commission's Procedural Rules and standing precedent do not contain such a requirement. Rather, the Commission has recognized that parties may submit facts that reflect a mutual position that the parties have agreed is acceptable to them in lieu of the hearing process. *See Amax Lead Co. of MO*, 4 FMSHRC 975, 977-78 (June 1982) ("Inherent in the concept of settlement is that the parties find and agree upon a mutually acceptable position that resolves the dispute and obviates the need for further proceedings."). Put another way, the facts required by Rule 31 may include a description of an issue on which the parties have agreed to disagree. The Commission does not require concessions from parties in settlement as long as the parties provide mutually acceptable facts that demonstrate the proposed penalty reduction is fair, reasonable, appropriate under the facts, and protects the public interest.

The Judge's requirement for "legitimate" questions of fact or facts that present "genuine" disputes (39 FMSHRC at 1188) is further flawed in that it appears that the Judge has assigned probative value to some facts without the benefit of an evidentiary hearing. We have recognized that, in reviewing information supporting a reduced penalty in settlement, a Judge "need not make factual findings with respect to each of the section 110(i) factors as a Judge would in the assessment of a penalty after hearing." *AmCoal*, 38 FMSHRC at 1982. In a final disposition after a hearing, a Judge must make findings on each section 110(i) factor in assessing a penalty, while a Judge's decision approving settlement need only "set forth the reasons for approval and . . . be supported by the record."[12] 29 C.F.R. § 2700.31(g); *Cantera Green*, 22 FMSHRC 616, 622-26 (May 2000).

Fifth and finally, the Judge erred in requiring the Secretary to provide an explanation for the specific numerical percentage reduction of each penalty.[13] The Judge determined that facts were lacking that would explain "the uniform 30% reduction for each citation," and observed that "it would be highly questionable if, through some magic, each citation ended up with an odds-defying 30% reduction." 39 FMSHRC at 1178; 39 FMSHRC at 1188. He reasoned that "a one-size-fits-all 30% reduction is not likely to be satisfactory because each violation is fact-specific." 39 FMSHRC at 1188; *see also* 39 FMSHRC at 1177 ("the Secretary sets forth this new

[12] Indeed, in 1980, the Commission amended Rule 31 to delete a requirement that decisions approving settlement must include a discussion of the section 110(i) criteria in order "to enhance the flexibility of the judges to approve settlements." 45 Fed. Reg. 44301, 44302 (1980); *see also Black Beauty*, 34 FMSHRC at 1866.

[13] The Judge found that the uniform percentage reduction for all 32 citations was additionally problematic because "at least 5 (five) of the citations were specially assessed." 39 FMSHRC at 1188. Contrary to the Judge's finding, the subject proposed settlement involves no penalties that were specially assessed. The five specially assessed penalties referred to by the Judge were the subject of a separate docket, Docket No. LAKE 2011-12. A decision approving settlement in LAKE 2011-12 was issued by this Judge on September 13, 2013, and became a final order of the Commission 40 days after its issuance. 30 U.S.C. § 823(d)(1).

justification and again, against all odds, miraculously arrives at . . . a 30% across-the-board reduction").

As the Judge acknowledged (39 FMSHRC at 1188), we have stated that uniform penalty reductions are not improper *per se*. *AmCoal*, 38 FMSHRC at 1985. Although monetary considerations that relate to section 110(i) factors may be amenable to explanation about why a particular numerical reduction is appropriate for a violation, there may be non-monetary considerations that also support settlement that are not amenable to such precision.

Indeed, when the Commission considers monetary and non-monetary aspects of a settlement together, across-the-board penalty reductions may be useful, and consistent with the Commission's settlement review standard. *Id.* at 1982. The Judge's requirements for precise individual adjustments for each citation or order would effectively make across-the-board percentage reductions impermissible *de facto* in large settlements involving multiple citations or in global settlements involving multiple operations or inspections and a voluminous number of citations. *See, e.g., Aracoma Coal Co.*, 30 FMSHRC 1160 (Dec. 2008) (ALJ), *aff'd*, 32 FMSHRC 1639 (Dec. 2010) (approving global settlement); *Alex Energy, Inc.*, 39 FMSHRC 1458 (July 2017) (ALJ) (approving global settlement); *Magma Copper Co. N/K/A BHP Copper, Inc.*, 1998 WL 433234 (July 1998) (ALJ) (approving an approximately 50% reduction of 46 penalties).

Given these errors, we vacate the Judge's denial and remand for further proceedings. The Judge shall provide the parties with 30 days to submit facts supporting the proposed penalty reductions, which may be submitted individually or collectively pursuant to Commission Procedural Rule 31. Consistent with this decision, the Judge shall consider the proposed settlement, including monetary and non-monetary aspects, in determining whether the proposed settlement is fair, reasonable, appropriate under the facts, and protects the public interest.

III.

Conclusion

For the reasons set forth above, we vacate the Judge's denial of the amended proposed settlement. We remand to the Judge for further submissions and consideration consistent with this decision.

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

/s/ Mary Lu Jordan
Mary Lu Jordan, Commissioner

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

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

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

August 2, 2018

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

v.

ROCKWELL MINING, LLC

Docket No. WEVA 2017-220

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

DECISION

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act" or "Act"). On May 9, 2018, an Administrative Law Judge issued a decision denying a motion to approve a settlement between the Secretary of Labor and Rockwell Mining, LLC. On June 5, 2018, the Judge issued an order certifying his ruling for interlocutory review pursuant to Commission Procedural Rule 76, 29 C.F.R. § 2700.76.

On June 25, 2018, we granted interlocutory review on the question of whether the Judge applied an incorrect legal standard and abused his discretion in denying the motion to approve settlement. We also stated that this case presents an issue that is before the Commission in *The American Coal Co.*, Docket No. LAKE 2011-13 ("*AmCoal*"), and stayed this proceeding pending further order of the Commission.

We hereby lift the stay in this proceeding.[1] We conclude that the Judge applied an incorrect legal standard in denying the settlement motion and abused his discretion. For the reasons discussed below, we vacate the Judge's order denying the settlement motion and remand for further proceedings.

I.

Factual and Procedural Background

This case involves seven citations, for which the Secretary initially proposed penalties in the sum of $6,977. On November 30, 2017, the Secretary filed a settlement motion agreed to by both parties. By the terms of that settlement, one citation would be vacated and six citations would be affirmed. Three of the six citations would be affirmed as issued and their civil penalty amounts would remain as proposed by the Secretary. The penalties for Citations Nos. 9068232, 9070540 and 9070542, however, would be reduced under the terms of the settlement.

[1] On this same date, we also issue our decision in *AmCoal*.

With respect to Citation No. 9068232, which alleged a rib control violation, the penalty would be reduced from $446 to $244. In support of the reduction, the motion to approve settlement states that Rockwell argued that evidence would establish that it was not negligent, that it was taking steps to control the ribs by installing rib bolts, and that the cited rib conditions likely occurred after the most recent examination of the area. The motion also provides that the "Secretary notes that no rock dust was observed in the cracks in the ribs indicating that the cracks were fairly recent." Mot. at 3.

With regard to Citation No. 9070540, which alleged a failure to maintain required clearance in an escapeway due to a parked mantrip, the penalty would be reduced from $2,598 to $2,000. The settlement motion sets forth Rockwell's argument that it was not negligent because there was no evidence as to how long the mantrip was parked or that management was aware of it.

As to Citation No. 9070542, which alleged a cable splicing violation, the penalty would be reduced from $666 to $443. The motion states that Rockwell argued that the levels of gravity and negligence were "overwritten" and that the violation was not of a significant and substantial nature because there were no exposed inner leads in the splice, that the cable was continually moved, and that the damage likely occurred sometime after the most recent weekly electrical examination. Mot. at 4.

The Judge denied the settlement on the basis that it lacked sufficient factual support. The Judge concluded that there was no representation by the parties that there is a legitimate dispute on any issue of fact or law. In his order certifying his denial for interlocutory review, the Judge explained that it was "insufficient for the Secretary to merely *identify* the Respondent's contentions." Order dated June 5, 2018 at 3 (emphasis in original). Rather, in his view, the Secretary must acknowledge that the "Respondent has identified legitimate issues of fact, which matters are in dispute and which can only be resolved by the hearing process." *Id.* He concluded that no information was presented to help him discern whether there was a legitimate dispute of fact or law with respect to Citation Nos. 9070540 and 9070542. As to Citation No. 9068232, he determined that the Secretary's observation regarding the lack of rock dust observed in the ribs' cracks was insufficient without a representation from the parties that there was a legitimate dispute of fact or law.

II.

Disposition

The Commission reviews a Judge's denial of a proposed settlement under an abuse of discretion standard. *Sec'y of Labor on behalf of Shemwell v. Armstrong Coal Co.*, 36 FMSHRC 1097, 1101 (May 2014).[2] When the Commission and its Judges evaluate settlement motions, we consider "whether the settlement of a proposed penalty is fair, reasonable, appropriate under the facts, and protects the public interest." *The American Coal Co.*, 38 FMSHRC 1972, 1976 (Aug. 2016).

The Commission and its Judges "must have information sufficient to carry out this responsibility." *Id.* at 1981. Consequently, through its procedural rules, the Commission has required parties to submit facts supporting a penalty amount agreed to in settlement. *Id.* In particular, Commission Procedural Rule 31 requires that a motion to approve penalty settlement must include for each violation "the penalty proposed by the Secretary, the amount of the penalty agreed to in settlement, and facts in support of the penalty agreed to by the parties." 29 C.F.R. § 2700.31(b)(1).

We conclude that the Judge erred in his denial of the settlement motion. First, he did not refer to or apply the standard set forth above that we use for evaluating penalty reductions in settlement.

Second, the Judge erred in concluding that a motion to approve settlement must include an acknowledgement by the Secretary that the Respondent's assertions present legitimate questions of fact which are in dispute and can only be resolved through the hearing process. As we stated in our *AmCoal* decision issued today, facts alleged in a proposed settlement need not demonstrate a "legitimate" disagreement that can only be resolved by a hearing. The Commission's Procedural Rules and precedents do not contain such a requirement.

Rather, the Commission has recognized that parties may submit facts that reflect a mutual position that the parties have agreed is acceptable to them in lieu of the hearing process. *See Amax Lead Co. of MO*, 4 FMSHRC 975, 977 (June 1982) ("Inherent in the concept of settlement is that the parties find and agree upon a mutually agreeable position that resolves the dispute and obviates the need for further proceedings."). Put another way, the facts required by Rule 31 may include a description of an issue on which the parties have agreed to disagree. The Commission does not require concessions from parties in settlement as long as the parties provide mutually acceptable facts that demonstrate the proposed penalty reduction is fair, reasonable, appropriate under the facts, and protects the public interest.

Accordingly, we conclude that the Judge applied an incorrect legal standard in denying the settlement motion and abused his discretion in denying the motion to approve settlement.

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[2] An abuse of discretion may be found where there is no evidence to support the Judge's decision or if the decision is based on an improper understanding of the law. *The American Coal Co.*, 38 FMSHRC 1972, 1976 (Aug. 2016).

III.

Conclusion

For the reasons set forth above, we hereby vacate the Judge's decision denying the settlement and remand this matter to the Judge for reconsideration consistent with this opinion and our decision in *AmCoal* issued on this date.

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

/s/ Mary Lu Jordan
Mary Lu Jordan, Commissioner

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

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

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

August 22, 2018

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	
v.	Docket No. PENN 2014-816
CONSOL PENNSYLVANIA COAL COMPANY, LLC	

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

DECISION

BY THE COMMISSION:

This case arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act" or "Act"). Consol Pennsylvania Coal Company, LLC ("Consol") appeals an Administrative Law Judge's decision upholding a citation issued to it by the Department of Labor's Mine Safety and Health Administration ("MSHA"). 39 FMSHRC 1279 (June 2017) (ALJ). The citation alleges a violation of 30 C.F.R. § 50.10(b)[1] for Consol's failure to immediately contact MSHA after learning that a miner had sustained an injury that had "a reasonable potential to cause death."

We conclude that substantial evidence supports the Judge's finding that Consol had a duty to contact MSHA immediately after the accident. We also conclude that the Judge did not err in his penalty determination. Accordingly, we affirm the finding of a violation and the assessed penalty.

[1] 30 C.F.R. § 50.10(b) states: "The operator shall immediately contact MSHA at once without delay and within 15 minutes . . . once the operator knows or should know that an accident has occurred involving . . . (b) [a]n injury of an individual at the mine which has a reasonable potential to cause death . . . ."

I.

Factual and Procedural Background

A. Factual Summary

This case arose from an injury to a miner at a large underground coal mine in Pennsylvania. In August 2013, miner Robert Stern, an employee of GMS Mine Repair and a contractor at the mine, was helping scoop operator Daniel Greathouse free a scoop weighing 5-10 tons which had become stuck on a 5-ton rail car.[2] At approximately 3:15 a.m., Stern stepped between the two machines to assess the problem when the rail car suddenly became dislodged. Due to slack in the rail car's chain, it drifted back towards Stern, crushing him against the scoop bucket. Greathouse immediately reversed the scoop, moving it forward, and Stern fell to the ground.

The mine section foreman, John McDonald, and miner Colby Watson, who were working about 900 feet away, arrived on the scene within three to four minutes of being notified of the accident. When McDonald arrived, Stern was conscious and lying on his side. Stern said that he had been pinched and that he was in a lot of pain. He could not move his legs and could only feel a pinch in one leg. When Stern's legs were moved, he screamed in extreme pain.

McDonald immediately got on the radio and urged Consol Fire Boss and certified emergency medical technician ("EMT") Shannon Smith to get to the scene right away because there was "a man crushed." Tr. 165. He instructed Watson to get a gurney and the EMT kits. McDonald then called the Bunker to request that an ambulance be called and to have haulage cleared so that Stern could leave the mine quickly. As they removed Stern from the mine, he instructed the Bunker to call Life Flight, an emergency helicopter service. Shift Foreman Donny Tomlin, who was in a different part of the mine and one of Consol's employees responsible for notifying MSHA of reportable accidents, was also notified of the incident over the radio.

Within 10 minutes of receiving McDonald's call over the radio, EMT Smith, along with fellow Fire Boss Donald Wolfe, arrived on the scene. Smith noticed that Stern's leg was bent awkwardly, as if it was broken, and he could not move or feel anything in one leg. Wolfe applied a cervical spine brace to Stern's neck to hold it straight in case there was a spinal injury. There were abrasions and bruising on the right side of Stern's waist and hip area, as well as a small amount of blood.

As they were leaving the mine with Stern, Smith and McDonald noticed that Stern's abdomen was swollen or distended causing them to become concerned about internal bleeding. Stern also stated that it felt like something was coming out of his penis. Smith checked Stern's genitalia but did not see anything wrong. Smith performed an assessment on Stern called DCAPBTLS, in which he checked for deformities, contusions, abrasions, punctures, bruising/burns, tenderness, lacerations, and swelling. Upon completion of the assessment, Smith

[2] A scoop is a type of diesel or battery-operated equipment with a scoop attachment for cleaning up loose material, for loading mine cars or trucks, and hauling supplies. Am. Geological Institute, *Dictionary of Mining, Mineral, and Related Terms* 484 (2d ed. 1997).

testified that he knew that "we had to get Stern out of the mine . . . fairly quickly." Tr. 183. As they were removing Stern, Smith called the Bunker to have Life Flight waiting. Smith and McDonald testified that internal bleeding can cause death. Tr. 179-80, 225.

Stern asked Smith to tell his wife and family that he loved them if something happened to him. Smith checked Stern's pulse and determined it was not elevated. It took approximately 40-45 minutes to get Stern out of the mine from the time of the accident. When Smith turned Stern over to paramedics, he gave them his notes on what had occurred.

Meanwhile, Eric Cecil, who was working in the Bunker, called Mine Supervisor Michael Tennant at home at about 3:30-3:45 a.m. to notify him about the accident and that EMTs were on the way. Tennant, who is also responsible for notifying MSHA of accidents, immediately called his boss Eric Shuble, the mine general superintendent, to inform him of the accident. Tennant then headed to the mine. While en route, Tennant received a second call from the Bunker, in which additional details of the accident were provided, including the fact that Life Flight had been called.[3] He arrived at the mine at around 4:50 a.m., roughly 20 minutes after Stern had left for the hospital. Although Tennant, a licensed EMT, did not drive to the mine every time there was an accident, he chose to on this particular occasion because he stated that "an employee [had been] pinched between two large pieces of equipment." Tr. 243, 268.

At 5:09 a.m., roughly two hours after the accident had occurred, Tennant called MSHA and the Pennsylvania Department of Environmental Protection to report the accident.

According to the MSHA Escalation Report, Tennant notified MSHA of the accident at 5:09 a.m. MSHA Inspector Thomas Bochna learned of the accident at about 5:30 a.m., shortly after arriving to work. Bochna's investigation revealed that the accident occurred at about 3:15 a.m. The report also described the injuries as "unknown." Tr. 53; Ex. GX-3.

Bochna arrived at the mine at 7:00 a.m. the same day to begin an investigation. He proceeded to interview a number of Consol and GMS employees who were present during or immediately after the accident. Bochna interviewed Stern at the Health South Rehab Facility on September 4, 2013. He did not speak with any medical personnel who had treated Stern on the day of the accident or check with the hospital regarding Stern's injuries or condition. Roy Cumberledge, GMS Coordinator for the mine, told Bochna that a doctor at the hospital had opined that Stern's bleeding would stop on its own. Bochna did not ask anyone if they thought Stern's injuries had a reasonable potential to cause death nor did he ask about Stern's vital signs. According to statements by witnesses at the hospital, Stern suffered a broken pelvis bone and some internal bleeding that stopped on its own before surgery. He underwent surgery at about 1:00 p.m. to repair his pelvis.

A company-generated handout provided during the operator's safety talk following the accident described Stern's accident as having "a high potential for fatal accident." Ex. GX-10. Similarly, an internal Consol Report of Personal Injury (RPI) rated Stern's accident as having a fatal potential of 5 out of 5 rating, with 5 having the highest potential of fatality.

[3] Calls were also placed to Stern's wife and to representatives of GMS.

Upon completion of his investigation and 43 days after the incident, Bochna issued a citation for Consol's failure to notify MSHA immediately of the accident as required by 30 C.F.R § 50.10(b). Consol contested the citation.

B. Judge's Decision

A Commission Administrative Law Judge affirmed the violation. He found that "reasonable potential to cause death" in section 50.10(b) is a clear and unambiguous standard. He determined that a "totality of the circumstances" test should be used when analyzing the reporting requirement, and that it is reasonable that the Secretary consider the circumstances that resulted in an injury. 39 FMSHRC at 1294-95.

In considering the "totality of the circumstances," the Judge determined that when considering "mental and physical signs and symptoms, this Court has given much more probative weight to the evidence of injury available *at the scene of the accident and at the time of the accident and immediately thereafter*." *Id*. at 1295 (emphasis in original). He opined that, when assessing the propriety of the operator's section 50.10(b) determination, less weight is given to medical information gathered at the hospital and thereafter. Guided by Commission precedent, the Judge reasoned that "the need for a *prompt* determination is inherent in section 50.10 and that permitting operators to wait for a medical or clinical opinion would frustrate the immediate reporting of accidents." *Id*.

The Judge found that given the protective purpose of the Act, the applicable standard, and the totality of the circumstances, a prudent operator, knowledgeable of the industry, should have known that Stern's injuries had a reasonable potential to cause death. The Judge identified specifically that Stern was crushed between two multi-ton pieces of equipment, had abdominal swelling and severe pain, felt a bizarre sensation of something coming out of his genitals, had an oddly bent leg, inability to move his legs properly, visible abrasions and some blood loss, and made a dying proclamation. The Judge found these were signs and symptoms indicative of a potentially fatal injury. He also concluded that Consol's decision to call Life Flight was made because of justifiable concern that Stern might have internal bleeding, which could be life threatening. *Id*. at 1292-98.

The Judge rejected Consol's fair notice argument, reasoning that the circumstances presented here demanded that a reasonably prudent person would believe that Stern's condition had the potential to cause death. *Id*. at 1298-99.

For the same reasons, the Judge affirmed the Secretary's assessment of moderate negligence. He found that the available signs and symptoms indicated that Consol knew or should have known that an accident occurred that had a reasonable potential to cause death. Although he acknowledged that Consol reacted quickly and efficiently to help Stern and that it did eventually alert MSHA, the Judge did not find that these sufficiently mitigated its negligence. After considering the six statutory penalty criteria found at 30 U.S.C. § 820(i), the Judge also determined that the Secretary's proposed statutory minimum penalty of $5,000 was appropriate. *Id*. at 1298-1300.

II.

Disposition

Section 50.10(b) provides in pertinent part that an "operator shall immediately contact MSHA at once without delay and within 15 minutes . . . once the operator knows or should know that an accident has occurred involving . . . (b) [a]n injury of an individual at the mine which has a *reasonable potential* to cause death." 30 C.F.R. § 50.10(b) (emphasis added). The Commission has held that section 50.10 is triggered by the occurrence of an "accident," as defined in 30 C.F.R. § 50.2(h). *Cougar Coal Co*., 25 FMSHRC 513, 520 (Sept. 2003).[4]

The Mine Act and MSHA regulations do not define "reasonable potential to cause death," and the Commission has not found it necessary to do so. *Signal Peak Energy, LLC*, 37 FMSHRC 470, 474 (Mar. 2015).[5] However, the Commission has held that "an operator, in determining whether it is required to notify MSHA under 30 C.F.R. § 50.10, must resolve any reasonable doubt in favor of notification." *Id.* at 477.

The Commission has also held that when determining whether a generally worded standard is intended to apply to a specific situation, the evidence must be evaluated under the "reasonably prudent person" test. *Ideal Cement Co*., 12 FMSHRC 2409, 2415 (Nov. 1990) ("given the broad wording of this standard intended to be applied to myriad factual contexts, . . . it is appropriate to evaluate the evidence in light of what a "reasonably prudent person, familiar with the mining industry and the protective purpose of the standard, would have provided in order to meet the protection intended by the standard."); *Quinland Coals, Inc*., 9 FMSHRC 1614, 1617-18 (Sept. 1987); s*ee also* Emergency Mine Evacuation, 71 Fed. Reg. 71,430, 71,433-34 (Dec. 8, 2006) ("In using the 'reasonable potential to cause death'" basis for injuries and entrapments, the MINER Act[6] and the final rule retain an element of judgment . . . . [T]he operator's decision as to what constitutes a 'reasonable potential to cause death'. . . is based on what a reasonable person would discern under the circumstances.") (internal citations omitted).

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[4] Section 50.2(h)(2), for purposes of this citation, defines "accident" as "[a]n injury to an individual at a mine which has a reasonable potential to cause death." 30 C.F.R. § 50.2(h)(2). The regulation implements section 3(k) of the Act, which states that "'accident' includes a mine explosion, mine ignition, mine fire, or mine inundation, or injury to, or death of, any person." 30 U.S.C. § 802(k).

[5] Commissioner Cohen continues to believe, as he stated in *Signal Peak*, 37 FMSHRC at 474 n.8, that the Commission should adopt a definition for "reasonable potential to cause death," and suggests the following definition: "The reporting requirement of section 50.10(b) is triggered when a miner is injured in a manner that would cause a reasonably prudent mine operator to consider the possibility that the injured miner's life may be in jeopardy. Obviously, because the extent of an injury is not always immediately apparent, the totality of the circumstances, including how the injury occurred, should be considered by the mine operator."

[6] Congress enacted the Mine Improvement and New Emergency Response Act of 2006, Pub. L. No. 109-236, 120 Stat. 493 ("MINER Act") in response to fatal accidents at underground coal mines.

Therefore, consistent with our holding in *Signal Peak*, when assessing the merits of a violation under section 50.10(b), the Commission employs a reasonable person standard, resolving reasonable doubt in favor of notification. 39 FMSHRC at 474, 477.

A. "Totality of the Circumstances"

Consol argues that the Judge incorrectly applied a "totality of the circumstances" test, maintaining that the Commission expressly rejected such test in *Signal Peak*, *supra*. We disagree. The operator erroneously construes the Commission's declining to further define the term "reasonable potential to cause death" in *Signal Peak* as a rejection of the principle that the "totality of the circumstances" must be considered when assessing a violation under section 50.10(b). *See Signal Peak*, 37 FMSHRC at 474.

On the contrary, we have held that "[t]he immediateness of notification under section 50.10 must be evaluated on a case-by-case basis, *taking into account . . . all relevant variables affecting reaction and reporting*." *Wolf Run Mining Co*., 35 FMSHRC 3512, 3517 (Dec. 2013), *quoting Consolidation Coal Co*., 11 FMSHRC 1935, 1938 (Oct. 1989) (emphasis added). Given the inability to acquire quickly a clinical diagnosis and the need for prompt reporting, readily available information such as the nature of the accident and any observable indicators of trauma are relevant and proper for consideration in assessing whether an injury is reportable. *Signal Peak*, 37 FMSHRC at 476.

The phrase "totality of the circumstances" describes the scope of the available evidence considered when making a section 50.10(b) determination. As the Judge correctly noted, the scope of the relevant evidence available to assist for purposes of section 50.10(b) generally will consist of the evidence available at the scene of the accident, at the time of the accident, and immediately following the accident. 39 FMSHRC at 1295. While the record will often contain subsequent relevant information from medical professionals, this information will likely not materialize until the time to make a decision to notify MSHA has already passed. Therefore, it is less probative in a section 50.10(b) analysis.

Here, the Judge considered the totality of the relevant evidence available to Consol management during the period immediately surrounding Stern's injury. Specifically, he reviewed the signs and symptoms of injury,[7] such as whether Stern was conscious and alert, his complaints of pain, apparent physical abnormalities, and the cause of Stern's injury. The Judge also considered the response Consol deemed necessary to insure Stern's health and safety. *See Cougar Coal*, 25 FMSHRC at 520 (considering foreman's performance of CPR on unconscious miner who became conscious and alert shortly thereafter).

Accordingly, we conclude that the Judge's analysis was proper and entirely consistent with Commission precedent.

[7] Consol also characterizes the Judge's consideration of the "signs and symptoms" of injury as yet another distinct standard erroneously applied by the Judge. However, the signs and symptoms of a victim's injury will be the crux of an analysis used to determine whether an injury has a "reasonable potential to cause death." Consequently, this argument is without merit.

B. "Reasonable Potential to Cause Death"

Consol primarily bases its defense upon the definition of the term "accident" in 30 C.F.R. § 50.2(h). In particular, Consol focuses upon the key phrase – the definition of an "injury to an individual at a mine which has a reasonable potential to cause death." 30 C.F.R. § 50.2(h)(2). In turn, section 50.10(b) uses that terminology in identifying accidents an operator must report immediately.

Consol asserts that the definition of an immediately reportable accident necessitates a fact-based analysis of whether the injuries to the injured miner as a matter of medical fact caused a reasonable potential for death. Applying this view, Consol asserts the Secretary must prove by a preponderance of evidence that the injured miner actually faced a reasonable potential for death.[8]

Consol then contends that the evidence in this case shows that there was not an actual reasonable potential for death, and the Secretary did not introduce any evidence proving such potential. Consol asserts that its employees never thought there was a potential for death, that the internal bleeding which did occur stopped on its own, and that the hospital waited more than seven hours to perform surgery to repair the miner's broken body. Thus, Consol argues that the evidence does not demonstrate that Stern's injuries resulted in a reasonable potential for death.

The fundamental problem with Consol's defense is that it misinterprets the regulation. Consol's error lies in the perspective from which it evaluates the miner's injuries. The notification requirement does not, and cannot, rest upon a post-medical treatment analysis of the likelihood of death from the injuries. The regulation does not create grounds for a guessing game regarding whether an injury, as a matter of post-hoc analysis, created any degree of danger to the miner's life. *See Cougar Coal*, 25 FMSHRC at 521 (the decision to call MSHA "cannot be made upon the basis of clinical or hypertechnical opinions as to a miner's chance of survival.").

The decision whether to call must be made immediately and often by persons with little medical expertise. The Commission has held that, "[o]nce a person with sufficient authority to call learns of an event injuring a miner, the clock begins to run on the period for evaluation of whether the injury presents a reasonable potential to cause death and a determination of whether a call is required." *Signal Peak*, 37 FMSHRC at 476. The regulation, therefore, does not look to an opinion of a medically qualified expert.

A person with sufficient authority to call must make the decision whether to call based upon whether a reasonable person with the information known by him/her would have considered the injuries as creating a reasonable potential for death. Of course, the primary information is the nature of the injury and the miner's condition. However, as noted above, relevant information includes the totality of circumstances including the nature of the event causing the injury. The outcome determinative inquiry in this case is whether responsible Consol employees had information that would lead a reasonable person to conclude there was a

[8] Consol asserts: "To meet his burden of proof, the Secretary is required to present competent and convincing evidence that the injury sustained had a reasonable potential to cause death. 30 U.S.C § 813(j); 30 CFR § 50.10." PDR at 10.

reasonable potential for death based upon the nature of the injury and the totality of the circumstances. The Judge found such information existed. We agree.

In the instant matter, Section Foreman McDonald, who had EMT training, and EMT Smith were among the earliest persons to arrive on the scene of the accident. They immediately determined that Stern had been pinned between two large machines, weighing between 5 and 10 tons. He was lying on the ground in extreme pain and had complained that it felt as if "his guts" were coming out of his genitals. There was swelling in Stern's abdomen, which indicated possible internal bleeding, and he could not move or feel one of his legs, which suggested a possible spinal injury.[9] *See Signal Peak*, 37 FMSHRC at 475-76 (concluding that the miner's "initial condition presented a sufficient possibility of internal injury and spinal damage that a reasonable person should have recognized that an injury with a reasonable potential to cause death had occurred."). Shortly after the accident, much of this information was also relayed from the Bunker to Mine Supervisor Michael Tennant who is a licensed EMT as well. Tr. 232-34.

Obviously, Stern had suffered a host of extremely painful and very serious injuries. There was an odd bend to his leg as if it were broken, and there were abrasions and bruising on the right side of his waist and hip area with a small amount of blood. Stern also asked Smith to tell his wife and family that he loved them if something were to happen to him, an indication that Stern was in extreme pain and believed that he might die. 39 FMSHRC at 1296-99. All of these symptoms reveal severe injuries. Perhaps most importantly and certainly outcome determinative here, when Smith and McDonald were taking Stern out of the mine, they became aware of possible internal bleeding, knew such bleeding could cause death, and asked for a Life Flight due to concern over the nature and severity of Stern's injuries, including the circumstances which caused them.

Smith testified that he had called Life Flight because he wanted to err on the side of caution regarding internal bleeding, which he acknowledged could be fatal. 39 FMSHRC at 1297. McDonald candidly testified that when he observed Stern's abdomen, he "got nervous" because he knew there could be internal bleeding, which he knew had a "reasonable potential to cause death." Tr. 225, 229. Tennant also agreed that Stern's accident had a high potential to be fatal. Tr. 247. Smith further stated that this was the first time Life Flight had been called since he began working at the mine.

In light of the knowledge and training possessed by Tennant, McDonald, and Smith, we conclude that someone with sufficient authority at Consol was aware of Stern's injury-causing event. These employees surely realized from their training that, when a miner is pinched between

[9] Based on MSHA's experience and common medical knowledge, some types of "injuries which have a reasonable potential to cause death" include concussions, cases requiring cardio-pulmonary resuscitation (CPR), limb amputations, major upper body blunt force trauma, and cases of intermittent or extended unconsciousness. These injuries can result from various indicative events, including an irrespirable atmosphere or ignitable gas, compromised ventilation controls, and roof instability. 71 Fed. Reg. at 71,434. However, this passage clearly indicates that this list was not intended to be exhaustive, and was meant to provide a sample of *some* injuries that could have a reasonable potential to cause death, as well as *some events* that could produce such injuries.

major pieces of equipment and then suffers from a distended and hardened abdomen, there is a high potential if not a likelihood of internal bleeding. In turn, nearly every knowledgeable witness testified to the obvious – namely, internal bleeding is a potential cause of death.[10] Under these circumstances, the evidence overwhelmingly demonstrates that a reasonable person possessing the available information would have concluded there was a reasonable potential for death.

Testimony that Stern was conscious, alert, talking, and presented no elevated pulse or obvious signs of breathing problems does not alter this conclusion. The Commission has previously rejected the assertion that because a miner is conscious and alert following an accident, management could reasonably conclude that there was no potential for death. *Cougar Coal*, 25 FMSHRC at 520; s*ee also Signal Peak*, 37 FMSHRC at 476 (noting that while the miner presented some stable vital signs, all vitals were not taken, thus evaluation was not exhaustive or conclusive and did not establish that the miner's injuries posed no reasonable potential for death). Indeed, Consol's limited assessment of Stern's vital signs could not readily determine the extent of any internal bleeding, its cause, or the potential for additional tears or damage to internal organs or other factors. Under these circumstances, knowing that internal bleeding may cause death, any reasonable person could not conclude otherwise than that a potential for death existed.[11]

Consol also argues that the Judge gave undue weight to the cause of injury, because the regulation is injury-based, not incident-based. However, the Commission has repeatedly held that the nature of the accident is relevant in determining whether an injury is reportable under section 50.10. *Signal Peak*, 37 FMSHRC at 475-76 (holding that a miner being propelled 50-80 feet due to blast and having a significant back protrusion indicated a reasonable potential to cause death); *Cougar Coal*, 25 FMSHRC at 520-21 (holding that an electric shock, 18-foot fall, and head injury had a "per se" reasonable potential for death); *see also Mainline Rock & Ballast, Inc.*, 693

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[10] Consol argues that the Judge failed to address a significant conflict between section 103(j) of the Act, 30 U.S.C. § 813(j), and 30 C.F.R. § 50.10(b). It contends that section 103(j), which states that an operator must call MSHA when it "*realizes*" an injury has occurred, conflicts with section 50.10(b), which states that MSHA must be called when an operator "*knows or should know*" that an accident has occurred. PDR at 31-32. We need not consider that argument. In this case, there is no doubt that a reasonable person evaluating the known facts would have found a reasonable potential for death. The operator knew the requisite information.

[11] Although the hardening of Stern's abdomen could have been the result of other types of injuries, the symptoms occurred after pinching between large pieces of equipment. And while the bleed turned out to be non-fatal, this in no way negates the finding that the nature of Stern's injuries, as readily observed by Smith and McDonald, presented a reasonable *potential* to cause death. Under this regulation, operators are not expected to know with absolute certainty the extent of a miner's injuries because this is simply impossible within the short window in which they must make the determination. Additionally, as noted above, the Commission has explicitly emphasized "that an operator, in determining whether it is required to notify MSHA under 30 C.F.R. § 50.10, must resolve any reasonable doubt in favor of notification." *Signal Peak*, 37 FMSHRC at 477.

F.3d 1181, 1189 (10th Cir. 2012) (stating that an operator should have been alerted to the potential for death by the fact that the miner was pulled through a roller).

Consol acknowledged the high danger of a pinch point injury. Foreman McDonald testified that red zone training is frequently given at the mine not only because of the tight areas and mobile equipment there, but *because* red zone violations are considered particularly dangerous. Tr. 224. Consol even used the accident involving Stern as an example in its Pinch Point/Red Zones training handout, which specifically noted that this particular accident "had a high potential for a fatal accident." Ex. GX-10; Tr. 212-14. Similarly, in Consol's internal RPI, which discusses incidents at all company mines and assigns them fatal ratings between 1 and 5, Stern's mechanism of injury was rated as having a fatal potential of 5 out of 5. Exs. GX-14, RX-5; Tr. 260-67.

Consol also argues that Bochna performed an inadequate investigation because he failed to acquire medical records and statements from medical personnel to support the conclusion that Stern's injuries had a reasonable potential to cause death. However, as we emphasized above, section 50.10 requires operators to notify MSHA "immediately . . . at once without delay and within 15 minutes" once an operator knows that an accident has occurred. 30 C.F.R. § 50.10. Therefore, "[g]iven the need for a prompt determination inherent in section 50.10 . . . permitting operators to wait for a medical or clinical opinion would 'frustrate the immediate reporting of near fatal accidents.'" *Signal Peak*, 37 FMSHRC at 476 (citation omitted); *see also* 71 Fed. Reg. 71,433-71,434 ("the operator's decision as to what constitutes a 'reasonable potential to cause death' 'cannot be made upon the basis of clinical or hypertechnical opinions as to a miner's chance of survival'. . . . The decision to call MSHA must be made in a matter of minutes after a serious accident.") (internal citation omitted).[12]

Lastly, Consol argues that it lacked fair notice of how the regulation would be applied because neither the Commission nor MSHA has defined "reasonable potential to cause death." However, the Commission has held that in interpreting and applying broadly worded standards, the appropriate test is not whether the operator had explicit prior notice of a specific prohibition or requirement, but whether a reasonably prudent person familiar with the mining industry and the protective purposes of the standard would have recognized the specific prohibition or requirement of the standard. *Ideal Cement Co*., 12 FMSHRC at 2416.

Under the circumstances presented in this case, a reasonably prudent person familiar with the protective purpose of section 50.10(b), would have recognized that a miner who had been pinned between two multi-ton machines and who suffered from Stern's symptoms had sustained an injury with a "reasonable potential to cause death," and that MSHA should have been immediately notified. The Judge's application of the standard is in harmony with the

[12] *See Consolidation Coal*, 11 FMSHRC at 1938 (finding that section 50.10 "accords operators a reasonable opportunity for investigation," but that the investigation "must be carried out . . . in good faith without delay and in light of the regulation's command of prompt, vigorous action"); *see also* 71 Fed. Reg. 12,252, 12,260 (Mar. 9, 2006) (noting that "[t]aking too much time to determine whether . . . an accident occurred" is a common reason for violations of section 50.10).

Commission's decisions in *Signal Peak* and *Cougar Coal*. Therefore, we reject Consol's notice argument.

Accordingly, we conclude that based on the substantial evidence presented in this case, a reasonably prudent miner, familiar with the mining industry and the protective purpose of section 50.10(b), would have concluded that Stern's injuries had a "reasonable potential to cause death" and would have immediately reported the injuries to MSHA.

C. Penalty

Finally, Consol argues that the Judge erred in failing to consider a penalty lower than the statutory minimum of $5,000 because the Commission assesses penalties de novo and is not bound by section 110(a)(2) of the Act. Section 110(a)(2) states that an operator "who fails to provide timely notification to the Secretary as required under section [103](j) of this [Act] (relating to the 15 minute requirement) shall be assessed a civil penalty by the Secretary of not less than $5,000 and not more than $60,000."[13] 30 U.S.C. § 820(a)(2).[14] The operator contends that because this section refers to the Secretary's penalty assessment, it does not bind Commission judges. We reject this contention.

The Commission has determined that an assessment of penalty for a non-flagrant violation of section 50.10(b) is governed by section 110(a)(2) of the Act, which, as noted, imposes statutory minimum and maximum amounts. 30 U.S.C. § 820(a)(2); *Signal Peak*, 37 FMSHRC at 484 n.22. Thus, the Judge here was simply unable to consider a penalty less than the minimum imposed by Congress when it passed the Miner Act.

We base our conclusion in large part on the Miner Act's legislative history. In briefly discussing the section that amends the statutory reporting requirements, the Senate Report states:

> Section 5 requires MSHA notification within 15 minutes for a subset of situations which are currently defined as accidents under regulation [30 C.F.R. § 50.2(h)]. . . . [It] is the intent of the committee that the minimum fine of $5,000 be assessed only for those accidents described in 30 CFR 50.2(h)(1), (2) and (3) [which include an injury to an individual at a mine which has a reasonable potential to cause death]. . . .
>
> . . .

[13] In January 2018, the minimum penalty was increased to $5,903 and the maximum penalty was increased to $70,834 to account for inflation. 30 C.F.R. § 100.4(c); *see also* Department of Labor Federal Penalties Inflation Adjustment Act Annual Adjustments for 2018. 83 Fed. Reg. 7, 15 (Jan. 2018). However, the minimum penalty in effect at the time of the violation, i.e., $5,000, applies here.

[14] Section 103(j) requires an operator to notify the Secretary "within 15 minutes of the time at which the operator realizes that . . . an injury . . . of an individual at the mine which has a reasonable potential to cause death, has occurred." 30 U.S.C. § 813(j). This is the same conduct required by sections 50.10(a), (b), and (c) of the Secretary's regulations.

> Section 5–Prompt Incident Notification. This provision codifies the recent MSHA emergency regulation which requires that operators make notification of all incidents/accidents which pose a reasonable risk of death within 15 minutes of when the operator realizes an accident has occurred. *It would fix a minimum civil penalty of $5,000, up to $60,000 (which is the current maximum) for failure to do so.*

S. Rep. No. 109-365 at 9, 13 (2006) (emphasis added). This is the extent of the discussion. There is no reference to the fact that the Secretary proposes penalties and Commission judges assess them. The Senate Report simply states that a minimum penalty of $5,000 is to be imposed.

In addition, section 110(a)(4) states that "[i]f a court, in making such review, sustains the order, the court shall apply at least the minimum penalties required under this subsection [section 110(a)]." 30 U.S.C. § 820(a)(4). A statutory scheme that permits the Commission to assess any penalty, however minimal, but requires a reviewing court to impose a penalty of at least $5,000, makes no sense.

Therefore, because assessment of Consol's violation of section 50.10(b) is governed by section 110(a)(2) of the Act, the Judge properly assessed a penalty of $5,000.

III.

Conclusion

For the reasons set forth above, we conclude that substantial evidence supports the Judge's finding that a reasonable person, familiar with the mining industry and the protective purpose of section 50.10(b), would have concluded that Stern's injuries had a reasonable potential to cause death and that Consol should have called MSHA immediately upon learning of the injuries giving rise to such potential. We also conclude that the Judge properly applied the requirements of section 110(a)(2) of the Act and did not err by imposing the penalty of $5,000. Accordingly, the Judge's decision is affirmed.

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

/s/ Mary Lu Jordan
Mary Lu Jordan, Commissioner

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

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

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

August 29, 2018

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) v. THE AMERICAN COAL COMPANY	Docket Nos. LAKE 2011-701 LAKE 2011-881 LAKE 2011-962 LAKE 2012-58

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

DECISION

BY THE COMMISSION:

This case, arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act" or "Act"), comes before us on appeal for the second time to determine whether the Administrative Law Judge properly explained his assessed penalties in this matter, which involves "special assessments" by the Secretary of Labor,[1] and whether substantial evidence supports the penalties assessed by the Judge.

On remand from the Commission's first decision in this case, 38 FMSHRC 1987 (Aug. 2016), the Administrative Law Judge reaffirmed the five penalty assessments he had assessed for citations issued by the Department of Labor's Mine Safety and Health Administration ("MSHA") to The American Coal Company ("AmCoal"). 38 FMSHRC 2612 (Oct. 2016) (ALJ).

AmCoal appeals the Judge's remand decision, alleging that the Judge's penalty assessments are arbitrary in part because he failed to explain how he set the penalty amounts, which, the operator argues, substantially deviated from the amounts that would have been assessed under the Secretary's regular assessment formula. AmCoal also argues that the Judge's penalty assessments are not supported by substantial evidence.

Commissioners Jordan and Cohen vote to affirm the Judge's decision, while Acting Chairman Althen and Commissioner Young vote to vacate and remand the Judge's decision. The effect of the split decision is to allow the Judge's decision to stand as if affirmed. *Pennsylvania Elec. Co.*, 12 FMSHRC 1562, 1563-65 (Aug. 1990), *aff'd on other grounds*, 969 F.2d 1501 (3d Cir. 1992).

[1] In this case, the Secretary proposed penalties using his procedures for "special assessment" rather than the "regular assessment" formula the Secretary commonly employs. *Compare* 30 C.F.R. § 100.5 ("Determination of penalty amount; special assessment") *with* 30 C.F.R. § 100.3 ("Determination of penalty amount; regular assessment").

I.

Facts and Proceedings Below

A. Background[2]

In the Judge's initial decision, he affirmed all five violations at issue in this case and the associated significant and substantial ("S&S")[3] designations. 35 FMSHRC 3077, 3099-122 (Sept. 2013) (ALJ). For four of the five citations, the Judge reduced the level of negligence, and for one citation, he reduced the level of gravity alleged by the Secretary. The Judge assessed a total penalty of $43,200 for the five violations, compared to the specially assessed total penalty of $69,608, which MSHA proposed.[4]

The Judge declined to address AmCoal's broader arguments about the validity of MSHA's special assessments[5] and the appropriate standard for reviewing the Secretary's proposed penalties. He explained that because the Commission alone is responsible for assessing final penalties, the Secretary's decision to propose a regular or a special assessment is not relevant to the Commission's determination of a penalty amount.

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[2] This case involves four roof control violations of 30 C.F.R. § 75.202(a) and one violation of a transportation safeguard, 30 C.F.R. § 75.1403. The factual background concerning the five violations at issue in this case has been fully set forth in both the Judge's and Commission's initial decisions.

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

[4] The penalties for the five violations proposed by the Secretary and as assessed by the Judge are as follows:

Citation No.	Regulation	Sec'y Proposal	ALJ assessment
8428508	75.202(a)	$40,308	$20,000
8432118	75.202(a)	$9,100	$7,200
8432126	75.202(a)	$7,700	$6,100
8432129	75.202(a)	$7,700	$6,100
8432052	75.1403	$4,800	$3,800

[5] MSHA may specially assess penalties pursuant to 30 C.F.R. § 100.5, which states that "MSHA may elect to waive the regular assessment under § 100.3 if it determines that conditions warrant a special assessment." 30 C.F.R. § 100.3(a). Section 100.5(b) states that "[w]hen MSHA determines that a special assessment is appropriate, the proposed penalty will be based on the six criteria set forth in § 100.3(a). All findings shall be in narrative form."

AmCoal appealed the Judge's first decision, arguing that MSHA's special assessments were arbitrary because the Secretary failed to meet his burden of substantiating enhanced special assessments. It contended that as a result, the Judge erred by using the Secretary's proposed special assessments as a baseline. AmCoal further argued that the Judge should have relied instead on MSHA's regular assessment formula when determining the penalty amounts in this case.

In its first decision, the Commission reaffirmed its independent authority to assess penalties de novo based on the penalty criteria contained in section 110(i) of the Mine Act, 30 U.S.C. § 820(i),[6] and stated that the Secretary's proposal is not a baseline for the Judge's independent assessment. 38 FMSHRC at 1995. Noting the Secretary's unilateral discretion to issue a special assessment, the Commission majority explained that the Secretary is not required to explain the reasons for his decision to specially assess a violation. *Id.* at 1993.

The Commission majority concluded that the Judge did consider the section 110(i) criteria, but could not determine whether he relied on the Secretary's special assessments as a baseline and thus could not determine whether he independently assessed the penalties in this case. The majority vacated the penalties and remanded the case to the Judge to explain whether he relied on the Secretary's special assessments and to provide an adequate explanation of the bases for his assessments. The majority also instructed the Judge to address the history of violations criteria pertaining to the safeguard violation because he failed to address the evidence and explain its impact on his assessment.[7] *Id.* at 1997-98.

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[6] Section 110(i) of the Mine Act provides that the Commission is authorized to assess all penalties under the Act and that the penalties must reflect consideration of six statutory factors:

> [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 [operator] charged in attempting to achieve rapid compliance after notification of a violation.

30 U.S.C. § 820(i).

[7] Then Commissioner Nakamura, concurring in part and dissenting in part, would have affirmed the Judge's penalty assessments regarding the four roof violations and joined the majority in remanding only the penalty for the safeguard violation. *Id.* at 1999-2003. Commissioner Jordan, dissenting, would have affirmed all five penalty assessments. *Id.* at 2004-05.

B. The Judge's Decision

On remand, the Judge stated that he did not rely on the Secretary's proposed special assessments as a starting point, nor did he make an across-the-board reduction of the proposed assessments in determining his final assessments. 38 FMSHRC at 2617. The Judge further explained that, in general, any "substantial deviations" from the Secretary's proposed assessments were due to his disagreement with the Secretary's negligence determinations and that he gave "great weight to the facts that the operator was large in size and able to continue in business despite the penalties imposed." *Id.* The Judge asserted that he "imposed penalties that [he] felt were large enough to serve as an effective enforcement tool and discourage further violations." *Id.* Specifically refuting the operator's arguments to the contrary, the Judge concluded that "this mine operator inarguably had a significant history of violations." *Id.* at 2618.

In discussing the relevant facts pertaining to the section 110(i) criteria for each of the five violations, the Judge repeatedly noted the mine's large size, the operator's ability to continue in business, and its excessive violation history for the four roof violations. Pertaining to the safeguard violation, the Judge specifically considered the evidence related to the operator's history of such violations. The Judge also noted the operator's good faith abatement and explained that any deviation from the Secretary's proposed assessments was due to the reduced negligence and/or gravity findings for each violation. The Judge reaffirmed the penalties he proposed in his initial decision.

II.

Disposition

In its second appeal, AmCoal continues to argue that the Judge's assessments are arbitrary and excessive because he failed to provide any explanation of how he arrived at the particular assessment amounts or to provide an adequate explanation for the bases of his assessments. It contends that the Judge on remand "failed to fully discuss the evidence bearing upon the appropriate penalties, failed to explain how he set his assessment amounts, and thus failed to adequately explain the bases of his assessments and their substantial deviations from the assessments proposed by the Secretary and those that would have resulted under the regular assessment mechanism." PDR at 10. AmCoal also argues that the Judge erred in justifying his assessments based solely on the mine's large size and violation history when the Secretary's special assessments did not rely on such factors. AmCoal asks the Commission to require a Judge who does not rely on the Secretary's proposed special assessment to explain a substantial deviation from what would have been proposed under the regular assessment mechanism under 30 C.F.R. § 100.3. Finally, AmCoal contends that substantial evidence does not support the Judge's penalty assessments based on the mine's size and excessive violation history.

The separate opinions of the Commissioners follow.

Commissioners Jordan and Cohen, writing in favor of affirming the Judge's decision:

The Commission's judges are accorded broad discretion in assessing civil penalties under the Mine Act. *Westmoreland Coal Co.*, 8 FMSHRC 491, 492 (Apr. 1986). Such discretion is not unbounded, however, and must reflect proper consideration of the penalty criteria set forth in section 110(i), as well as the deterrent purpose of the penalty. *Id.* (citing *Sellersburg Stone Co.*, 5 FMSHRC 287, 290-94 (Mar. 1983), *aff'd*, 736 F.2d 1147 (7th Cir. 1984)); *Black Beauty Coal Co.,* 34 FMSHRC 1856, 1864-69 (Aug. 2012).

Commission judges are not bound by the Secretary's penalty regulations set forth at 30 C.F.R. Part 100, including those utilized to compute a special assessment. *E.g.*, *Sellersburg Stone Co. v. FMSHRC*, 736 F.2d at 1151-52 ("neither the ALJ nor the Commission is bound by the Secretary's proposed penalties"). The Judge's duty is to make a de novo assessment based upon his or her review of the record. The Commission has required an explanation of any substantial divergence from the penalty proposal of the Secretary. *Sellersburg*, 5 FMSHRC at 290-94. As a general matter, a judge's penalty assessment is an exercise of discretion which we review under an abuse of discretion standard. *Id.*

In this case, the Commission's remand was for a very limited purpose: "On remand, the Judge should explain whether he relied on the Secretary's specially assessed proposed penalties [as a benchmark or starting point] and provide an adequate explanation for the bases of his assessments, in light of the record evidence and his section 110(i) findings[;] . . . the Judge must also make a finding as to the history of violations pertaining to the safeguard violation, . . ." 38 FMSHRC at 1997-98. The Judge did exactly what we required of him. He clearly stated that he had not used the Secretary's specially proposed assessments as a baseline or starting point for his assessments, and he explained how he had determined the five assessments. 38 FMSHRC at 2615.

AmCoal argues that the Judge abused his discretion by failing to adequately explain the bases for his penalty assessments. In particular, AmCoal contends that the Judge erred by not using the amount that would have been imposed under MSHA's regular assessment formula as a reference point in making his own penalty determinations. AmCoal also mounts a substantial evidence challenge to the Judge's application of the section 110(i) penalty criteria. As we find neither argument persuasive, we would affirm the Judge's penalty assessments.

A. The Judge Committed No Legal Error.

AmCoal argues that any judge who does not adopt the Secretary's underlying rationale for specially assessing a penalty must consider the amount that would have been proposed under the Secretary's regular assessment formula at 30 C.F.R. § 100.3 as a reference point, and must justify any departure from that amount. In this case, the operator considers the Judge's disagreement with the Secretary's negligence and gravity determinations to constitute a rejection of the Secretary's bases for a special assessment. Not only does AmCoal consider the negligence and gravity findings to provide inadequate support for the penalty the Judge imposed, AmCoal also maintains that the remaining penalty criteria – such as the mine size, ability to continue in

business, and violation history – do not support the imposition of what AmCoal claims are the "elevated" assessments imposed by the Judge.[1]

The Commission has already rejected the line of reasoning offered by AmCoal. When this case was previously before us, the operator contended that Judges must utilize the dollar amounts that would have resulted from the regular assessment process as the baseline for determining their penalty, and must explain any substantial divergence from that figure. 38 FMSHRC at 1990. Ultimately, however, the majority's remand instructions only required the Judge to: (1) explain whether he relied on the Secretary's specially assessed proposed penalties (which he did, answering in the negative) and (2) provide an adequate explanation for the bases of his assessments (which he did, *see* 38 FMSHRC at 2618-2622). 38 FMSHRC at 1997. Thus, the discussion in the operator's brief comparing the Judge's penalty assessments with what would have been imposed under the regular assessment mechanism is misplaced and irrelevant.

We again decline to require Commission Judges to rely upon MSHA's regular assessment formula as a reference point in assessing penalties where a Judge chooses not to adopt the Secretary's special assessment proposal. Such a practice would compel the Commission's Judges to use the Secretary's penalty regulations and point system, contrary to Commission and federal court precedent, thereby undermining the independence of the Judges in assessing penalties.

As we emphasized in *U.S. Steel Mining Co.*:

> The Act does not condition the penalty assessment authority and duties of the Commission upon the manner in which the Secretary of Labor has chosen to implement *his* statutory responsibility for proposing penalties. Therefore, it is irrelevant to the Commission for penalty assessment purposes whether a penalty proposed by the Secretary in a particular case was processed under § 100.3 [the regular penalty assessment regulation] . . . or § 100.5 [the special assessment regulation].

6 FMSHRC 1148, 1150 (May 1984); *see also Sellersburg*, 736 F.2d at 1151-52; *Mach Mining, LLC v. Sec'y of Labor*, 809 F.3d 1259, 1263-64 (D.C. Cir. 2016) ("'[U]nder both Commission and court precedent, the regulations do not extend to the independent Commission, and thus the MSHA regulations are not binding in any way in Commission proceedings.'") (citations omitted).

In making his or her de novo assessment, a judge may assign different weights to the section 110(i) penalty criteria according to the circumstances of the case. *Knight Hawk Coal,*

[1] If the Commission were to accept AmCoal's argument that the Judge erred in relying on the mine's large size and violation history after reducing some of the negligence and gravity findings, we would effectively be binding and limiting the authority of Commission judges to consider some of the section 110(i) factors.

LLC, 38 FMSHRC 2361, 2373-74 (Sept. 2016); *Lopke Quarries, Inc.*, 23 FMSHRC 705, 713 (July 2001). Moreover, the Judge is "not required to weigh the criteria in the same manner that the criteria are weighed in the proposal of a penalty." *Jim Walter Res., Inc.*, 36 FMSHRC 1972, 1980 (Aug. 2014). As long as the Judge's findings and independent weighing of the penalty factors are supported by substantial evidence, and his or her assessment is not infected by plain error or an abuse of discretion, the Commission will affirm the Judge's assessment.

Here, the Judge emphasized the record evidence pertaining to the operator's large size, its ability to continue in business, its violation history, and the need to provide an effective deterrent. With regard to several violations, the judge considered the negligence and gravity to be less severe than the determinations reached by the Secretary.[2] The Judge weighed all of these factors in determining a penalty.

Our colleagues consider any special assessments by the Secretary to be inherently arbitrary and subjective "by their very nature." Slip op. at 28. Embracing a cognitive bias theory they describe as "anchoring," they contend that a Commission judge cannot avoid becoming mentally attached ("anchored") to whatever proposed dollar amount the Secretary's special assessment process has produced. In other words, in their view, any specially-assessed proposed penalty effectively prevents a Commission judge from independently applying the statutory penalty criteria and assessing a penalty de novo.[3] Using our colleagues' logic, we should consider any penalty imposed by a judge for a violation that was specially assessed by the Secretary, to be basically the fruit of the poisonous tree, and therefore inherently suspect.[4]

Despite our colleagues' skepticism regarding a judge's ability to independently determine an appropriate penalty once the Secretary proposes a special assessment, our colleagues nevertheless conclude they should remand this matter once again, in order for the Judge to make another attempt at an independent penalty determination. However, it would appear that our colleagues would accept the Judge's penalty assessment only if it is tethered to the regular assessment system. *See* slip op. at 30 n.17 ("The reader may find an implication that regular assessments, in fact, should constitute a form of anchor whereas special assessments may not. That is true in a general sense.").

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[2] We note, however, that he affirmed the S&S designations for all five violations.

[3] Thus, our colleagues implicitly reject as untrue the Judge's emphatic statement – answering the critical question on remand – that he "*did not use and has not used the Secretary's proposed specially assessed penalties as a baseline or starting point*." 38 FMSHRC at 2615 (emphasis in original). The Commission should not treat the statements of its Judges in such a cavalier manner.

[4] We note that the percentage of violations actually subjected to special assessment is very small. In response to a request from the Commission during oral argument in this case the Secretary reported that in fiscal year 2015, 1,069 (or less than 1%) of 115,483 assessments were special assessments. Letter from W. Christian Schumann, Counsel, Appellate Litigation, Office of the Solicitor, to Lisa M. Boyd, Executive Director, FMSHRC (May 2, 2016).

In this case, the special assessments resulted in large part from the Secretary's frustration with AmCoal's repeated history of noncompliance, particularly with regard to roof and rib violations. This would appear to be a justifiable rationale. Notably, an operator's history of previous violations is the first penalty criteria mentioned in section 110(i), and the legislative history of the Mine Act supports the significance Congress' attached to it:

> In evaluating the history of the operator's violations in assessing penalties, it is the intent of the Committee that repeated violations of the same standard, particularly within a matter of a few inspections, should result in the substantial increase in the amount of the penalty to be assessed. Seven or eight violations of the same standard within a period of only a few months should result, under the statutory criteria, in an assessment of a penalty several times greater than the penalty assessed for the first such violation.

S. Rep. No. 181, at 43, *reprinted in* Senate Subcomm. on Labor, Comm. on Hum. Res., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 631 (1978).[5]

Our colleagues attempt to downplay the concern of MSHA (and Congress) by claiming that AmCoal's violation history is not significant when considered in relation to the violation history of other large coal operators in the mining industry. Even assuming that to be the case, we do not believe MSHA's penalty proposal must be based on an assessment of an operator's behavior solely in the context of industry-wide statistics. Here the inspector who recommended that four of the citations be specially assessed, Edward Law, explained what prompted his action:

> [Ninety-seven violations of section 75.202(a)[6]] in two years, that's almost 50 a year, that's a big number. To me, that's something they should be taking care of and they should be making changes to take care of that. And the people should be

[5] The Secretary was also provided with a serious enforcement tool to address operators who demonstrated a "pattern of violations." 30 U.S.C. § 814(e). In subsequent amendments, Congress provided that certain violations be deemed "flagrant" thereby subjecting them to penalties significantly higher than the maximum typically allowed under the Act. The "flagrant" designation applied to violations indicating a "reckless or *repeated* failure to make reasonable efforts to eliminate a known violation of a mandatory health or safety standard that substantially and proximately caused, or reasonably could have been expected to cause, death or serious bodily injury." 30 U.S.C. § 820(b)(2) (emphasis added).

[6] Section 75.202(a) requires that the "roof, face and ribs of areas where persons work or travel should be supported or otherwise controlled to protect persons from hazards related to falls of the roof, face or ribs and coal or rock bursts."

> trained so that they're taking care of it on their own; and it would eliminate a lot of those.

Tr. at 243.[7]

Moreover, Inspector Law further testified that in the period prior to his issuance of the citations for violations of section 75.202(a), he had repeatedly talked with AmCoal officials about the need to "do something about these areas that are being found to be inadequately supported." Tr. at 295. In the context of unwarrantable failure cases, the Commission has held that repeated warnings about an unsafe practice by MSHA inspectors constitute grounds for finding that an operator is on notice that its safety program is inadequate. *See Brody Mining, LLC*, 37 FMSHRC 1687, 1699-1700 (Aug. 2015) (citing *San Juan Coal Co.*, 29 FMSHRC 125, 131 (Mar. 2007)). The same principle applies to enhancing penalties based on the section 110(i) factor of the operator's history of previous violations.

Our colleagues acknowledge that under their theory, a Commission judge cannot avoid becoming mentally "anchored" to whatever amount the Secretary has proposed, even those computed under the regular formula. In an attempt to reconcile this "anchoring" with their steadfast support of the Commission's independent authority to assess penalties de novo, based on the penalty criteria contained in section 110(i) of the Mine Act, they suggest that the regular penalty proposed by MSHA be considered "an authorized anchoring" because in their view it reflects application of a uniform and regularized system. They consider special assessments, on the other hand, to "flow from formalized calculations largely, and sometimes wholly, unrelated to the violation." Slip op. at 28.

Our colleagues' concern is not born out in the instant case, nor do we believe they have made a persuasive argument that special assessments generally are based on irrelevant factors. The Secretary has implemented a scheme which allows the Secretary to propose a special assessment when he deems it appropriate, and we recognize that "the Secretary has very broad discretion to devise a scheme implementing the Act's civil penalty guidelines." *Coal Employment Project v. Dole*, 889 F.2d 1127, 1129 (D.C. Cir. 1989).[8]

If an operator wishes to challenge a penalty determination, the operator is afforded the opportunity for a hearing and a de novo assessment by a Commission judge, based on an independent application of the statutory criteria. We disagree with our colleagues that the

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[7] The number of prior violations of section 202(c) issued in the two years prior to the ones at issue here varied from 97 to 109. This is due to the fact that the four citations were each issued on different dates within a five-month period. Thus, the two year time period differed slightly for each violation.

[8] That case involved a challenge to the validity of a single penalty assessment provision the Secretary had implemented. Because the Court could not determine if the single penalty would be adequately reflected in the operator's history of violations, it remanded the case so that the Secretary could amend or establish regulations as necessary. 889 F.2d at 1136-39.

relevant question before the Judge should be: on what basis does the Secretary justify a substantial heightening of penalties from regular penalties? Slip op. at 29. This approach is inconsistent with our longstanding jurisprudence when reviewing a judge's penalty assessment, in which we focus on the penalty criteria in section 110(i) and determine whether the judge's decision reflects a reasonable application of those factors.

Our colleagues, citing no legal precedent, would announce a new standard for Commission review of penalty determinations: a judge's penalty assessment must be consistent with other assessments. Slip op. at 20. This assertion begs the question "consistency with what?" Is it consistency with penalties other Commission judges have assessed in allegedly similar circumstances? Or is it consistency with the particular Judge's prior decisions, as our colleagues suggest in section III.B of their opinion, slip op. at 33. The only "consistency" which seems to satisfy our colleagues is consistency with the Secretary's regular assessment system. *See* slip op. at 20 & 29-30 n.17. This position is irreconcilable with both the existence of the Secretary's special assessment system as well as the independence of Commission Judges. In short, besides having no legal foundation, this approach is unworkable and inconsistent with the bedrock concept of a judge's obligation to assess a de novo penalty based on the section 110(i) criteria.

Accordingly, we conclude that the Judge committed no legal error in assessing the penalties herein on remand.

B. <u>Substantial Evidence Supports the Judge's Penalty Assessments.</u>

AmCoal's remaining arguments involve the sufficiency of the evidence substantiating the Judge's penalty assessments. On remand, in specific response to the question posed to him in the Commission's first decision, the Judge clarified that he did not rely upon nor utilize the Secretary's proposed special assessments as a benchmark for his assessments and instead relied on the record evidence pertaining to the section 110(i) penalty criteria to explain his penalty assessments. 38 FMSHRC at 2615. AmCoal contends that the only statutory criteria mentioned or relied upon by the Judge to warrant increasing penalties beyond the regular assessment mechanism are the "great weight" given to the fact "that the operator was large in size and able to continue in business despite the penalties imposed," 38 FMSHRC at 2617, and the Judge's finding that "as a general matter, regardless of possible inconsistencies in the record, this mine operator inarguably had a significant history of violations." *Id.* at 2618. However, AmCoal fails to recognize that the Judge, relying on *Black Beauty Coal Co.*, also appropriately took into consideration the deterrent effect of his penalty assessments, by imposing penalties "large enough to serve as an effective enforcement tool and discourage further violations." *Id.* at 2617. Hence, deterrence provided another ground for his penalty determinations.[9]

[9] We also note that the Judge found all five penalties to be S&S, a finding requiring the violations to be more serious than an ordinary violation. *See* 30 U.S.C. § 814(d)(1) (S&S designates a violation that "could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard"). Thus, although the Judge did not specifically rely on the S&S findings to support his assessed penalties, we disagree with our colleagues' statement that the Judge did not find any "aggravation" in these cases. Slip op. at 35.

AmCoal further contends that the findings related to the operator's size and history of violations are not supported by substantial evidence. In particular, it maintains that because the mine is indeed so large, it necessarily will have a greater number of violations and that this would give the impression that AmCoal has a worse history of violations than it actually does. We reject AmCoal's arguments.

The Judge provided an extensive explanation for his penalty determinations, including his consideration of the section 110(i) criteria. 38 FMSHRC at 2617-22. That the operator takes issue with the relevance or import of these factors in ultimately determining the penalty amount does not establish that the Judge abused his discretion. As discussed below, the Judge explained that a significant part of his consideration in determining the penalty amount was the large size of this mine, the fact that the penalties would not affect the operator's ability to continue in business, and the need to assess penalties that would deter the operator from continuing to violate the cited standards. *Id.* at 2617. All these are relevant factors for the Judge to consider in assessing the penalty pursuant to section 110(i). Moreover, deterrence is a relevant factor that Judges may consider in assessing penalties. *See Black Beauty Coal Co.*, 34 FMSHRC at 1864-69 (in approving or rejecting a proposed settlement, a Commission ALJ may take into account the deterrent effect of the penalty).

1. Size of the Mine

The Judge considered the amount of coal produced by this mine and determined that the mine was large and that size was a significant factor to consider when determining the penalty amounts. 38 FMSHRC at 2618. He noted that the mine tonnage exceeded six million tons and the production of its controlling entity exceeded twenty-nine million tons. The Judge did not err in assigning great weight to the fact that the operator was large in size. As noted above, the Judge, in conducting an independent assessment, may assign varying weights to the penalty criteria based on the record.

2. Violations History

AmCoal contends that the finding that its violations history is excessive is not qualitatively or quantitatively substantiated by the record. It argues that the Judge simply relied on the record evidence of the number of past violations and made a conclusory determination that the operator's history was excessive.

However, the record contains evidence of the operator's repeated history of noncompliance, particularly with regard to the roof and rib violations, and the inspector testified as to his opinion that the operator's history was excessive.

With respect to Citation No. 8432118, Inspector Law "recommended the citation for special assessment because the operator had a 'lot of issues with ribs' and roofs and had been cited a 'pretty high' number of times for 202(a) violations." 35 FMSHRC at 3089. Citation No. 8428508 stated that "Standard 75.202(a) was cited 109 times in two years at [the] mine." *Id.* at 3106. The inspector acknowledged consideration of AmCoal's excessive history as influencing the decision to propose special assessments. As the Judge noted in his initial decision,

"Respondent's past history of violations involving ribs and roofs was considered by Law in recommending a special assessment." *Id.* at 3090.

Regarding Citation Nos. 8432126 and 8432129, the inspector again testified that he recommended special assessments due to the operator's history of violations. *Id.* at 3092 ("Law had again recommended a special assessment because . . . of Respondent's past violation history."); 3096 ("Law had recommended a special assessment for essentially the same reasons, number of previous citations/violations that existed for the other citations testified to.").

The Judge may evaluate the evidence in the record and make credibility determinations. Here, the Judge found that, based on the MSHA inspector's testimony, the operator's history was significant. AmCoal presents no basis for overturning the Judge's credibility determinations.[10]

As to the safeguard violation, the Commission majority instructed the Judge on remand to consider the evidence and make a finding as to the history of violations pertaining to the safeguard violation. 38 FMSHRC at 1997-98.[11] On remand, the Judge found that AmCoal had 19 previous violations in the preceding 15 months involving the general safeguard standard (30 C.F.R. § 75.1403). As previously discussed, the Judge determined that the mine's overall history of violations was significant. 38 FMSHRC at 2620 & n.10.[12]

AmCoal contends that the Judge failed to make a finding as to the history of violations pertaining to the specific safeguard notice at issue in this case. First, "[t]he Commission has previously held that the references in section 110(i) to an 'operator's history of previous violations' refers to the operator's general history of previous violations, not just to violations of a kind similar to the one giving rise to the penalty assessment." *Jim Walter Res., Inc.*, 28 FMSHRC 983, 995 (Dec. 2006). Hence, we conclude that the Judge appropriately considered the operator's history of 19 safeguard violations here.

Even if the Judge failed to explicitly make a quantitative finding on AmCoal's history of this type of safeguard violation, any error was harmless. The violation involved a ram car striking a miner standing on the back side of a curtain. 38 FMSHRC at 2621. The Judge

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[10] A judge's credibility determinations are entitled to great weight and may not be overturned lightly. *Farmer v. Island Creek Coal Co.*, 14 FMSHRC 1537, 1541 (Sept. 1992); *Penn Allegh Coal Co.*, 3 FMSHRC 2767, 2770 (Dec. 1981).

[11] In the Commission's initial decision in this case, Commissioner Jordan affirmed the $3,800 penalty for the safeguard violation, stating that the Judge's single omission in not making a finding on the history of violations criterion did not constitute an abuse of discretion. 38 FMSHRC at 2004.

[12] Our colleagues insist that a mine operator's history of violations must be considered against the histories of other coal operators in the mining industry. Slip op. at 32. We find no support for such a proposition in the text of the Mine Act, in the legislative history of the law, or in Commission precedent.

otherwise affirmed the Secretary's proposed findings, particularly moderate negligence and serious gravity, and assigned greater weight to the high level of gravity in his penalty determination. *Id.* at 2622. He further noted that this safeguard notice violation involved one of the ten "rules to live by" and was S&S. *Id.* at 2621. Thus, based on the record evidence and his findings on the other penalty criteria, we conclude that the Judge adequately substantiated his penalty assessment for the safeguard violation and hence did not abuse his discretion in assessing a penalty of $3,800.

III.

Conclusion

The Judge did not abuse his discretion in assessing the penalties for these five S&S violations. He made no legal error, and his determinations regarding the section 110(i) penalty criteria are supported by substantial evidence. For the foregoing reasons, we would affirm the Judge's penalty assessments.

/s/ Mary Lu Jordan
Mary Lu Jordan, Commissioner

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

Acting Chairman Althen and Commissioner Young, in favor of vacating and remanding:

For the reasons set forth below, the penalties issued by the Judge in this case are arbitrary, capricious, and excessive. We would therefore vacate and remand.

The Mine Act identifies six specific penalty criteria for use by both the Mine Safety and Health Administration ("MSHA") in proposing and the Commission in assessing penalties. The Act does not identify guidelines for setting penalties or require either agency to adopt a formulaic system for the application and weighing of the criteria. However, it was inevitable that one or both agencies would do so to avoid the appearance of arbitrary assessments. Significantly disparate penalties for similarly situated operators charged with similar violations would be all but inevitable without some uniform framework.

Faced with this dilemma, MSHA developed a point system to apply to its penalty assessments in most cases ("regular" assessments). That regular assessment system provides a reasonable measure of uniformity and predictability to assessments.

MSHA has also promulgated a regulation pursuant to which it issues significantly higher assessments to deter certain types of violative activity. These are "special" assessments.

The difference between the procedures for making and the reasons for imposing regular versus special assessments may, in some cases (including this one) result in the adoption of arbitrarily enhanced penalties.

BACKGROUND

I. Assessments

This case involves five citations. One of the citations, Citation No. 8432052, was for a safeguard violation. The other four citations alleged violations of 30 C.F.R. § 75.202(a). For convenience, the discussion in this opinion deals exclusively with the four violations of section 75.202(a) and does not consider the separate safeguard violation, a relatively low-dollar violation.

A. Regular Assessments

Recognizing the need for systematic guidance for proposing penalties to provide for relative uniformity in penalty assessments, MSHA acted. Through notice and comment rulemaking, MSHA implemented a formula for penalizing typical citations[1] through the

[1] Use of the phrase "typical citations" does not suggest acceptance of any violation of a mandatory safety standard. It reflects only that all involved in the mining industry know that the rigorous and frequent inspection of mines by hundreds of inspectors for violations of detailed and complex mandatory safety standards in a constantly changing mining environment results in (continued…)

"regular" point system, which assigns points for the penalty criteria related to the size of the operator, frequency of violations, negligence, and gravity depending upon where an operator and the violation fall along continuums of the frequency of violations, negligence, and gravity. The points are added and converted into a penalty assessment according to a penalty point conversion table. 30 C.F.R. § 100.3(g) Table XIV.

The Commission has never sought to impose a regular or uniform system to guide Judges toward fair and consistent assessment of penalties. Instead, the Commission has long recognized the utility of MSHA's regular point system to a fair and systematic application of the penalty criteria. It is therefore now axiomatic that if a Judge imposes penalties that substantially diverge from the penalties proposed by MSHA using the regular point system, the Judge must explain the reason for such divergence based on the penalty criteria. *See, e.g.*, *Sellersburg Stone Co.*, 5 FMSHRC 287, 293 (March 1983), *aff'd*, 736 F.2d 1147 (7th Cir. 1984). In *Sellersburg*, the Commission stated that when a Judge imposes a penalty that substantially diverges from the originally proposed penalty, the Judge must explain the bases for such penalty to ensure credibility and avoid the appearance of arbitrariness.

The Commission has repeatedly reaffirmed the Sellersburg instruction. *See, e.g.*, *Unique Electric,* 20 FMSHRC 1119, 1123 & n.4 (Oct. 1998); *Dolese Bros. Co.*, 16 FMSHRC 689, 695 (Apr. 1994); *Hubb Corp.*, 22 FMSHRC 606, 612 (May 2000); *Cantera Green*, 22 FMSHRC 616, 622-623 (May 2000); *Douglas R. Rushford Trucking*, 22 FMSHRC 598, 601 (May 2000); *Spartan Mining Co.*, 30 FMSHRC 699, 723 (Aug. 2008); *Performance Coal Co.*, 35 FMSHRC 2321 (Aug. 2013); *Hidden Splendor Res., Inc.*, 36 FMSHRC 3099, 3104 (Dec. 2014); *Newmont USA Limited*, 37 FMSHRC 499, 506 n.8 (Mar. 2015).[2]

The Commission requires such explanations even when the Judge has considered and made findings on all penalty criteria:

> Here, the Judge considered and made findings on all six section 110(i) factors and assessed a penalty that was 23% below that

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[1] (… continued)
yearly issuance of tens of thousands of citations. For example, in calendar year 2017, MSHA issued 104,792 citations. https://www.msha.gov/data-reports/statistics/mine-safety-and-health-glance.

[2] In enacting the Mine Act, Congress recognized the benefit of the regular point system implemented under the Coal Act by MSHA's predecessor, the Mine Enforcement Safety Administration ("MESA"), describing MESA as having "adopted a schedule or gradation of violations to provide consistency in imposing penalties under the Coal Act. The committee recognizes that such a schedule will be equally applicable to situations in noncoal mining and should allay unwarranted misapprehensions by operators of excessively heavy fines." H.R. Rep. No. 95-312, 95th Cong., 1st Sess. 20, *reprinted in* Senate Subcomm. on Labor, Comm. on Human Res., 95th Cong., *Legislative History of the Federal Mine Safety and Health Act of 1977,* at 357, 376 (1978).

> proposed by the Secretary. However, the Judge did not offer any explanation for the divergence, for instance, by explaining whether he gave special weight to various criteria, and thus failed to provide the basis for meaningful review of the penalty by the Commission. . . . Accordingly, we remand the penalty associated with Citation No. 6685833 to the Judge for further explanation consistent with this decision.

Hidden Splendor, 36 FMSHRC at 3104 (citation omitted).

A Judge need not explain insubstantial variances due to the Judge's evaluation of the case or adjustments in penalty criteria findings such as minor adjustment of a violation on the continuums of negligence and gravity. However, if the Judge imposes a penalty that is substantially higher or lower than the penalty assessed under the regular point system, the Judge must provide a sufficient justification based upon his/her findings of fact related to penalty criteria. The Commission has never defined "substantially," but it has consistently explained the reason for the *Sellersburg* requirement, stating the first time this case was before us that "[t]he Commission's reason for requiring an explanation for a substantial divergence between the Secretary's proposed penalty and a Judge's assessed penalty is to maintain the integrity of the assessment process." *American Coal Co.*, 38 FMSHRC 1987, 1994 (Aug. 2016).[3]

Of course, penalty assessments still will vary and two Judges are unlikely to assign an identical penalty even when cases involve similarly situated operators found liable for violations of the same standard and with similar gravity, negligence, and other penalty criteria. However, a decent respect for fairness and regularity in a penalty system suggests that the penalties not be grossly disparate. The *Sellersburg* principle seeks that objective.

B. Special Assessments

Separately from the regular point system, MSHA reserved a discretionary right to propose substantially higher penalties in individual cases through a "special assessment" process. 30 C.F.R. § 100.5. MSHA did not propose or adopt through rulemaking any formula for

[3] The requirement for an explanation of a substantial divergence from a penalty assessed under the regular point system at section 100.3 is not an incursion into the Judge's authority or a grant of deference to MSHA. It is recognition of the importance of the regular point system for essentially uniform initial assessments based upon standard criteria, thereby advancing fair and uniform penalty assessments across the tens of thousands of assessments made annually. The regular point system constitutes a reasonable effort to normalize penalties across operators and violations. A regularly assessed penalty is not a "baseline" to be adjusted upwards or downwards but it does provide a vital reference point to assist the Commission in achieving consistent, non-arbitrary assessments.

computing special assessments and does not have published guidelines for when it would make special assessments.[4]

On the face of 30 C.F.R. 100.5, a special assessment is entirely discretionary and arbitrary. Originally, MSHA put some meat on the bones of special assessments through a list of eight specific categories of violations reviewed for possible special assessments.[5] In 2007, MSHA scraped the meat from the bones revising the regulation to simply say that it "may elect to waive the regular assessment under § 100.3 if it determines that conditions warrant a special assessment." 30 C.F.R. § 100.5. The regulation provides that "MSHA may elect to waive the regular assessment under §100.3 it determines that conditions warrant a special assessment." 30 C.F.R. § 100.5. The regulation further provides that all findings will be in a narrative form. 30 C.F.R. § 100.5(b). It does not define or describe violations that warrant a special assessment.

Typically, the narrative findings for special assessments are brief and conclusory. The hearing record will also include a "Special Assessment Narrative Form," which reflects a

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[4] MSHA does not specially assess only those violations that are especially egregious due to negligence or gravity. Recently, the Secretary settled five citations in Docket No. LAKE 2011-12. MSHA specially assessed the citations because they were violations of "Rules to Live By" rather than for necessarily indicating a high level of negligence. Although specially assessed, three of the citations were for moderate negligence. The Secretary agreed to settle based on the negligence found by the inspector. The settlement reduced the total penalties from $87,300 to $28,500. A special assessment, therefore, does not necessarily arise from an allegation of a high level of misconduct on the part of the operator, and the Secretary in a prior similar case agreed to a substantially reduced penalty based upon findings of moderate negligence. This stands in sharp contrast to the Judge's arbitrary determination in this case to assess penalties doubling or quadrupling a special assessment for the violation as found by him.

[5] Prior to April 2007, MSHA's regulations listed eight specific categories of violations reviewed for possible special assessments. The specific types of violations were:

> (1) Violations involving fatalities and serious injuries;
> (2) Unwarrantable failure to comply with mandatory health and safety standards;
> (3) Operation of a mine in the face of a closure order;
> (4) Failure to permit an authorized representative of the Secretary to perform an inspection or investigation;
> (5) Violations for which individuals are personally liable under Section 110(c) of the Act;
> (6) Violations involving an imminent danger;
> (7) Discrimination violations under Section 105(c) of the Act; and
> (8) Violations involving an extraordinarily high degree of negligence or gravity or other unique aggravating circumstances.

30 C.F.R. § 100.5(a) (2006); 72 Fed. Reg. 13,592, 13,621-22 (Mar. 22, 2007).

calculation of both a regular assessment and the special assessment. The regulation does require MSHA to base the proposed penalty upon the six penalty criteria. *Id.*

Although section 100.5 does not describe a methodology or system for special assessments, MSHA informally and without public notice and comment adopted internal "MSHA Special Assessment Procedures."[6] Regardless of the reason for a special assessment, the process for determining the amount of the assessment follows the internally prescribed MSHA formula.

The system does not vary according to the standard violated. The starting point for a special assessment is the regularly assessed point value. Then, MSHA adds a specified number of penalty points to negligence and gravity based upon identified conditions of the violation including, e.g., whether the violation contributed to an accident, involved reckless disregard, or was the result of an unwarrantable failure. The Special Assessment procedures do not adjust the penalty for the size of the business, the frequency of violations, or the frequency of repeat violations. MSHA continues to assign points for those criteria on the regular point formula.

Of course, therefore, the reason for which an inspector may recommend a special assessment might not relate in any way to the actual special assessment. For example, in this case, the inspector testified he recommended the violations for special assessment based upon the operator's history of violations. Tr. 243. However, history of violations was not an additive component to the special penalty assessment; thus, the operator's history of violations played no role in the calculation of the "special" or "higher than regular" assessment. Instead, MSHA added a substantial number of points for gravity and negligence even though it did not change the gravity or negligence evaluations.[7]

Having added penalty points to the violations, MSHA computes the special (higher) assessment through reference to the regular Penalty Conversion Table at section 100.3(g). Under the internal procedures, MSHA may then add or subtract up to 25% from the table result in assessing a final penalty. A special assessment, therefore, results from a decision to increase an assessment substantially through the addition of penalty points, principally for gravity and negligence, according to a fixed formula, followed by a discretionary decision whether to raise or to lower the calculated assessment by up to 25%.

A decision by MSHA to assess specially may be viewed as somewhat analogous to a decision by a Judge to diverge substantially from a proposed regularly assessed penalty. In making a special assessment, the Secretary asserts a need for a substantially higher penalty. When MSHA issues a special assessment, MSHA must support its request with substantial

[6] The procedures are Attachment A to this opinion. MSHA's website (https://www.msha.gov) also sets out the procedures.

[7] Ironically, given that MSHA based the greatly increased assessment upon the addition of penalty points to negligence and gravity, the Judge actually reduced the negligence on all of the violations and the gravity on one of the violations.

evidence relating the need for the proposed penalty to the penalty criteria. Indeed, when this very case was previously before us, the Commission held that the Secretary "bear[s] the 'burden' before the Commission of providing evidence sufficient in the Judge's discretionary opinion to support the proposed assessment under the penalty criteria. When a violation is specially assessed, that obligation may be considerable." 38 FMSHRC at 1993.

In light of the entirely subjective, discretionary decision to assess specially in the first place and the special assessment procedures themselves, special assessments do not seek to assess similar operators a relatively similar penalty for similar violations. A special assessment instead constitutes a determination by MSHA to impose a penalty substantially higher than the regular penalty in a specific case. It is an especially punitive exaction for purposes of deterrence.

Unlike a regular assessment, the special assessment process, applied through informal procedures upon which MSHA has not allowed public comment, does not assure the integrity of administrative processes. Indeed, the special assessment system may result in the very danger feared in *Sellersburg* — namely, "the credibility of the administrative scheme providing for the increase or lowering of penalties after contest may be jeopardized by an appearance of arbitrariness." *Sellersburg*, 5 FMSHRC 293. The danger of a special assessment against which Judges must guard, therefore, is that the penalty assessed by MSHA, already diverging from the system designed to avoid arbitrariness, may not reflect proper consideration of the penalty criteria.

In turn, a Judge may not simply pick a penalty amount out of the air but must exercise prudence to assess a penalty that, based upon the evidence, is consistent with a fair penalty assessment program. Therefore, when MSHA asserts the need for a special assessment, Judges must demand the presentation of the "considerable evidence" necessary for an assessment that does not track with the consistent penalization of violations based upon the penalty criteria as furthered by the regular penalty system.

C. Commission Review of Assessments

In *Sellersburg*, the Commission recognized that a Judge's discretion in assessing penalties is wide but not unbounded. The assessed penalty must reflect proper consideration of the statutory penalty criteria. 5 FMSHRC at 290-294. Substantial evidence must support the assessment, and the assessment must be consistent with the statutory penalty criteria. *Pyro Mining Co.*, 6 FMSHRC 2089, 2091 (Sept. 1984). Although all the penalty criteria are important, emphasis ordinarily rests with the negligence and gravity criteria. *Spartan Mining*, 30 FMSHRC at 724-25. When a Judge fails to give proper weight to penalty criteria or fails to reflect proper consideration of the criteria, the Commission may set aside the assessed penalty and make the final assessment. *Westmoreland Coal Co.*, 4 FMSHRC 491, 492 (Apr. 1986).

An additional principle bears upon the consideration of this case. Courts of Appeals have rebuked the Commission for an absence of consistency in decision-making. In *Noranda Alumina, L.L.C. v. Perez*, 841 F.3d 661 (5th Cir. 2016), and *Lone Mountain Processing, Inc. v. Sec'y of Labor*, 709 F.3d 1161(D.C. Cir. 2013), federal circuit courts found that inconsistency in the

Commission's application of principles for evaluation of motions to reopen required vacature of the Commissions' denial of such motions.

Although there are obvious differences between motions to reopen and penalty assessments, the Commission expects Judges to exercise consistency in their penalty assessments. Otherwise, Judges are just picking numbers out of the air. Indeed, such consistency is the raison d'être for the Commission's *Sellersburg* principle. The Commission's recognition of the regular point system as providing a measure of consistency across different operators is a good but not final assurance of the regularity and predictability inherent in a fair penalty system. If, on the face of an assessment, a Judge has applied one or more penalty criteria in a particularly different or inconsistent fashion from other cases, the deviation is a matter of concern and may dictate vacature of the inconsistent penalty as arbitrary and capricious.

In reviewing a penalty assessment, the Commission determines whether substantial evidence justifies the penalty and whether the penalty is consistent with the statutory penalty criteria. *Pyro*, 6 FMSHRC at 2091. When the Commission, using this standard, concludes that the penalties assessed do not properly reflect the penalty criteria, it may reassess penalties as warranted by the record. *See, e.g.*, *United States Steel Corp.*, 6 FMSHRC 1423, 1431-32, 1434 (June 1984).

II. The Special Assessments in This Case

This case demonstrates MSHA's application of its procedures for special assessments. Using the largest monetary penalty (Citation No. 8428508) as an example, and recalling that the inspector cited frequency of violations rather than negligence or gravity as the reason for the special assessment, the following table sets forth MSHA's addition of points to the regular point assessment for gravity and negligence in order to arrive at the 2011 special assessment under the Part 100 regular and the MSHA Special Assessment Procedures.

Penalty Factor	Calculation of what MSHA regular assessment would have been	MSHA special assessment
Adversely Affect Staying in Business	No affect	No affect
Mine Size	15	15
Controller Size	10	10
Frequency	10	10
Repeat Frequency	8	8
Gravity (Likelihood)	30	35 (added 5)
Gravity (Severity)	10	20 (added 10)
Gravity (# Persons Affected)	1	2 (added 1)
Negligence	35	40 (added 5)
Imminent Danger	0	0
Unwarrantable Failure	0	0
Defiance of Order	0	0
Abatement	0	-2 (subtracted 2)

Additional penalty points		**19**
Total Points	119	138
Resultant Penalty from Table XIV	$12,563	$53,858
Good Faith Abatement	$1,256	—
Discretionary increase/reduction		**-25% for this violation**
Final Penalty	$11,307	$40,300

As demonstrated, MSHA used its regular point system and then added 16 points to gravity and 5 points to negligence pursuant to its special assessment procedures. MSHA subtracted 2 penalty points for abatement and granted a discretionary 25% reduction in the calculated penalty. In another case, it might have increased the penalty by 25% to a total of $67,322.

After the hearing, the Judge reduced the levels of gravity to an injury resulting in lost work days or restricted duty and negligence to "moderate." Such lower levels would have reduced the points accorded those factors in an MSHA regular assessment. Thus, MSHA's special assessment of the penalty turns out to have added 20 negligence points to the level of negligence over the regular point schedule and added 16 points for gravity over the regular point schedule — a total of 36 points. Therefore, subtracting the 2 points for abatement, MSHA's calculation of the special assessment applied 34 penalty points above the regular section 100.3-point schedule for the violation as eventually determined by the Judge. As a result, MSHA assessed an amount of $40,300 for a violation of a nature as found by the Judge that it would have regularly assessed at $2,282. This $38,000 increase amounts to about a 1,750 percent higher penalty assessment than regular assessment. Indeed, as shown a few pages below, an MSHA special assessment for the violation as found by the Judge would have been $5,831.

The penalties for the other three citations reflect similar increases. Of course, MSHA based all additions of penalty points unrelated to the history of violations.

Citation No.	Penalty under regular assessment	Special Assessment
8432118	$2,678	$9,100
8432126	$2,282	$7,700[8]
8432129	$2,282	$7,700[8]

As with Citation No. 8428508, the Judge's findings, had they been reflected in an MSHA regular assessment, would have resulted in markedly different assessments for these citations. For Citation Nos. 8432126 and 8432129, the regular penalty for the violations as found by the Judge would have been $1,026 and a special assessment would have been $3,493. For Citation No. 8432118, the regular penalty for the violations as found by the Judge would have been $1,023 and the special assessment would have been $3,074.[9]

[8] MSHA did not reduce these penalties by 25%.

[9] The lower dollar amount results from giving the 25% reduction that MSHA gave for Citation 8432118 but not for the other citations.

III. The Judge's Decisions

A. The Initial Decision

The Judge affirmed all the violations and all S&S findings. 35 FMSHRC 3077, 3099-3122 (Sept. 2013) (ALJ). The Judge reduced the level of negligence alleged by the Secretary for all four violations. He reduced the level of gravity for one citation. *Id.* at 3108-09, 3114-15, 3118-19, 3122. Specifically, he made the following changes:

1. Citation No. 8428508 – The Judge reduced the gravity from an expectation of a permanently disabling injury to lost or reduced workdays. He reduced negligence from high to moderate.

2. Citation No. 8432118 – The Judge reduced negligence from moderate to low. He sustained a gravity determination of reasonable likelihood of lost workdays.

3. Citation No. 8432126 – The Judge reduced negligence from moderate to low. He sustained a gravity determination of reasonable likelihood of lost workdays.

4. Citation No. 8432129 – The Judge reduced negligence from moderate to low. He sustained a gravity determination of reasonable likelihood of lost workdays.

The Judge discussed negligence and gravity for each violation in the decision.

Before assessing penalties for specific citations, the Judge considered the arguments of the parties regarding the imposition of penalties. *Id*. at 3109-10. According to the Judge, the Secretary's argument for specially assessed penalties was that the Judge should take into account a violation's level of negligence, possible S&S character, and the history of violations. In turn, the Judge stated that the operator's argument was that the changes to section 100.5 in 2007 made the regulation vague, ambiguous, and undeserving of deference, and that the Secretary had failed to prove "particularly serious and egregious violations" or "other aggravating circumstances" justifying enhanced penalties. *Id.* Although the Judge identified the penalty criteria, he did not make any findings related to the ability of the operator to stay in business. Further, he never mentioned the size of the operator.

In the next section of his penalty discussion, the Judge imposed specific penalties for each citation. He started with Citation No. 8428508. In a brief discussion, he cited the Commission case law requiring a Judge to explain a substantial deviation from a proposed assessment, demonstrating an awareness of the limits of his discretion. He then found that he would deviate substantially from the proposed assessment of $40,308 because he reduced gravity to lost workdays or restricted duty and reduced negligence from high negligence to moderate negligence. He imposed a penalty of $20,000.

The discussions of the penalties for the other three citations are identical except for amount:

> For the same reasons provided with respect to Citation No. 8428508, supra, the ALJ finds that, in light of Respondent's previous violations history and the requirements of pertinent case law, significant penalties are appropriate.
>
> However, as with Citation No. 8428508, a deviation from the Secretary's proposed penalty is warranted. Under *Sec. v. Performance Coal Co.*, that deviation must be explained. As discussed supra, Respondent's conduct was not, in this Court's opinion, the result of moderate negligence but only low negligence.
>
> Affirming the citation as issued with a modification of negligence from moderate to low the ALJ finds the Secretary's proposed penalty should [be] reduced from $[proposed amount] to $[assessed amount].[10]

Id. at 3115, 3119, 3122. Consequently, for each penalty, the Judge stated that the reasons are the same as the reasons for Citation No. 8428508 and explicitly noted a duty to explain a substantial variation from the MSHA assessed penalty.

B. The Decision on Remand

On remand, the Judge affirmed his prior penalty assessments. 38 FMSHRC 2612 (Oct. 2016) (ALJ). In a general discussion, he stated that the statutory penalty criteria guided his penalty determinations and that he "emphasizes and clarifies" that he did not use MSHA's special assessments as a baseline for his assessments. Separately, the Judge stated that he imposed the penalties "with no feelings of constraint imposed by the proposed special assessments." *Id*. He found a $20,000 penalty appropriate for Citation No. 8428508.

Apparently thinking that the *Sellersburg* requirement for an explanation of a substantial variance applies with equal vigor and identical reasons to special assessments, the Judge explained his divergence in accordance with the *Sellersburg* requirement.[11] Although the Judge

[10] For Citation No. 8432118, the reduction was from $9,100 to $7,200. For Citation No. 8432126, the reduction was from $7,700 to $6,100. For Citation No. 8432129, the reduction was from $7,700 to $6,100.

[11] The Judge stated that "[t]o the extent that there were any substantial deviations in this Court's penalty amounts that would require a Sellersburg explanation, this Court notes that, on the one hand, it frequently disagreed with the Secretary's negligence assessments." *Id*. at 2617.

stated he did not use the initial special assessment as a baseline, it is not logically possible that the initial penalty assessment did not strongly influence his assessment. Indeed, the Judge explicitly stated that in lowering the penalty based on lowered gravity and negligence, "this Court was persuaded that the penalty should be *reduced* (emphasis added)." *Id*. at 2619. Therefore, the Judge expressly characterized his assessment as a "reduction" of MSHA's special assessment thereby contradicting his own assertion of independence.

After the general discussion, the Judge explained his assessment for each violation. The Judge cited three reasons for his assessments in these discussions.[12]

First, for two of the citations — Citation Nos. 8432118 and 8432126 — the Judge found that the penalties would not affect the operator's ability to continue in business. Therefore, he seemed to link the amount of the assessment to a finding that it would not drive the operator out of business. *Id*. at 2619.

Second, for Citation Nos. 8428508, 8432118, and 8432126, the Judge cited the size of the operator. In discussing Citation No. 8428508, the Judge specifically noted that the operator's production exceeded 6,000,000 tons and the controlling tonnage exceeded 29,000,000 tons. He found that "[t]he size of Am Coal's operation would call for more than a minimal fine as to all the citations at issue." *Id*. at 2618.

The Judge did not mention either of these factors in his initial decision. The Judge did not identify the operator's ability to continue in business in his initial decision other than to include it in a list of penalty criteria. In addition, the Judge did not mention the operator's size in his initial decision other than to include size in a list of penalty criteria. Nonetheless, in his remand decision, the Judge asserted that he gave those two factors "great weight." *Id*. at 2617.

Third, as in his initial decision, the Judge cited the history of violations as a factor in his penalty determination. He expressly rejected any argument that the operator's violations history was "not extraordinary or extreme" thereby warranting lesser penalties. *Id*. at 2618

The Judge did not opine upon whether he viewed the history of violations factor in an absolute sense — that is, the raw number of violations regardless of total production, or took into account the frequency of violations relative to the size of the mine and the tons of coal produced. Importantly, in applying the history of violations factor, the Judge did not correlate his weighing of that factor with MSHA's exhibit showing the operator was below the midpoints for assignment of penalty points regarding both frequency of violations (10 points out of a possible 25) and frequency of repeat violations (6 points out of a possible 20).

[12] Not every reason appears in every specific discussion. However, we agree with the Secretary that because the citations were all for violations of the same standard, were assessed with the same gravity determination, and three of the four were assessed as low negligence, the Judge meant to apply the same reasons to all citations.

DISCUSSION

For the reasons set forth below, we would find the penalties imposed by the Judge arbitrary and capricious. This case presents a remarkably clear opportunity to discuss a well-documented phenomenon of which Commission Judges must be aware and against which they must gird themselves — an "anchoring" bias.[13] "Anchoring" is the term used for the common human bias — a cognitive bias — in which a person making a decision relies too heavily on the first piece of information of which he/she becomes aware.

Cognitive scientists and behavioral economists have long understood and described the anchoring effect. *See* Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases,* 185 Science 1124-31 (Sept. 1974). However, this is not the province only of scientists and specialists. Common sense teaches that the starting, guidelines-departure point matters. When people are given an initial numerical reference, even if it is random, they tend to "anchor" their subsequent judgments — as to someone's age, a house's worth, how many cans of soup to buy, or even what sentence a defendant deserves — to the initial number given. When the number is not random but arises from a supposed "special formula," the propensity for swaying a decision must be significantly greater.

Secondly, this Judge's decision demonstrates a misunderstanding that the *Sellersburg* principle applies rigorously to special assessments. Such misunderstanding undoubtedly influenced the Judge's penalty decision and, in turn, worsened cognitive bias arising from MSHA's initial special assessment.

Separately from these important considerations, the penalties assessed by the Judge are arbitrary and capricious based upon other errors and inconsistencies in his decision. Upon remand, the Judge relied upon a penalty criterion irrelevant to the establishing the amount of a penalty — a criterion not mentioned at all by the Judge in the initial decision and which does not support his remand decision, and an overemphasis upon one penalty criterion without weighing its importance to the specific operator before him. Moreover, his penalty assessment is dramatically inconsistent with his assessment in a very similar (in fact, virtually identical) case. These errors, along with self-evident cognitive bias and misapplication of the *Sellersburg* principle, led the Judge to impose penalties in excess of reasonable amounts.

The following table demonstrates the effect of anchoring, the undue application of the *Sellersburg* principle in the context of a special assessment, and the excessiveness of the penalties flowing from the Judge's erroneous application of the penalty criteria.[14] The table is a strong indicator of excess. Even if, standing alone, it does not ***prove*** arbitrariness, it serves to illustrate tellingly the discussion that follows.

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[13] *See* generally Section I, *infra*.

[14] The data for the table are set forth in Appendices Attachment B to this opinion.

Citation No.	Penalty that would have been assessed in 2011 under the regular point system for violations as found by the ALJ	Penalty that would have been assessed in 2011 under the MSHA special assessment system for violations as found by the ALJ	ALJ's Final Assessment
8428508	$2,282	$5,831	$20,000
8432118	$1,003	$3,074	$7,200
8432126	$1,026	$3,493	$6,100
8432129	$1,026	$3,493	$6,100
Safeguard	$1,412	$1,412	$3,800
Total	$6,769	$18,328	$43,200

The table illustrates that the Judge imposed a penalty of $20,000 for the moderate negligence, lost workdays/restricted duty violation he found in Citation No. 8128508. The regular assessment for the violation would have been $2,282. Using MSHA's special assessment procedures the penalty would have been $5,831. This means the Judge's assessment was nearly 10 times higher than the ordinary regular assessment and nearly four times higher than the special assessment MSHA would have sought for the violation as found by the Judge. Similar changes apply to the assessments of the other violations. Therefore, recognizing that the regular and special assessments are not outcome determinative, we nonetheless do not find any sufficient explanation warranting penalties exceeding a regular assessment by approximately 900% and a special assessment by 350%.

I. The Anchoring Effect of Special Assessments

Clearly, the recognized anchoring phenomenon is relevant to special assessments. If MSHA proposes an assessment of $50,000 based upon a "system" developed by it for special assessments, it is virtually inevitable that such assessment exercises an effect, at least a "tug" in the words of one court, upon the final assessment.

Courts have long recognized this intuitive cognitive behavior. Circuit courts often refer to the anchoring effect in considering sentencing guidelines. *See, e.g.*, *United States v. Rushton*, 738 F.3d 854, 861 (7th Cir. 2013). In *Rushton*, the court held that:

> The calculation [of the sentencing range] is complicated, mandatory, and done first; thus it is likely to exert a not wholly conscious tug on the judge when, after having determined the guidelines range, he is deciding what sentence to give, guided by the sentencing factors in 18 U.S.C. § 3553(a). See, e.g., Stephanos Bibas, "Plea Bargaining Outside the Shadow of Trial," 117 *Harv. L.Rev.* 2463, 2515–19 (2004); Birte Englich & Thomas

> Mussweiler, "Sentencing Under Uncertainty: Anchoring Effects in the Courtroom," 31 *J. Applied Soc. Psychol.* 1535 (2001)

Id.

The Fourth Circuit also set forth the effect of anchoring through a listing of references:

> Hon. Mark W. Bennett, *Confronting Cognitive "Anchoring Effect" and "Blind Spot" Biases in Federal Sentencing: A Modest Solution for Reforming a Fundamental Flaw,* 104 J.Crim. L. & Criminology 489, 492 (2014) ("[I]t is critically important for sentencing judges, probation officers who prepare presentence reports, and practicing lawyers to understand the potential robust and powerful anchoring effect of advisory Guidelines and the effect of the 'bias blind spot' in determining just sentences."); Hon. Jed S. Rakoff, *Why the Federal Sentencing Guidelines Should be Scrapped,* 26 Fed. Sent'g Rep. 6, 2013 WL 8171733, at *8 (Oct. 1, 2013) ("[T]he very first thing a judge is still required to do at sentencing is to calculate the Guidelines range, and that creates a kind of psychological presumption from which most judges are hesitant to deviate too far.").

United States v. Parral-Dominguez, 794 F.3d 440, 448 n.9 (4th Cir. 2015). A Judge on the Eleventh Circuit explained anchoring as follows:

> Not only have district courts now become used to relying on them, but the Guidelines inevitably have a considerable anchoring effect on a district court's analysis:
>
> > Anchoring is a strategy used to simplify complex tasks, in which numeric judgments are assimilated to a previously considered standard. When asked to make a judgment, decision-makers take an initial starting value (i.e., the anchor) and then adjust it up or down. Studies underscore the significance of that initial anchor; judgments tend to be strongly biased in its direction.
>
> Nancy Gertner, *What Yogi Berra Teaches About Post–Booker Sentencing,* 115 Yale L.J. Pocket Part 127 (2006), http://www.thepocketpart. org/2006/07/gertner.html (quotations omitted).

United States v. Docampo, 573 F.3d 1091, 1105 n.5 (11th Cir. 2009) (Barkett, J., concurring, in part and dissenting, in part).[15]

Of course, the anchoring phenomenon is not itself a sufficient reason for reversal lest all penalty assessments become subject to reversal based on a cognitive bias challenge. However, it would be foolish to suggest Commission Judges are somehow immune to the anchoring phenomenon. Research suggests otherwise. An experiment conducted on 167 federal magistrate judges demonstrated that experienced court officers may be affected. Emily L. Forster, *Anchoring and the Expert Witness Testimony: Do Countervailing Forces Offset Anchoring Effects of Expert Witness Testimony?*, 77 Tenn. L. Rev. 623, 635 (2010).

In a sense, the Commission has recognized a regular penalty assessment by MSHA as an authorized "anchoring" assessment because a regular assessment reflects application of a uniform and regularized system to an assessment. It is not binding, but a substantial change requires an explanation in order to assure the integrity of the penalty process. On the other hand, special assessments issued by MSHA flow from formulized calculations largely, and sometimes wholly, unrelated to the violation and the untethered discretion to move the assessment within a range for 25 percent higher or lower. Nonetheless, special assessments undoubtedly create an anchoring effect resulting in psychological resistance to a great deviation from the special assessment. Next, we turn to the impact of *Sellersburg* when applied to special assessments in general and in this case in particular.

II. ***Sellersburg* in the Context of Special Assessments**

MSHA, and MESA before it, developed the regular point system to avoid the arbitrariness of penalties likely to arise from assessing penalties without any system providing for some level of uniformity. Application of the *Sellersburg* principle to regularly assessed penalties works to avoid an appearance of arbitrariness in penalty assessments. Because regular assessments serve the purpose of consistency and uniformity, it is important for the parties and the Commission to know the reasons for a substantial variance from a regular assessment.

Special assessments, on the other hand, do not serve a purpose of avoiding arbitrariness. They are arbitrary by their very nature because they are not moored to predictive norms and values, as regular assessments are. MSHA has not promulgated any

[15] The Journal piece quoted by Judge Barkett is one of many articles confirming the importance of anchoring in judicial proceedings. *See, e.g.,* Sarah M.R. Cravens, *Judging Discretion: Contexts for Understanding the Role of Judgment*, 64 U. Miami L. Rev. 947, 962 (2010); Jelani Jefferson Exum, *The More Things Change: A Psychological Case Against Allowing the Federal Sentencing Guidelines to Stay the Same in Light of Gall, Kimbrough, and New Understandings of Reasonableness Review*, 58 Cath. U.L. Rev. 115, 125 (2008); Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, *Inside the Judicial Mind*, 86 Cornell L. Rev. 777, 787–94 (2001); Kate Stith, *The Arc of the Pendulum: Judges, Prosecutors, and the Exercise of Discretion*, 117 Yale L.J. 1420, 1496 (2008).

rules defining when it will make a special assessment.[16] In turn, the calculation of the proposed special penalty by MSHA is based largely on arbitrary increases in points and then a wholly subjective decision to increase or reduce the total calculated penalty. Further, as here, the points may be added for penalty criteria (negligence and gravity) when the ostensible reason for the special assessment was frequency of violation. Such a calculation does not have a rational foundation. A special assessment provides no benefit for assurance uniformity or integrity of the penalty system. Consequently, when MSHA makes a special assessment, it is uniquely the task for the Judge to make an independent judgment based upon the record. The Judge may not pull the penalty out of the air as a perceived compromise between a regular point assessment and an overstated special assessment. The Judge must explain the penalty based on the penalty criteria in a manner that shows thoughtful consistency of the penalty amount with the criteria and a proper penalty under those criteria.

Thus, the Secretary must produce the considerable evidence necessary to justify an assessment substantially above a normal, regular assessment based on a claim of special circumstances by MSHA. The Judge's duty does not diminish the right of MSHA to make special assessments and does not diminish the right and obligation of the Judge to assess a final penalty. It simply recognizes that regularity of results is not a goal of special assessments and, as MSHA itself recognizes, special assessments arise from factors MSHA believes warrant a discretionary penalty that is inconsistent with the regular assessment process.

When MSHA decides to issue a special assessment the relevant issue is whether the Secretary introduces a sufficient quality and quantity of evidence to justify the penalty he seeks. Stated simply, on what basis does the Secretary justify a substantial heightening of penalties from regular penalties promulgated after notice and comment rulemaking to bring relative consistency to penalties? This is nothing more than requiring the Secretary to bear the burden of establishing that the penalty is appropriate, as the Mine Act requires.

This does not mean that the Judge must use the regular point schedule as a starting point when the Secretary makes a special assessment. It means the fundamental elements of a fair assessment are critical. The Judge must apply all penalty criteria and must explain fully the basis for a fair and reasoned penalty based as much as possible upon an objective application of the penalty criteria.

In prior decisions, the Commission has not expressed clearly enough the distinction between regular penalty assessments and special assessments. This case presents the opportunity to clarify the distinction between applying *Sellersburg* to regular assessments versus special assessments. Regular assessments follow a system intended to assure the integrity and fairness of

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[16] MSHA has issued various forms of informal guidance. None of these guides has been subject to public comment, and none actually establishes any duties for MSHA. Indeed, the guides themselves provide complete flexibility for MSHA to apply or not apply them in its discretion. Some of the circumstances most likely to draw special assessments such as a fatality, are predictable but not uniformly applied. Further, other special assessments, such as the assessment in this case, are wholly unpredictable.

the penalty system. Special assessments result from a series of subjective decisions and thereby give rise to the risk of an arbitrary system. While the special assessment process may be designed to impose a heightened penalty to deter a particular type of conduct, there is no methodology for the Commission to evaluate the quality of that determination against firm criteria. Judges need not and should not view the decision to assess specially or the special assessment itself as the product of a system developed for uniform assessment of fair assessments. In the case of a special assessment, the Judge must weigh the evidence holistically taking care to avoid any anchoring influence by the special assessment.[17]

III. Errors in the Administrative Law Judge's Assessment

From the foregoing discussion, it is obvious the Judge, in this case, faced a double whammy. The special assessment had an anchoring effect upon his evaluation of the penalty. In turn, his stated belief that the *Sellersburg* principle applied to the special assessment could only intensify a predisposition not to stray too far from the special assessment. The penalty imposed by the Judge undoubtedly is arbitrary and capricious.

A. The reasons cited by the Judge for the penalties do not support the size of the penalties.

The Judge does not provide a reasonable basis for the unusually high penalties for three low negligence violations and one moderate negligence violation. As set forth above and as pointed out in our earlier decision in this case, when a Judge assesses a penalty at an amount ten times above the regular assessment and even four times above what a special assessment would have been, the Judge faces a considerable burden in supporting the penalty. On remand, the Judge supported his original assessment through reference to three penalty criteria: the penalties would not affect the operator's ability to stay in business, the size of the operator, and the frequency of violations. These findings do not support his assessment.

1. Affect upon Continuation in Business

It is not entirely clear that the Judge actually meant to "support" the assessment by mentioning, for the first time on remand, the criterion that the penalty would not interfere with the continuation of the operator's business. Regardless, the criterion that a penalty not put an operator out of business with consequent job losses is not a criterion for enhancing a penalty substantially. It is a governing or limiting factor — a potential limitation upon a penalty assessment. The Judge must consider whether a penalty would affect an operator's

[17] The reader may find an implication in this opinion that regular assessments, in fact, should constitute a form of anchor whereas special assessments may not. That is true in a general sense. Regular assessments further an institutional and legal purpose of fairness and uniformity. For that reason, a reason different from cognitive bias, a regular assessment should have weight with Judges. However, a regular assessment is not outcome determinative. Obviously, changes in findings on penalty criteria will cause changes and even when the Judge's finding matches the allegations of the claim, Judges must decide independently on a fair and appropriate penalty.

continuation in business with the resultant loss of jobs and community investment. The fact that a given penalty will not crush an operator's mining venture is not a basis for increasing a penalty assessment without a direct relationship to the subtantive penalty criteria. Certainly, for example, if a Judge agreed with every aspect of MSHA's charge related to a regular assessment, such agreement would not provide a basis for doubling or tripling a penalty based on the premise that such extreme action would not drive the operator out of business.

2. Size of the Operator

The Judge did not even mention the operator's size as a factor in his initial penalty assessment. Upon remand, however, the Judge suddenly gave size and the ability to stay in business "great weight." 38 FMSHRC at 2617. In inserting this previously unmentioned criterion into his assessment, the Judge does not deal with the fact that MSHA's assessment already factored into the assessment calculation the maximum number of penalty points for size. Of course, size is size, so that by parity of reasoning if the size of this operator was a reason for such abnormally high penalties, we must assume that the Judge would apply similar reasoning to all large operators and assess grossly outsized penalties. Such a position simply is not sustainable and, in any event, we will see below is not consistent with the Judge's actions elsewhere.

3. History of Violations

In this case, the inspector cited the operator's violation frequency as the reason for a special assessment. However, MSHA calculated the special assessment by instead arbitrarily adding penalty points for negligence and gravity. There is no rational connection between the decision to assess specially a violation due to the frequency of violations and an arbitrary increase in the penalty based upon negligence and gravity. Here, MSHA simply applied the arbitrary calculation of its formalized Special Assessment Procedures to a violation even though MSHA did not assert any need for a special assessment based upon negligence or gravity.

However, even then, the Judge's use of the history criterion is clearly erroneous. Notably, under the regular point system, MSHA assigns 10 and 8 points respectively to the history of violations and history of repeat violations categories. The maximum points in those penalty categories are 25 and 20, respectively. Assessments of 10 and 8 points fall below the midpoint for each range used in assessing repeat violations.

Therefore, in assessing the penalties, the Secretary did not place, nor would have placed, any significant weight either under the regular or special assessment formula on frequency of violations. The Secretary simply did not base the computation of the large special assessment on the frequency of violations. At the hearing stage, the Secretary cited the raw number of violations as a reason for special assessment. The Secretary argued and Judge accepted that the simple raw numbers of violations, although below the midpoint for frequency, required a much higher than expected penalty.

The Judge's decision did not include any analysis of the actual meaning of the raw numbers of violations to the application of frequency to the appropriate penalty and the

Secretary does not supply one on appeal. The Secretary states in his brief that the operator's production in 2010 was approximately 6,000,000 tons, accounting for approximately 2% of the total of 337,594,564 tons of production from all underground coal mines in the United States in 2010. S. Br. at 11-12. According to MSHA statistics, MSHA cited 2,901 violations of section 75.202(a) at underground coal mines in calendar year 2010. Most Frequently Cited Standards for 2010, https://arlweb.msha.gov/stats/top20viols/top20viols.asp. Two percent of 2,901 citations is 58 citations. Therefore, if an expected frequency were calculated without further evidence or information, operator(s) producing 2 percent of the coal would be expected to have 58 citations per year under section 75.202(a).

The Secretary states that in the two years before issuance of the contested citations, MSHA cited the mine 97 times for violating section 75.202(a). S. Br. at 4. The brief does not breakdown the citations by year. Using just rough math, 97 divided by two would mean 48.5 citations per year. Using MSHA's database of operator violations, we find only 33 citations at the mine for violations of section 75.202(a) during calendar year 2010. In any event, it is clear that the frequency of violations at this mine for violations of section 75.202(a), evaluated on a per-ton basis, actually was better than the average mine's occurrences of such violations.

Of course, the parties could perhaps have argued before the Judge regarding the advantages and/or disadvantages of a large mine regarding violations of section 75.202(a). Perhaps factors such as efficiency of scale, length of beltlines, speed of beltlines, monitoring equipment, or other factors should result in markedly better numbers for a large operator. On the other hand, perhaps such factors as lengthy beltlines, multiple junction points, and other factors make it more difficult to control accumulations. Judges and Commissioners certainly do not have the expertise to make such evaluations. Moreover, no such analysis appears in the Judge's decision.

As a result, in this case, all we have is a number of violations that is below the average frequency on a per-ton basis. Here, the Judge considered only the raw number as a simple, discrete number without considering it in relation to the size of the operator or the performance by coal operators throughout the mining industry. Further, in both his decisions, he totally ignored that MSHA's penalty assessment placed the operator below the midpoint for frequency rates. These failures to consider MSHA's finding that the history of violations fell below the midpoint for both history categories are inexplicable. MSHA's calculation accurately reflects the seriousness of the frequency number on a ton-for-ton basis across the coal industry. We find no basis to ignore those findings that MSHA submitted to the Judge.

The Secretary never made any effort to explain why frequency numbers falling below its midline under section 100.3 warranted a quadrupled penalty. More importantly, the Judge did consider this conundrum in either of his decisions.

In summary, the fact that a penalty will not put an operator out of business is not a basis for imposing an assessment very substantially above an expected or reasonable penalty. The Judge did not even mention the size of the operator in imposing his original high assessment and,

thus, reference to it upon remand as having "great weight," indicates a post-hoc rationale in defense of an unexplained initial decision. Moreover, as we see below, the Judge elsewhere has not applied size in the manner he applied it in this case, thereby undercutting the significance of the reference in this remand decision.

Finally, the frequency of the operator's violations falls below a midpoint for frequency of violations on MSHA's table. It is irrational for such a below-midpoint finding to serve as a basis for assessing penalties many times higher than they would have been under MSHA's regular and special assessment point system. Clearly, the Judge initially picked numbers out of the air most likely based upon a misunderstood application of the *Sellersburg* principle to the special assessment and a cognitive bias created by the anchoring assessment by MSHA. Regardless of the reason, there is no reasonable basis for his final assessments.

B. The Judge's assessment is substantially inconsistent with other assessments made by him.

The Judge issued his remand decision on October 18, 2016. Just several months earlier, the same Judge imposed a penalty for a violation of 30 C.F.R § 400 upon The Ohio Valley Coal Company ("TOVCC"), a similar-sized sister company to AmCoal. *Ohio Valley Coal Co.*, 38 FMSHRC 1084 (May 2016) (ALJ Lewis). Identically to AmCoal, the penalty did not threaten the continuation of TOVCC's business and TOVCC received the maximum 25 penalty points for size. The total points for frequency were 17 (one less than AmCoal). However, there were two distinct differences from the present case. First, the Judge found TOVCC had engaged in a high degree of negligence and an unwarrantable failure. Second, the Secretary proposed a regular penalty assessment of $8,421. The Judge accepted and assessed MSHA's regular penalty assessment. Therefore, in a case in the same time frame in which a sister company of virtually indistinguishable size committed an unwarrantable failure with high negligence, the Judge assessed a penalty less than half of the amount he assessed here for Citation No. 8428508 — a moderate negligence violation. Further, his penalty of $8,421 in that case is very similar to the assessments he made in this case for three low negligence violations.

Clearly, these penalties are wildly divergent in ways that are inconsistent with the progressive discipline imposed by the Act and *Sellersburg*'s command to avoid arbitrary penalty determinations.[18] Standing alone, such inconsistency requires reworking the penalties in the case

[18] We recognize that the comparison of these two cases, which involve the same Judge and similar facts, is a sui generis situation. We do not suggest that Judges must keep a register of their penalty assessments over time attempting to achieve some sort of illusory mathematical consistency. We raise this point in this case because to us it demonstrates the outsized effect the special assessment had on the final penalty assessment. In the TOVCC case, the Judge apparently anchored himself to the regular point schedule assessment whereas in the present case the Judge apparently anchored himself to the special assessment. In light of the TOVCC decision, it is simply impossible for us to believe the Judge would have assessed AmCoal the penalties assessed in this case for reasons other than the cognitive tug of the special assessment and his concern with explaining a substantial divergence from the MSHA special assessment.

before us. The duty to re-evaluate the assessment is even more apparent when coupled with the previously identified errors.

We have compared the penalty here to alternative outcomes because we find it necessary to thoroughly analyze the essence of the Judge's decision and the bases he has provided. Our colleagues suggest that no further analysis is necessary, because the Judge has stated that he complied with our mandate on remand. Slip op. at 10. Their reason for voting to affirm the penalty is that simple. But rather than resting on that determination, or providing an evidence-based counterpoint to our analysis, they attack our opinion with a series of non-sequiturs and erroneous and pejorative misinterpretations.

First, our colleagues elide the true nature of the Judge's reasoning here by claiming that the Judge "emphasized the record evidence pertaining to the operator's large size, its ability to continue in business, its violation history, and the need to provide an effective deterrent."[19] Slip op. at 7. In fact, most of these are static criteria that will bear the same weight in any penalty determination for a given operator. And as we point out above, the Judge did not even mention mine size in his initial decision, other than in a listing of the six penalty criteria. There is no indication that it played any significant role in his original assessment. Having already reduced the charged negligence and downgraded an important gravity finding, when required to explain his outsized penalty, he bolstered his assessment by rote recitation of the remaining possible penalty criteria. Amplifying factors on remand that were unremarkable upon the first assessment is not an "adequate explanation" for the penalty. *See* 38 FMSHRC at 1997. It is grasping at straws. We do not criticize a Judge for being human, but we need not be foolishly naive either.

Second, our colleagues erroneously claim that we have said that "any specially-assessed proposed penalty effectively prevents a Commission Judge from independently applying the statutory penalty criteria and assessing a penalty de novo." Slip op. at 7. They charge that our logic compels the conclusion that any assessment made after a special assessment has been proposed is "fruit of the poisonous tree." *Id.* In fact, we make no such contention. It is the record that shows that *this* Judge impermissibly relied on the Secretary's special assessment *in this* case and that his assessment *here* is impermissibly grounded on a special assessment whose asserted justifications were found lacking *by this Judge in this specific case.* We have simply provided an explanation for the inescapable correlation between an unwarranted special assessment and the

[19] Regarding deterrence, we again disagree with any suggestion that it may be considered as a separate factor. *See Black Beauty Coal Co.*, 34 FMSHRC 1856, 1864-69 (Aug. 2012) (Commissioners Duffy and Young, dissenting); *Lehigh Anthracite Coal, LLC*, 40 FMSHRC 273, 299 (Apr. 2018) (Commissioner Althen, dissenting). The inconsistency with the statute and the potential problems arising from this misapprehension were noted at the time in the *Black Beauty* dissent. *Black Beauty*, 34 FMSHRC at 1864-69. That *Black Beauty* has not fomented chaos is a tribute to our Judges and their opinions since that decision, which have reflected a principled approach bounded by the statutory criteria. We of course recognize deterrence as the animating purpose behind any effective penalty regime and have no quarrel with a Judge emphasizing statutory factors that reflect a need for a larger punitive sanction to encourage corrective action and deter further serious violations of safety standards.

Judge's own assessment, grounded on a known, established, judicially-recognized fact of the occurrence of cognitive bias.

To acknowledge this reality is not to claim that a Judge may not independently assess a penalty using the statutory criteria. It only serves, in this case, to explain a penalty grossly outside the norm and to advise Judges and ourselves to guard against psychological tugs common to the human experience.

Our colleagues also erroneously claim we "downplay" the operator's history of violations, and the significance Congress attached to this factor. *Id*. at 8. We do not. We simply note that the Judge himself did not find this to be a factor of such aggravation, in his initial assessment, as to warrant an extraordinarily large penalty. On remand, it cannot therefore stand unchallenged, and virtually alone among the section 110(i) criteria, as a basis for penalties that are, by any measure, extraordinary.[20]

The facts of this case are wholly unsupportive. There is no special finding of unwarrantable failure, recklessness, or high negligence here, as one would expect with a history of profligate and repeated indifference or ineffectiveness. But our colleagues would hold that the operator should nonetheless be punished as a serious, serial malefactor. Our colleagues' suggestion that statements of an inspector are enough, on their own, to justify an increase in a penalty because the operator has been repeatedly warned about unsafe practices (slip op. at 9), carries no weight at all — not because such warnings are not important, but because the Judge chose not to agree with the inspector that the failure to heed the warnings amounted to a serious lack of reasonable care.

Our colleagues further suggest that we would impose a "new standard" that requires consistency with other assessments by the Judge. Slip op. at 10. They say we would beg the question, "consisten[t] with *what?*" *Id*. (emphasis added). This is not so, either. All we are demanding is factual validation of the necessary assumption upon which our colleagues rely: that this operator's history is so *excessive* that it must be damned as a scofflaw with an excessive violations history. This is virtually the only mutable factor that might support a huge penalty, but the Judge did not find extraordinary negligence, gravity, an unwarrantable failure, or any other aggravation here. Thus, it is entirely fair to ask – yes – "excessive *compared to what?*"

All we have done is point out that the entirety of the record refutes the Judge's conclusion, and that a further analysis of the operator's relative safety performance and the Judge's own perceptions of this very factor foreclose the determinative effect our colleagues have assigned to it. In assessing the penalty, the Judge failed to recognize that the frequency of penalties for an operator the size of this respondent was below the midpoint for the industry

[20] As we have noted, *supra*, at 26, the penalties here not only greatly exceeded those that would have been assessed under the regular assessment schedule, they were significantly higher than penalties that would have been imposed under the special assessment guidelines, had the negligence, gravity, and other criteria been calculated in accord with the Judge's own findings on those factors.

Further, this same Judge imposed lesser penalties upon a same-sized corporate relative in a case that was similar in time and circumstances, but with findings of higher negligence, including an unwarrantable failure. This is not a "new standard" – it is impeachment by inconvenient facts. Logical inconsistencies and disparate treatment by the same Judge evince the very sort of arbitrariness *Sellersburg* stands against. Our colleagues see no difficulty with a draconian penalty far outside the bounds of normality for violations as found by the Judge. The penalty does not square with his own factual findings, and it cannot be reconciled with how he has treated another operator in virtually identical circumstances. The only correlation that may be drawn – as the Judge himself repeatedly has done by reference to "reductions" from the proposed assessment – is to the Secretary's Special Assessment.

The irony here is that our colleagues claim we treat the statements of the Judge in a "cavalier manner." Slip op. at 7 n.3. It is they, though, who uncritically accept the Judge's statements without subjecting them to the intellectual rigor the circumstances demand of us on review. We respect every Commission Judge, but the compelling evidence of bias – evinced by his own repeated assertion in the original decision that he was "reducing" the penalty based on mitigating findings – belies the unsupported assertion that he did not use the special assessment here as a baseline.

We appreciate our colleagues crediting "our view" that regular penalties reflect application of a uniform and regularized penalty system helping to ensure credibility and avoid the appearance of arbitrariness. Slip op. at 9. This is not merely "our" view, however. It is the true core of the *Sellersburg* decision and has been the view of every Commission and every Commissioner since the *Sellersburg* decision in 1983.[21] Our colleagues' opinion ignores the obvious tension between this essential and central principle and the potential for a result like the one reached in this case.

Here, the Judge reached findings and conclusions that could not be reconciled with the Secretary's proposed assessment grounded on that system's justifications. In seeking to nonetheless defend the penalty he calculated, the Judge attempted to rely on factors that do not

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[21] We repeat from *Sellersburg*:

> When based on further information developed in the adjudicative proceeding, it is determined that penalties are appropriate which substantially diverge from those originally proposed, it 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.

distinguish the operator as deserving special punishment here and that cannot support the extraordinary penalty imposed. This is not a "sufficient explanation of the bas[is] underlying the penalties assessed by the Commission." *Sellersburg*, 5 FMSHRC at 293. At best, it represents post-hoc rationalization. At worst, it reflects, as we have noted above, the potential for the purely arbitrary assessments we have proscribed for 35 years.

CONCLUSION

For the reasons set forth above, we would reject the Judge's assessments. We would again remand the penalty determination to the Judge for assessment of a penalty in a manner consistent with this opinion and with our precedent in *Sellersburg*.[22]

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

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

[22] We recognize that we could simply suggest a proper penalty here, but we respect the proper application of judicial discretion to what is inherently a Judge's responsibility. We are confident that the Judge, on remand, would assess an appropriate penalty free of improper influence from the unfounded special assessment, using the statutory criteria in a manner consistent with *Sellersburg* and the record in this case.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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WASHINGTON, D.C. 20004-1710

August 29, 2018

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) v. MACH MINING, LLC	Docket Nos. LAKE 2014-77 LAKE 2014-132

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

DECISION

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

This proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act"), and involves two citations issued by the Department of Labor's Mine Safety and Health Administration ("MSHA") to Mach Mining, LLC ("Mach"). The citations allege that Mach violated 30 C.F.R. § 75.821(a) by failing to maintain chirp alerts on a disconnect box and power center.[1]

Mach contested the citations and the associated civil penalties. The case proceeded to a hearing before a Commission Administrative Law Judge. After counsel for the Secretary of Labor presented his case, Mach's attorney moved for a directed verdict. The Judge granted Mach's motion and vacated both citations. 38 FMSHRC 1379 (June 2016) (ALJ). Thereafter, the Secretary filed a petition for discretionary review challenging the Judge's grant of directed verdict in favor of Respondent.

[1] Section 75.821 is entitled "Testing, examination and maintenance." Subsection (a) requires that:

> At least once every 7 days, a person qualified in accordance with § 75.153 to perform electrical work on all circuits and equipment must test and examine each unit of high-voltage longwall equipment and circuits to determine that electrical protection, equipment grounding, permissibility, cable insulation, and control devices are being properly maintained to prevent fire, electrical shock, ignition, or operational hazards from existing on the equipment. Tests must include activating the ground-fault test circuit as required by § 75.814(c).

We find that substantial evidence supports the Judge's conclusion: The Secretary did not present evidence demonstrating that Mach failed to perform the testing and examination required by section 75.821(a). *Id.* at 1381-82 n.2. Accordingly, we affirm the Judge's decision.

I.

Factual and Procedural Background

Mach operates an underground bituminous coal mine in Williamson County, Illinois. On June 18, 2013, MSHA Inspectors Britt Belford and John Butcher conducted a quarterly longwall inspection at the mine, accompanied by Parker Phipps, the Mach longwall coordinator.

When the inspectors reached the headgate in the No. 2 entry outby the longwall face, they began to examine the mule train.[2] Inspector Butcher observed that two of the mule train's chirp alerts[3] were inoperative. According to Inspector Butcher, the chirp alerts should have been both flashing and producing a high-pitched noise every two to three seconds. However, Butcher observed that the chip alerts on the disconnect box and 4000 KVA power center were silent and did not flash.

Butcher then issued two citations alleging violations of section 75.821(a). Both citations were designated as "significant and substantial" ("S&S"),[4] and the result of a moderate degree of negligence.

A hearing was held before a Commission Administrative Law Judge. At the conclusion of the Secretary's case, Mach made a motion for directed verdict as to the two citations in question. Mach argued that section 75.821(a) requires that a qualified person must test and examine each unit of high-voltage longwall equipment and circuits at least once every seven days. Mach noted that Inspector Butcher testified that the examinations had in fact been performed. In addition, Mach noted that the Secretary had failed to offer any evidence about the required seven-day examination of electrical equipment at the longwall.

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[2] A "mule train" is a colloquial name for the collection of equipment, including disconnect boxes, pumps, and power centers, that are used to distribute electric and hydraulic power to the longwall. A "disconnect box" is an electrical box where high voltage cables bring power into the mule train. The box has a switch that allows miners to cut all power to the entire mule train. From the disconnect box, power is transferred to power centers and ultimately onto the electrical equipment used on the longwall.

[3] A "chirp alert" is a safety feature on an electrical box that provides an auditory and visual warning when equipment is energized, thereby reducing the risk of electric shock or electrocution.

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

The Secretary contended that it was reasonable to infer from Butcher's testimony that the chirp alerts had not been tested, since two were inoperative at the time of the inspection. Moreover, the Secretary argued that the standard required an ongoing duty of maintenance that required Mach to maintain the chirp alerts in working condition.

The Judge orally granted Mach's motion at the hearing. In his written decision, the Judge explained that he had granted the motion because Inspector Butcher's allegation rested solely on the fact that he believed the chirp alerts were not properly maintained. The Judge noted that the inspector had answered in the affirmative when asked if there was "no dispute in your mind that the tests that are required by [Section] 75.821(a) were actually performed at the times required, correct?" 38 FMSHRC at 1382 n.2 (quoting Tr. 109). Because the Secretary had failed to establish that a qualified person had not tested and examined the chirp alerts within the last seven days to ensure that the equipment was being properly maintained, the Judge granted the motion for directed verdict and vacated the citations.

II.

Disposition

On appeal, the Secretary argues that the Judge erred in finding that section 75.821(a) does not require operators to maintain electrical protection devices on high-voltage longwall equipment. According to the Secretary, such a reading would allow operators to ignore nonfunctional electrical equipment for up to an entire seven days, until the operator is required to perform the next examination. Instead, the Secretary claims that the standard's regulatory history and placement strongly supports a plain reading of the standard requiring an ongoing duty to maintain the chirp alerts.

We find the Secretary's arguments unconvincing. The Secretary's characterization of the regulatory history presupposes that section 75.821(a) was intended to replace the multiple requirements contained in other regulations that impose a duty to maintain electrical equipment. However, the standard's history and context make clear that section 75.821(a) was intended to supplement, not supplant, existing examination and maintenance requirements.

Prior to the promulgation of section 75.821, mine operators were required to petition for a modification of 30 C.F.R. § 75.1002 before high-voltage cables could be used to supply power to their longwall operations. 57 Fed. Reg. 39,041, 39,041-42, 39,047-48 (proposed Aug. 27, 1992). In 1989, MSHA proposed significant revisions to the existing electrical standards in 30 C.F.R. Part 75. The proposed revisions would have allowed the use of high-voltage cables without petitioning for a modification, in exchange for more stringent rules governing electrical longwall equipment. *See* 54 Fed. Reg. 50,062-01, 50,122 (proposed Dec. 4, 1989). The proposal, which did not contain an analog to section 75.821, did not become a final rule. MSHA later said that its withdrawal of the proposed rule was due, in part, to the fact that the 1989 proposed rule "specifically focuse[d] on the safety issues related to use of high-voltage with longwall mining systems and [was] not incorporated within the context of an overall revision to the electrical safety standards." 57 Fed. Reg. at 39,042.

In 1992, MSHA proposed a new rule to address these deficiencies. The 1992 proposed rule included a new section 75.821to address testing and examination requirements of high voltage longwall electrical equipment. *Id.* at 39,047-48. MSHA stated that section 75.821 was to be "used in conjunction" with other regulations requiring maintenance, specifically section 75.1002.[5] *Id*. at 39,047. Moreover, the 1992 proposed rule created section 75.813,[6] which requires that all other existing electrical standards apply to longwall circuits and equipment where appropriate. *Id.* at 39,043. The final rule, which included section 75.821, was issued on March 11, 2002, after an extended notice-and-comment period. 67 Fed. Reg. 10,972, 10,992-95.

Consistent with its history and placement, the plain language of section 75.821(a) specifically requires periodic examinations of longwall electrical equipment. Section 75.821(a) does not require maintenance of electrical equipment. By its clear and unambiguous terms, it requires only that:

> At least once every 7 days, a person qualified in accordance with § 75.153 to perform electrical work on all circuits and equipment must test and examine each unit of high-voltage longwall equipment and circuits. . . .

30 C.F.R. § 75.821(a).

In light of the clear and unambiguous regulatory language, we decline the Secretary's invitation to read a requirement for maintenance into the standard where one simply does not exist.[7] Had the Secretary intended the standard to contain an ongoing maintenance requirement, he surely would have done so, as is evident in the numerous regulations that expressly require maintenance. *See, e.g.,* 30 C.F.R. §§ 75.503, 75.506(a), 75.506-1(a), 75.1002(a), 75.512, 75.1725(a). Indeed, section 75.512 provides, in pertinent part: "All electric equipment shall be frequently examined, tested, *and properly maintained* by a qualified person *to assure safe operating conditions*." 30 C.F.R. § 75.512 (emphasis added).

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[5] 30 C.F.R. § 75.821(a) states that "Electric equipment must be permissible and maintained in a permissible condition when such equipment is located within 150 feet of pillar workings or longwall faces."

[6] 30 C.F.R. § 75.813 states that: "Sections 75.814 through 75.822 of this part are electrical safety standards that apply to high-voltage longwall circuits and equipment. All other existing standards in 30 CFR must also apply to these longwall circuits and equipment where appropriate."

[7] The Secretary cites the Commission's decision in *Nally & Hamilton Enterprises, Inc.*, 33 FMSHRC 1759, 1763 (Aug. 2011), as supporting his reading that section 75.821(a) establishes a duty to maintain. However, the Secretary's reliance on *Nally & Hamilton* is inapposite. In that case, the Commission found that the inclusion of the term "maintain" in 30 C.F.R. § 77.410(c) imposed a continuing responsibility on the operator to ensure that warning devices were maintained in working condition at all times. *Id.* at 1763. By contrast, section 75.821(a) contains no such explicit maintenance requirement.

In the context of high-voltage longwall equipment, however, the Secretary elected to promulgate a standard that complemented existing regulations by imposing stricter requirements for examinations of longwall electrical equipment but did not create an additional maintenance requirement.

The standards governing high-voltage electrical equipment are part of a total set of regulations to protect miners' safety. As 30 C.F.R. § 75.813 clearly states, "[a]ll other existing standards . . . must also apply to these longwall circuits and equipment where appropriate." Thus, the Secretary could have looked beyond section 75.821 for a standard more appropriately suited to the facts of the case, such as section 75.512. He did not do so.

Instead, the Secretary proceeded to present his case at hearing on a theory not supported by the evidence. The Secretary alleged a violation of section 75.821(a), which requires a weekly examination of electrical longwall equipment, but failed to provide any evidence that adequate examinations were not performed. The Secretary did not submit Mach's examination records as evidence nor did he attempt to elicit testimony from adverse witnesses. The only evidence that the Secretary presented was the testimony of Inspector Butcher, and he testified that Mach had unquestionably performed the tests required by section 75.821(a).

Because an operator has an ongoing duty under Section 75.512 to maintain its equipment to protect miner health and safety, it appears that the inspector could have issued citations under that section. The Commission's procedural rules provide that petitions for assessment of penalties by the Secretary shall identify the section of the Mine Act or regulations alleged to have been violated. 29 C.F.R. § 2700.28(b)(1). These rules reflect the fundamental requirements of due process that an operator charged with a violation of the Act be given fair notice of the standard that it has allegedly violated. Neither the citation nor the penalty petition in this case refers to, let alone asserts, a violation of section 75.512.

Here, after filing the penalty petition, the Secretary could have moved to amend the citations. In the interest of justice, Judges freely grant such motions absent a showing of prejudice. *See, e.g., Cyprus Empire Corp.*, 12 FMSHRC 911, 916 (May 1990); *El Paso Rock Quarries, Inc.*, 3 FMSHRC 35, 38 (Jan. 1981). However, the Secretary never made such a motion prior to resting his case. Quite reasonably, Mach mounted its defense against the Secretary's allegations that the operator violated section 75.821. The Secretary's citation of a violation of section 75.821(a) went to a directed verdict without any mention of section 75.512.[8]

[8] Our colleague points to *Faith Coal Co.*, 19 FMSHRC 1357 (Aug. 1997), to suggest this matter should be remanded for the judge to consider whether Mach violated section 75.512. Slip op. at 10. In *Faith Coal*, the inspector mistakenly entered an outdated number for the cited regulation in the citation paperwork. Neither party noticed the error and proceeded to try the case at hearing under the correct safety standard, which still existed under a different number in the Secretary's safety regulations. The Commission therefore determined that the operator had suffered no prejudice from the Secretary's pleading deficiencies and that the Secretary's request to amend the citation should be allowed. 17 FMSHRC at 1362. Here, in contrast, Mach directed its defense against a citation under section 75.821(a) and the Secretary's novel, expansive

(continued…)

Thus, we are left to adjudge only the Secretary's allegations under section 75.821(a). Given the lack of evidence of a violation of that section, the Judge correctly vacated the citations upon Mach's motion for a directed verdict.[9]

III.

Conclusion

For the reasons set forth herein, we affirm the Judge's decision.

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

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

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

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[8] (…continued)
reading of that standard. Mach has not had the opportunity to defend against allegations that it violated section 75.512. Thus, the procedural history of *Faith Coal* renders it inapposite to the case at hand. We decline to send this case back to the judge to consider whether the operator has violated a standard the Secretary has never sought to allege.

[9] This decision is not criticism of Inspector Butcher. We recognize that MSHA inspectors have difficult jobs and must make quick determinations in the field when issuing citations. Inspector Butcher identified defects in the chirp alerts and issued citations to remedy what he saw as a danger to miner safety. Inspectors may not have the legal expertise required to always select the appropriate standard when issuing a citation. However, after a citation has been initially issued, it will be reviewed again by MSHA staff in the process of preparing the petition for assessment of penalties. Then, if the operator contests the penalty, it is reviewed again by the Secretary's trial counsel in preparation for the hearing. Trial counsel must determine that the facts alleged in the citation constitute a violation of the section of the regulations cited and, if not, should seek to amend the citation as appropriate. It is incumbent on the Secretary to make corrections to his pleadings before hearing to ensure the correct violation is charged and to provide due process.

Commissioner Jordan, dissenting:

This case arose when an MSHA inspector determined that two "chirp alerts" on the high voltage longwall equipment failed to emit any audible sound. Without proper notification from a functioning chirp alert that certain equipment is energized, miners are at risk of fatal injuries from electrocution. 38 FMSHRC 1379, 1381 n.2 (June 2016) (ALJ); Tr. 74-75.

The inspector issued two citations, each referencing a violation of 30 C.F.R. § 75.821(a).[1] The judge below dismissed the challenged citations. He determined that the standard relied upon by the inspector required tests and examinations of the equipment, but did not require that the equipment be properly maintained. According to the Judge, unless MSHA could show that the operator had failed to conduct the mandatory tests and examinations, the agency could not sustain a violation of this standard. Since the inspector's testimony did not contain such proof, the Judge granted the operator's motion for a directed verdict and dismissed the two challenged citations. My colleagues have agreed with this narrow construction of section 75.821(a).

I. Section 75.821(a) requires operators to properly maintain high voltage equipment.

As the Judge and my colleagues correctly note, the standard in question explicitly mandates periodic testing and examination of the longwall equipment and circuits. Contrary to my colleagues' contention, this instruction does not equate to "clear and unambiguous regulatory language" restricting the scope of the standard to those specified activities. Slip op. at 4. My colleagues have chosen to ignore the language explaining that the reason for these exams and tests is "to determine that electrical protection, equipment grounding, permissibility, cable insulation, and control devices *are being properly maintained* to prevent fire, electrical shock, ignition, or operational hazards from existing on the equipment." 30 C.F.R. § 75.821(a) (emphasis added).

[1] The standard states:

> **Testing, examination and maintenance.**
>
> (a) At least once every 7 days, a person qualified in accordance with § 75.153 to perform electrical work on all circuits and equipment must test and examine each unit of high-voltage longwall equipment and circuits *to determine that electrical protection, equipment grounding, permissibility, cable insulation, and control devices are being properly maintained* to prevent fire, electrical shock, ignition, or operational hazards from existing on the equipment. Tests must include activating the ground-fault test circuit as required by § 75.814(c).

30 C.F.R. § 75.821(a) (emphasis added).

A standard that mandates certain steps be carried out on equipment for the purpose of determining that such equipment is being properly maintained necessarily imposes an obligation on the operator to maintain that equipment. This is made evident when one considers the entire standard. The purpose of section 75.821(a) is not simply to perform tests and examinations. The purpose, as the standard states, is "to prevent fire, electrical shock, ignition, or operational hazards from existing on the equipment." 30 C.F.R. § 75.821(a). In order to prevent these operational hazards, the equipment must be "properly maintained." *Id.*

The standard the inspector referenced in citing Mach is one of a group of regulations promulgated in 2002 directed at high voltage longwalls. In proposing these standards the Secretary explained that "[p]roper testing, examination, and *maintenance* of high voltage longwall systems would assure that they would not pose increased hazards to miners." 57 Fed. Reg. 39,041, 39,047 (proposed Aug. 27, 1992) (emphasis added). By promulgating standards "related specifically to the safe use of high-voltage longwall equipment," 67 Fed. Reg. 10,972 (Mar. 11, 2002), MSHA envisioned "increased protection from electrical hazards" (*id.* at 10,973).

Despite the efforts of the Secretary to create a comprehensive and focused regulatory scheme relevant to high-voltage longwall equipment, our colleagues insist that only the more generic standard at 30 C.F.R. § 75.512 may be used to enforce a maintenance requirement in this case.[2] The majority relies on 30 C.F.R. § 75.813 for this holding.[3] However, that standard simply clarifies that, in addition to the specific safety standards that apply to high-voltage longwall circuits and equipment, other existing MSHA safety standards continue to apply. MSHA did not want the mining community to conclude that the new standards were the exclusive means of regulating high-voltage longwall equipment—section 75.813 means no more than that. Unfortunately, however, the measure that was included so as to avoid any gaps in the miners' protection is being used instead to restrict the Secretary's prosecutorial discretion and provide a rationale for vacating citations.[4]

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[2] Section 75.512 states in relevant part that "[a]ll electric equipment shall be frequently examined, tested, and properly maintained by a qualified person to assure safe operating conditions."

[3] 30 C.F.R. § 75.813 states: "Sections 75.814 through 75.822 of this part are electrical safety standards that apply to high-voltage longwall circuits and equipment. All other existing standards in 30 CFR must also apply to these longwall circuits and equipment where appropriate."

[4] According to my colleagues, because operators had an ongoing duty to maintain equipment under section 75.512, and because section75.821(a) should be read to supplement rather than supplant this obligation, the "standard more appropriately suited to the facts of the case" is 75.512. Slip op. at 5. The mental acrobatics that will be required of inspectors as a result of this decision seems daunting.

Indeed, the majority acknowledges that "[i]nspectors may not have the legal expertise required to always select the appropriate standard when issuing a citation." *Id*. at 6 n.9. With respect, I suggest that the miners' safety may suffer to the extent enforcement of mandatory standards is dependent on inspectors needing sufficient "legal expertise."

II. Even if section 75.821(a) were limited to an examination and testing requirement, the Secretary's evidence was adequate to sustain a violation.

Section 75.821(a) requires that a qualified person test and examine each unit of high-voltage longwall equipment and circuits "*[a]t least* once every 7 days." 30 C.F.R. § 75.821(a) (emphasis added). The referenced language implies an obligation to examine the equipment more frequently under certain circumstances. Surely one such circumstance occurs when the equipment develops a visible defect. In this case the inspector arrived at the site and observed that two separate warning devices were not functioning.

The inspector testified that miners frequented the area where this equipment was located and would have noticed the fact the chirpers did not work.

> [A]nybody that is around that longwall train should notice that chirp alert is not working, because, you know, they're on all the time there's power. They're on—every day when a crew goes—goes in and gets out of the truck and walks by the disconnect and the power centers, they're walking by it and those are chirping and also the light is flashing. . . . There's people come there at the beginning of every shift and there's electricians walk by, the foreman walks by, the maintenance foremens walk by, and it's noticeable when those chirp alerts are working that they're working, and in this case, you know, both boxes, they weren't working.

Tr. 76, 91-2.

The existence of the hazardous condition, of which the operator was aware or should have been aware, would trigger the requirement to test and examine the chirp alerts. Since failing to take steps to address the defective warning devices could constitute a violation of section 75.821(a), even under the narrow construction adopted by the Judge and my colleagues, the Judge erred in issuing a directed verdict at the close of the Secretary's case.

III. Even if the majority ruling that the operator should have been cited under section 75.512 were correct, the Commission should remand the case instead of vacating the citation.

My colleagues in the majority vote to vacate these citations because they conclude the inspector listed the wrong safety standard on the citation. They believe he should have written 30 C.F.R. § 75.512 on the citation form, instead of section 30 C.F.R. § 75.821(a). Slip op. at 5.

Even if the majority's determination that section 75.512 is the relevant standard is correct, the appropriate response would be to remand this matter in order for the Judge to consider whether the operator violated that section. This approach would be consistent with our decision in *Faith Coal Co*., 19 FMSHRC 1357 (Aug. 1997). In that case, the citation alleged a violation of the wrong standard (the cited standard had previously applied to methane monitors but had been amended and renumbered). The Judge vacated the citation on the ground that it alleged a

violation of the wrong standard and was never modified to assert a violation of the correct standard. The Commission reversed the Judge's decision to vacate the citation, holding that the Judge erred by vacating the citation on the basis of the Secretary's pleading error. We remanded for a determination of whether Faith's conduct violated the correct standard. *Id*. at 1361-62. Given that the majority's central complaint here appears to be that the inspector should have written section 75.512 on the citation instead of section 75.821(a), we should follow our case precedent and remand to the Judge.

My colleagues' concern that such an approach would violate the requirements of due process is unfounded. Of course, due process requires that an operator receive adequate notice of charges made against it. Here, Mach was on notice from the time it was first cited that the inspector considered the violative conduct to be a failure to maintain electrical equipment as evidenced by the defective chirpers. The citations allege that the volt disconnect box and power center are "not being properly maintained to prevent electrical shock hazards" and that the "chirp alerts fail[ ] to emit any audible sound to signal that the [equipment] is energized." S. Exs. 111, 112. Both citations were abated when new chip alerts were installed. *Id.*

The Judge recognized that MSHA was charging the operator with failing to properly maintain the electrical equipment. He emphasized that the inspector stated "it wasn't his contention it was a test and examination requirement. He was saying the chirp alerts didn't work. It was a maintenance requirement. . . . It's the inspector's theory of the case . . . ." Tr. 258.[5] Although I believe it to be entirely reasonable and appropriate for the inspector to have referenced the high voltage longwall standard at 30 C.F.R. § 75.821(a), it would hardly be prejudicial to amend the citation to refer instead to the requirement at section 75.512.

Mine operators have long been aware of their obligation to maintain electrical equipment. Section 305(g) of the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 801 et seq. (1976), used language identical to that of section 75.512 to mandate that "[a]ll electric equipment shall be frequently examined, tested, and properly maintained by a qualified person to assure safe operating conditions." Pub. L. No. 91-173, § 305(g), 83 Stat. 742, 778 (1969). This language requirement was retained in section 305(g) of the Mine Act, 30 U.S.C. § 865(g).

[5] The Judge also told counsel for the Secretary: "You proved that there was a defect." Tr. 251.

The Commission long ago made clear that an operator's requirement to maintain mine equipment is an ongoing responsibility. As we observed in *Nally v. Hamilton Enterprises, Inc.*, 33 FMSHRC 1759, 1763 (Aug. 2011), a case involving a back-up alarm on a truck, we have "consistently construed 'maintain' . . . to require a continuing functioning condition." *See also Lopke Quarries, Inc.*, 23 FMSHRC 705, 707-08 (July 2001) ("[t]he inclusion of the word 'maintain' in the standard . . . incorporates an on-going responsibility on the part of the operator"). In sum, Mach was well aware of its legal duty to properly maintain the chirpers.

IV. Conclusion

I would vacate the Judge's decision and remand this case for further proceedings.

/s/ Mary Lu Jordan
Mary Lu Jordan, Commissioner

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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August 30, 2018

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	
v.	Docket No. WEST 2016-624-R
SIGNAL PEAK ENERGY, LLC	

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

DECISION

BY THE COMMISSION:[1]

This proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act"). At issue is whether the Administrative Law Judge properly upheld the rejection by the Department of Labor's Mine Safety and Health Administration ("MSHA") of a ventilation control plan proposed by Signal Peak Energy, LLC ("Signal Peak").

In July 2016, MSHA issued a technical citation to Signal Peak alleging a violation of 30 C.F.R. § 75.370(a)(1).[2] MSHA issued the citation after Signal Peak and MSHA reached an impasse while negotiating provisions of the operator's ventilation plan. The dispute arises from MSHA's denial of the operator's request for approval to change its ventilation plan from a dual-entry tailgate return system to a single-entry tailgate return system.

The operator had argued that changing its ventilation plan would decrease the amount of oxygen in the gob, or mined-out area, thereby lessening the chance of spontaneous combustion, and would reduce the risk of material handling and roof control incidents. MSHA in turn expressed concerns that the operator's proposed plan could cause noxious gob gases to enter an area where miners work, reduce available oxygen in that area, and result in less effective monitoring for a spontaneous combustion event.

[1] The votes of the four Commission members regarding whether to affirm the decision below are evenly divided. All four members join in the factual and procedural background section of this decision. However, Commissioners Jordan and Cohen join in one opinion voting to affirm, while Acting Chairman Althen and Commissioner Young vote to reverse the Judge's decision.

[2] Section 75.370(a)(1) states in relevant part that "[t]he operator shall develop and follow a ventilation plan approved by the district manager" and that "[t]he plan . . . shall be suitable to the conditions and mining system at the mine." 30 C.F.R. § 75.370(a)(1).

The Judge affirmed MSHA's technical citation. In doing so, she held that MSHA's rejection of Signal Peak's proposed plan was not arbitrary and capricious. 39 FMSHRC 638, 653 (Mar. 2017) (ALJ). Signal Peak filed a petition seeking discretionary review of the Judge's decision, which we granted.

Two Commission members vote to affirm the Judge's decision and two Commissioners vote to reverse the Judge's decision. As a result, the Judge's decision will stand as if affirmed. *Pennsylvania Elec. Co.*, 12 FMSHRC 1562 (Aug. 1990), *aff'd on other grounds*, 969 F.2d 1501 (3d Cir. 1992).

I.

Factual and Procedural Background

A. Factual Background

1. The Mine's Operations

Signal Peak operates the Bull Mountain Mine, a large underground coal mine in Montana. The operator primarily mines its coal using the longwall method.

During longwall mining, the operator drives two sets of lengthy parallel entries on each side of a block of coal. At the end of the entries, the operator creates a crosscut perpendicularly (at right angles) to connect the parallel entries. The coal along the perpendicular cut becomes the longwall face.

A shearer moving back and forth across the face extracts the coal from the longwall. In turn, a conveyor system in an entry transports the coal from the face. The set of entries containing the conveyor system is the headgate; the parallel set of entries at the other side of the longwall panel is the tailgate. In developing the panel, there are three headgate entries and three tailgate entries. Each panel of coal is approximately 22,000 feet long and 1,250 feet wide.

Hydraulic roof jacks support the roof in a canopy above the longwall and shield miners operating machinery along the face from collapsing rock. As the face retreats, the operator moves the roof support shields outby towards the mine's entrance to allow the roof to collapse into a compressed area known as the gob. Gases may build up in the gob area. To ventilate the longwall, air flows through the headgate entries, then along the face, and exits the area through the tailgate entries.

Although the Signal Peak mine does not have a high concentration of methane, it is prone to spontaneous combustion, which is the "heating and slow combustion of coal . . . initiated by the absorption of oxygen." Stip. 4; Am. Geological Inst., *Dictionary of Mining, Mineral and*

Related Terms, 529 (2d ed. 1997) ("*DMMRT*").[3] Due to this danger and because it had been experiencing elevated levels of carbon monoxide ("CO") in the gob, Signal Peak changed from a "bleeder entry"[4] system to a "bleederless" system in January 2010.

A bleederless system reduces the potential for spontaneous combustion by limiting the oxygen that is available in the longwall gob. *Id*. The gob area must be isolated and sealed from the active mining area. Accordingly, a bleederless ventilation system requires the progressive installation of seals as the panel is mined.

In December 2011, Signal Peak experienced a major event of spontaneous combustion, which resulted in the loss of approximately 22 production days. The event was caused by oxygen pulled in by the mine's exhausting ventilation system through subsidence cracks on the surface into the rider seam[5] above the main seam being mined.

As a result, Signal Peak, with the approval of MSHA, instituted additional measures on subsequent longwall panels in order to decrease the risk of spontaneous combustion. These measures included lowering the gob's oxygen levels by injecting nitrogen into the gob and monitoring the oxygen levels on an ongoing basis. Further, in January 2013, the operator replaced the exhausting ventilation system with a blowing ventilation system in order to pressurize the gob and decrease the danger of pulling air into the gob through cracks in the mine surface.

In January 2015, Signal Peak submitted a revised ventilation plan that proposed an additional change, which is the subject of this litigation. It proposed changing from a system in which air flows out of both tailgate entries ("dual entry system") to a system in which the air exiting the longwall would flow only through a single entry ("single entry system"). *See* attached diagrams, Sec. Ex. 24 (the dual entry system) and Sec. Ex. 26 (the single entry system).

Under the dual entry system, the operator leaves the tailgate entries open to the first crosscut inby the panel. As ventilating air exits the longwall, its flow is divided with some going down entry 1 (entry closest to the panel) while a separate quantity of air is directed back to the cross cut and then into the other tailgate entry (entry 2) for exit (sometimes called the "back-around return"). Under the single entry system, the tailgate entries are mined as the longwall develops, and air leaving the longwall exits only through the tailgate entry 1. Like the current plan, the proposed single entry plan would be a bleederless, blowing air system.

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[3] The necessary components of spontaneous combustion are: (1) coal of a suitable chemical and physical nature; and (2) sufficient broken coal and air leaking through it to supply the oxygen needed. *DMMRT* at 529.

[4] Bleeder entries" are defined as "[p]anel 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." *DMMRT* at 55.

[5] A "rider seam" is defined as "[a] thin coal seam above a workable seam, or a seam that has no name." *DMMRT* at 460.

2. The Plan Negotiation Process

On January 12, 2015, the operator submitted the proposed plan to Russell Riley, District Manager for MSHA Coal Mine Safety and Health District 9. On April 3, 2015, Riley rejected the operator's plan and requested additional information about seals and monitoring. In Riley's view, the operator failed to show that its plan would be "as effective [as the current dual-entry plan] at minimizing risks to miners such as possible low [oxygen] and [methane] buildup near the tailgate entries." Sec. Ex. 4.

On April 23, 2015, the operator submitted another proposed single-entry plan, and met with MSHA District 9 personnel approximately two weeks later to discuss it. On May 29, 2015, Riley again rejected the operator's plan. According to Riley, the proposed plan failed to ensure that contaminated air from the gob would not "enter the longwall face exposing miners to low [oxygen] levels at the tailgate and to gob gasses [sic] moving outby around the last shield." Sec. Ex. 7. Riley also stated that an increased likelihood of carbon monoxide overexposures and spontaneous combustion would occur, as well as an increase in carbon dioxide.

On July 9, 2015, Signal Peak and MSHA District 9 personnel met again to discuss the operator's proposed single-entry plan. Rather than approve the plan, Riley requested assistance from the MSHA Director of Technical Support at the Ventilation Division of the Pittsburgh Safety and Health Technology Center.

On January 13, 2016, MSHA Technical Support issued a report prepared by Dennis Beiter, Senior Mining Engineer in the Ventilation Division (the Beiter report).[6] The report recommended against approval stating, "the dual tailgate return system . . . results in better protection for miners and enables earlier detection of spontaneous combustion." Sec. Ex. 10 (quoting Sec. Ex. 10a at 2).

Riley then rejected the operator's proposed plan for the third time, relying on Beiter's report. The findings of better protection against buildups of toxic gases, lowered oxygen, and better monitoring were the basis for disapproving the Signal Peak plan.

In March 2016, MSHA District 9 requested that MSHA Technical Support perform two fan stoppage tests using the mine's existing dual-entry tailgate return and a simulated single-entry tailgate return. On April 25-28, 2016, the fan stoppage tests were performed by Thomas Morley, a Mining Engineer in the Ventilation Division, and others.[7] On May 3, 2016, MSHA Technical Support issued a report prepared by Morley. On May 11, 2016, Riley sent a letter to the operator referencing Morley's report, which stated that unacceptably low levels of oxygen occurred during the fan stoppage tests for *both* plans. Although Morley did not suggest that the operator's proposed plan be denied, he recommended that the operator add language to its plan to

[6] Beiter was not told whether District 9 had a preference of one plan over the other, but instead was directed to perform an independent review. Tr. 108-09.

[7] The first fan stoppage test occurred on Monday, April 25, for the dual-entry system. It lasted 90 minutes. The second 90-minute test for the single-entry system occurred three days later on Thursday, April 28.

address fan stoppages, regardless of whether it ultimately used a dual-entry or a single-entry plan. Sec. Ex. 15a at 5-6; Sec. Ex. 15.

Based on the results of the fan stoppage tests, on May 11, 2016, MSHA notified Signal Peak that it needed to make immediate changes to its existing ventilation plan to protect miners in the event of a fan stoppage. On May 16 and 18, 2016, the operator submitted another proposed single-entry tailgate return ventilation plan.

On June 15, 2016, for the fourth time, Riley rejected Signal Peak's proposed plan. About a week later, the operator requested the issuance of a technical citation.[8] MSHA subsequently issued the citation that is the subject of this litigation.[9]

B. The Judge's Decision

The Judge affirmed the citation. 39 FMSHRC at 653. As a threshold matter of law, she rejected Signal Peak's argument that the Secretary is required to prove that the operator's ventilation plan is "unsuitable" for the mine, holding that operators are "not entitled to . . . *de novo* hearing[s] on the merits of . . . plan[s]." *Id*. at 651. Instead, she held that a district manager's rejection of a proposed plan must be "arbitrary, capricious, or an abuse of discretion" in order to be vacated. *Id*., *citing Prairie State Generating Co*., 35 FMSHRC 1985, 1989 (July 2013), *aff'd*, *Prairie State Generating Co. LLC v. Secretary of Labor*, 792 F.3d 82 (D.C. Cir. 2015*)*; *Mach Min., LLC*, 34 FMSHRC 1784, 1790 (Aug. 2012), *aff'd*, *Mach Min., LLC v. Secretary of Labor, Mine Safety and Health Admin*., 728 F.3d 643 (7th Cir. 2013)). Applying the "arbitrary and capricious" standard of review, the Judge held that Riley's decision "was based on careful consideration of all of the relevant factors, and that he did not abuse his discretion in requiring the mine to use a dual-entry plan." 39 FMSHRC at 653.

The Judge found that Riley reasonably explained his position that: (1) the dual-entry system was more effective at removing noxious gases from the tailgate area where miners work, (2) the dual-entry system enabled better monitoring of conditions in the gob and earlier detection of noxious gases before the gases reached the working face, (3) the dual-entry system did not present significant material handling hazards, (4) there was a suitably low risk of spontaneous combustion under the dual entry system, and (5) fan stoppage tests did not strongly favor either plan. The Judge found that the District Manager based his decision on a careful consideration of relevant factors and did not abuse his discretion.

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[8] The operator had twice before requested issuance of a technical citation. On those occasions, however, MSHA continued to consider the request and asked for additional information or investigation.

[9] MSHA's original citation included a reference to the deficiencies in the mine's current ventilation plan discovered during the fan stoppage tests. Due to the ongoing negotiations addressing these deficiencies, however, the Secretary at hearing moved to amend the citation to remove that portion, and the Judge granted the motion. 39 FMSHRC at 638, n.1. As such, the fan stoppage deficiencies in the current plan are not at issue in the case before us.

Accordingly, the Judge affirmed the citation.

II.

Separate Opinions of the Commissioners

Commissioners Jordan and Cohen, voting to affirm the Judge:

We vote to affirm the Judge's conclusion that District Manager Riley's decision to reject Signal Peak's proposed single-entry ventilation plan was not arbitrary and capricious. The record reflects that District Manager Riley carefully weighed several criteria before deciding to reject the operator's proposed plan. For instance, he determined that although the single-entry plan would offer the benefit of potentially diminishing exposure to certain hazards, such as spontaneous combustion and roof control hazards, any benefit would come at the expense of protection from other potential hazards, such as an increased likelihood that miners would be exposed to contaminated air.

The District Manager did not dismiss the operator's concerns regarding spontaneous combustion. Rather, he determined that the proposed additional protections against the risk of spontaneous combustion would be marginal because the mine had already taken adequate steps to control spontaneous combustion by injecting nitrogen into the gob and installing a blowing system of ventilation. District Manager Riley reasonably focused on the hazard of oxygen-deficient air exiting the gob into the areas where miners work. In sum, Riley rejected the single-entry plan, concluding that the plan "will not ensure that [contaminated] air" from the gob would not "enter the longwall face exposing miners to low [oxygen] levels at the tailgate and to gob gasses [sic] moving outby around the last shield." Sec. Ex. 7.

The Judge concluded that Riley reasonably evaluated the relevant factors and specific conditions of the mine prior to his determinations about the proposed plan. The Commission is not in a position to substitute its view for the expertise of the District Manager on this highly technical issue. Instead, the law requires us to determine whether the Judge's findings that informed her decision, on whether the District Manager's decision was arbitrary and capricious, was supported by substantial evidence. We conclude that substantial evidence supports the Judge's findings.[1]

[1] We also uphold the District Manager's and Judge's decisions as necessary to prevent the weakening of standards under section 101(a)(9) of the Mine Act. 30 U.S.C. § 811(a)(9). In our view, the Act's prohibition of weakening of mine health and safety standards is equally applicable to ventilation plans. Just as new mandatory standards may not "reduce the protection afforded miners" provided by the standards they replace, *see id.*, we would decline to read new plans – enforced as mandatory standards – to reduce the protection of miners provided by the plans they replace. *UMWA v. Dole*, 870 F.2d 662, 671 (D.C. Cir. 1989) (holding that roof control plans are enforceable as mandatory standards) (citing *Zeigler Coal Co. v. Kleppe*, 536 F.2d 398 (D.C. Cir. 1976)).

A. The "Arbitrary and Capricious Standard" of Review Applied by the Judge was Appropriate and Consistent with Legal Precedent.

Signal Peak argues that the Judge erred in applying an "arbitrary and capricious" standard of review, and asks the Commission to reconsider its decisions in *Prairie State Generating Co.*, 35 FMSHRC 1985, 1989 (Jul. 2013) and *Mach Mining, LLC*, 34 FMSHRC 1784, 1790 (Aug. 2012). Signal Peak urges the Commission to adopt an approach under which, upon appeal of a ventilation plan dispute, the Judge would hold a *de novo* hearing at which the Secretary is required to prove that the operator's plan is unsuitable, and if so, that MSHA's plan is suitable. SP Br. at 13-19; Oral Arg. Tr. 12. We decline to do so.

The Commission has recognized the Secretary's discretion in the ventilation plan process, relying upon the Act's legislative history. *See*, *e.g.*, *Peabody Coal Co*., 18 FMSHRC 686, 690-692 (May 1996); *C.W. Mining Co*., 18 FMSHRC 1740, 1746-47 (Oct. 1996). The Senate Committee Report on the Act stated that "while the operator proposes a plan and is entitled, as are the miners and representatives of miners to further consultation with the Secretary over revisions, the Secretary must independently exercise his judgment with respect to the content of such plans in connection with his final approval of the plan." S. Rep. No. 95-181, at 25 (1977), *reprinted in* Senate Subcomm. on Labor, Comm. on Human Res., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 613 (1978) ("*Legis. Hist.*").

The Secretary's ultimate responsibility to approve ventilation plans was expressly affirmed by the D.C. Circuit and Seventh Circuit respectively. *See Prairie State Generating Co*., *supra*, *aff'd*, 792 F.3d 82, 91-92 (D.C. Cir. 2015); *Mach Mining*, *LLC*, *supra*, *aff'd*, 728 F.3d 643, 657-58 (7th Cir. 2013).

Prairie State and *Mach Mining* require a Judge to consider whether a district manager's decision to deny the operator's proposed ventilation plan was made arbitrarily, capriciously, or otherwise amounted to an abuse of discretion. *Mach Mining,*728 F.3d at 658; *Prairie State Generating Co.*, 792 F.3d at 93. Under this standard, a district manager's action may be considered arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise. *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co*., 463 U.S. 29, 43 (1983). We continue to apply this standard here.[2]

We reaffirm the application of the "arbitrary and capricious" standard of review in ventilation plan disputes as best effectuating the independent responsibilities delegated to MSHA and to the Commission by the Mine Act. As the court recognized in *Mach Mining*, the process delegated to the Secretary of approving mine-specific ventilation plans involves a congressional

[2] Our colleagues candidly acknowledge that they believe the decisions of the Seventh Circuit in *Mach Mining* and the D.C. Circuit in *Prairie State Generating Co.* were wrongly decided. Slip op. at 17 n.5. Indeed, their opinion is predicated on a legal theory that is antithetical to those two circuit court decisions.

mandate that his representatives exercise independent judgment. 728 F.3d at 657. Therefore, the ventilation plan approval process is more akin to the *formulation* of a safety standard rather than the *enforcement* of that standard and, thus, a *de novo* hearing (prototypically granted when the Secretary seeks to enforce a safety standard against an operator) regarding the proposed plan would be inconsistent with Congress's delegation of responsibilities. *See id*; *see also Prairie State*, 792 F.3d at 91-92. Accordingly, the court in *Prairie State* held that a "deferential [standard of] review appropriately respects the Secretary's policymaking prerogative and ensures that his determinations are reasonable and adequately supported by the evidence." 792 F.3d at 92.

For these reasons, we deny Signal Peak's request to abrogate *Prairie State* and *Mach Mining*.[3]

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[3] Our colleagues, purporting to rely on *Secretary of Labor v. Canyon Fuel Co.*, 894 F.3d 1279 (10th Cir. 2018), assert that section 303(o)'s requirement that a ventilation plan be "suitable to the conditions and mining system at the mine" limits the Secretary's authority when reviewing ventilation plans to a determination of whether the plan submitted by the operator to MSHA "achieves safety and health requirements for adequate ventilation." Slip op. at 15-17, 18. Our colleagues expressly reject the idea that "suitable" may include a determination of which of two proposed ventilation plans affords the greatest safety for miners. Thus, they state, "[s]ection 303(o) does not call for a 'comparability' analysis of potentially different ventilation plans." *Id.* at 20. However, our colleagues provide no standard for determining when a proposed plan "achieves safety and health requirements for adequate ventilation" and do not define the word "adequate." Their rejection of MSHA's ability to compare the relative merits of alternative ventilation plans lacks legal foundation.

Moreover, our colleagues fail to understand MSHA's use of the word "minimum" in its Handbook for Mine Ventilation Plan Approval Procedures. MSHA Handbook Series, Handbook Number PH13-V-2, Mine Ventilation Plan Approval Procedures (Apr. 2013). The Handbook is saying that once the ventilation plan is approved, it becomes the minimum standard for ventilation requirements at the mine. In no way is MSHA suggesting that ventilation plans need only provide minimum protection for miners.

Far from a decision which "perfectly illustrates" our colleagues' position, slip op. at 19, *Canyon Fuel* reiterated the principle set forth in *Mach Mining*, 728 F.3d at 658, and *Prairie State*, 792 F.3d at 92, that "the Secretary acts arbitrarily if he 'entirely fail[s] to consider an important aspect of the problem.'" 894 F.3d at 1297. Indeed, we are not aware of any pronouncement by the Commission or a circuit court in the history of the Mine Act and its predecessor Coal Act going back to 1969 which sanctioned the idea that a ventilation plan is "suitable" because it is adequate even though another plan for the same mine afforded better protection for miners. Quite to the contrary, in *UMWA v. Dole*, *supra*, 870 F.2d at 666, the D.C. Circuit held: "Thus when new standards replace existing mandatory health or safety standards it is not sufficient that the new standards demonstrate a reasonable accommodation of the competing goals of safety and efficient coal mine operation. The statute expressly mandates that

(continued…)

B. Substantial Evidence Supports the Judge's Findings.

1. Substantial Evidence Supports the Judge's Finding that the District Manager Reasonably Concluded that the Proposed Single-Entry Plan Would Create an Unacceptable Risk of Noxious Gob Gases and Low Oxygen Entering Areas Where Miners Work.

The operator's proposed single-entry plan would change the manner in which the air travels after sweeping the working face. Specifically, the proposed plan would omit the "T split" and "back around" return that are components of the dual-entry plan; instead the air would leave the mine in a single entry, the same entry in which miners work. 39 FMSHRC at 645.

The Commission reviews the Judge's factual findings under the substantial evidence standard of review. *See* 30 U.S.C. § 823(d)(2)(A)(ii)(I). "Substantial evidence" means "such relevant evidence as reasonable minds might accept as adequate to support [the Judge's] conclusion even if it is possible to draw two inconsistent conclusions from the evidence." *Landes Constr. Co. v. Royal Bank of Canada*, 833 F.2d 1365, 1371 (9th Cir. 1987) (citation omitted); *see also Rochester & Pittsburgh Coal Co*., 11 FMSHRC 2159, 2163 (Nov. 1989). In reviewing the whole record, an appellate tribunal must consider anything in the record that "fairly detracts" from the weight of the evidence that supports a challenged finding. *Midwest Material Co*., 19 FMSHRC 30, 34 n.5 (Jan. 1997) (quoting *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951)).

The Judge credited the testimony of both District Manager Riley and the Secretary's expert witness Beiter, who explained that because the blowing ventilation system puts pressure

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[3] (…continued)

no reductions in the level of safety below existing levels be permitted, regardless of the benefits accruing to improved efficiency."

Moreover, in actual practice, our colleagues' insistence that MSHA must view an operator's proposed plan in a vacuum and turn a blind eye to an alternative plan (even one currently in effect at the operator's mine) is difficult, if not impossible, to apply. As recognized by Congress, ventilation issues are "complex and potentially multifaceted," S. Rep. No. 95-181, at 25 (1977), *reprinted in Legis. Hist.* at 613, and thus ventilation plans are more readily assessed by balancing competing concerns in a mine, which necessitates an evaluation of potential solutions and the potential effects of those solutions on other aspects of the plan. Thus, in determining "suitability," there are trade-offs which must be evaluated. In the present case, MSHA's plan emphasized protection from noxious gases entering working areas while Signal Peak's plan emphasized protection from spontaneous combustion. Rather than an arbitrary determination of whether a plan (viewed with blinders on to avoid consideration of any other options) is "adequate," the process of evaluation involves a balancing of hazardous risks. Instead of our colleagues' formulation, we are guided by the D.C. Circuit's statement in *Prairie State* that as used in section 75.370(a)(1) "suitability is a discretionary, contextual exercise of expert judgment regarding the safeguards needed to keep miners safe." 792 F.3d at 93.

on the gob, noxious gases or low oxygen may be released into areas where miners work, if the proposed single-entry system was used. 39 FMSHRC at 647; RH Tr. 35-36, 117-18. The mined-out gob contains locations where noxious gases can accumulate. Riley and Beiter were concerned about three different events which could cause the release of noxious gases or low oxygen to occur: (1) a fan stoppage; (2) the air pressure in the tailgate entries and face becoming lower than the gob's air pressure, which would create a path of least resistance for the gases to travel out from the gob to the working areas, or (3) a delayed rock fall that could push gob air out on the face. RH Tr. 36-37, 111-12.

Riley testified that under the current plan, in these scenarios, the "back-around return" in the dual-entry system acts as a "pressure relief valve" to help prevent the gob air from coming out onto the face. RH Tr. 35. Specifically, the air that flows inby through the gob at the tailgate from the "T-Split" pushes and directs the noxious gob gases up crosscut 49 and then outby in tailgate entry number 2 (the "back return" entry), which is sealed off from entry number 1. RH Tr. 35, 115-16; *see also* Sec. Ex. 24.

By contrast, the operator's proposed single-entry system would eliminate tailgate entry number 2, which means that any noxious gas accumulations would exit the gob and flow directly into tailgate entry number 1, where miners work. Sec. Ex. 26; RH Tr. 117-18, 121-22; *see also* Sec. Ex. 10(a) at 3 (Beiter Report) (concluding that the "potential for miners exiting the tailgate side of the longwall face to be exposed to more elevated contaminant levels is greater in a [single-entry] system than in a dual tailgate return system incorporating a back return.").

Signal Peak claims that the results of a fan stoppage test[4] contradict MSHA's concerns. It asserts that the oxygen levels for the single-entry test fell to a "slightly lesser degree" than the dual-entry test, and that therefore the single-entry system was just as safe, if not slightly safer, than the dual-entry system. Accordingly, it contends that Riley's rejection of the single-entry plan was arbitrary.[5]

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[4] The test was meant to determine how quickly gases would come out of the gob into the working face in the event of a fan stoppage.

[5] Signal Peak also points to testimony from Morley regarding the fan stoppage tests, which could potentially be interpreted to suggest that noxious gas and low oxygen would be unlikely to exit the gob in the event of a fan stoppage, under the single-entry system. *See*, *e.g.*, Tr. 79 ("We didn't find many contaminants at all"); Tr. 80-81 (stating that "good quality" air came out from behind the shields); SP Post-Hrg. Br. at 16. This testimony is not relevant, however, because Morley's statements were made in response to questions from Signal Peak's counsel about the air quality that had occurred during the time *in between the two fan stoppage tests*. *See* Tr. 79 (Q: "[D]id you compare on Monday with readings on *Tuesday and Wednesday* to see whether there were more contaminants on the dual entry or the single entry?") (emphasis added). The second test did not occur until *Thursday*, April 28, 2016. Sec. Ex. 15 at 4. As such, the Judge appropriately did not give much weight to Morley's testimony in favor of the operator on this issue.

(continued…)

We disagree. Riley considered the results of the fan stoppage test and he determined that the results did not favor one plan over the other. This determination was supported by substantial evidence and was within the District Manager's discretion. Furthermore, there is evidence that the tests were not performed in accordance with the agreed upon protocols creating doubt about the reliability of the results. 39 FMSHRC at 649.

The operator also suggests that the back-up fan at the mine rendered the District Manager's decision arbitrary and capricious. However, MSHA had provided an opportunity for Signal Peak to supply necessary information about the back-up fan before it made its decision, and the operator failed to do so.[6] We decline to consider this new information, which was never communicated to MSHA. *See*, *e.g.*, *Chamber of Commerce v. SEC*, 443 F.3d 890, 904 (D.C. Cir. 2006) (holding that interested parties may not "withhold relevant data [in rulemaking proceedings] and blindside the agency on appeal"). Even assuming that we were to find that the Judge erred in overlooking the evidence of the back-up fan, this constitutes harmless error because there is still evidence of the other types of events that could have caused the release of noxious gases or low oxygen into the areas where miners work, e.g., the air pressure in the tailgate entries and face could become lower than the gob's air pressure, which would create a path of least resistance for the gases to travel from the gob into the working areas or a delayed rock fall could occur, which would push gob air out on the face. RH Tr. 36-37, 111-12.

As such, we find that substantial evidence supports the Judge's finding that the District Manager reasonably concluded that the proposed plan would create an unacceptable risk of noxious gob gases and low oxygen entering areas where miners work.

2. Substantial Evidence Supports the Judge's Finding that the Risk of Spontaneous Combustion Under the Current Ventilation Plan was Low.

Signal Peak argues that the Judge and the District Manager overlooked material evidence that the proposed plan would significantly decrease the risk of spontaneous combustion. The operator relies on the fact that the current plan directs a certain amount of air inby the number 1 tailgate entry for a distance of one crosscut (approximately 225-285 feet) along the inner edge of

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[5](…continued)
For the same reason, we reject the operator's argument that the air in the gob would not come out into the face during normal mining operations because the mine face has higher air pressure than the gob. Tr. 130, 143. MSHA was not concerned with normal mining operations. MSHA is concerned with *aberrations* from normal mining operations – where the ventilation is being disrupted or not properly controlled (such as a drop in barometric pressure or a loss of fan power). RH Tr. 122-23.

[6] Signal Peak had never submitted to MSHA any information regarding whether the back-up fan had a separate power source or whether it could easily be activated – even though MSHA had specifically requested this information. Sec. Ex. 10(a) at 5 (Beiter Report) (requesting clarification on "the means or time necessary for implementing [the back-up fan's] usage following a main fan outage . . . [and] whether or not the backup main fan was powered by a power source separate from the main fan").

the gob. *Id*. at 34; Tr. 128; SP Ex. EEE; Sec. Ex. 24. By contrast, the operator argues that the proposed single-entry plan would introduce substantially less oxygen into the gob, which would better prevent spontaneous combustion. SP Br. at 25; RH Tr. 78-79; Tr. 50-51, 128.

The operator also asserts that the proposed plan would introduce less oxygen into the gob on the headgate side. Specifically, under the current plan, the crosscut seals cannot be installed until after the longwall passes each crosscut. The operator emphasizes that the seals are currently built between headgate entries 2 and 3, and that the seals would obstruct access to the primary escapeway in entry 2 if built prior to the gob advancing. *See* Sec. Ex. 24. This means that, until the seal is constructed, there is an opening into the gob through which air could enter. *Id*. Under the proposed plan, the seals would be between entries 1 and 2 and so could be built before the longwall advances without obstructing access to the escapeway. SP Br. 25-26; *see also* Sec. Ex. 26. This would prevent any temporary opening into the gob through which air could enter.

Despite these arguments, we believe that the Judge did not overlook any material evidence that the proposed plan would significantly decrease the risk of spontaneous combustion. The Judge found that the "mine's current ventilation plan [requiring a blowing system] has been in place since January 2013 and has successfully limited spontaneous combustion since that time." 39 FMSHRC at 644-45. The Judge further concluded that Riley reasonably determined that the risk of spontaneous combustion was suitably low under the current plan, and that it was not necessary to decrease the amount of air entering the gob beyond the current amount. *Id.* at 652. These findings are supported by substantial evidence.

Riley testified that he had considered Signal Peak's concerns that the current plan imposes a significant risk of spontaneous combustion. RH Tr. 41-42. Specifically, Riley testified that he had taken into account the fact that the mine has a lengthy incubation period (the time for the coal in the gob to combust when exposed to oxygen).[7] RH Tr. 41-43. Based on these criteria, Riley had concluded that it was not necessary to decrease the amount of air entering the gob below the current amount.

Furthermore, Riley testified that he had considered the fact that Signal Peak "inject[s] nitrogen into the gob to help prevent spontaneous combustion" and explained that, since December 2011, there have been no spontaneous combustion events at the mine, which indicated to him that the present system is effective. RH Tr. 43, 105-07. Signal Peak's Vice President of Engineering Farinelli himself agreed that, since December 2011, the operator has been successfully mining under the dual-entry system, and controlling spontaneous combustion. Tr. 176. Therefore, the record supports Riley's determinations, which the Judge recognized, that the risk of spontaneous combustion is low under the current plan, and that considerations of preventing spontaneous combustion should not be a decisive factor here in determining the suitability of the proposed plan.

Moreover, Riley testified that he had taken into account that the mine injects nitrogen 10-15 crosscuts (2200 to 3300 feet) behind the face. RH Tr. 79-80; Tr. 31. This indicated to Riley

[7] Incubation periods are based on the "temperature versus the moisture content versus the oxygen content" of the mine. RH Tr. 42-43.

that there is no imminent threat of spontaneous combustion caused by the current practice of introducing air a mere 225-285 feet into the gob on the tailgate side because, if the risk for spontaneous combustion was so great, the mine would be injecting nitrogen much closer to the longwall face. RH Tr. 43; *see* Sec. Ex. 24.

Signal Peak claims that nitrogen injected closer to the face would be diluted by the air on the face and immediately behind the longwall shields, and therefore would be ineffective in inerting the gob. Tr. 36-37, 187. However, Beiter testified that only a *portion* of the nitrogen would be diluted and carried away by the face airflow, and that, in his view, the operator would have simply needed to inject a higher quantity of nitrogen closer to the face. Tr. 37-38.

Likewise, Signal Peak's claim that the current plan allows for more oxygen to be introduced into the gob on the headgate side conflicts with other evidence in the record. Beiter rejected this claim in his report. Specifically, Beiter stated that "a curtain was typically installed in the crosscut inby the longwall face where the headgate seal would later be constructed. That curtain was described as 'not tight.'" Sec. Ex. 10(a) at 6. In Beiter's view, "[c]onstruction of a more substantial control such as a permanent stopping or framed check curtain (temporary stopping) instead of a curtain described as 'not tight' would reduce the quantity of intake air leaking into the worked-out area." *Id*. This would prevent air from flowing through any opening into the gob on the headgate side before the seal is constructed. Tr. 10. As stated, the Judge permissibly credited Beiter's testimony.

In summary, the record does not reflect that the District Manager failed to give adequate consideration to the evidence relating to the hazard of spontaneous combustion.

3. Substantial Evidence Supports the Judge's Finding that the Current Plan Allows for Earlier Detection of Spontaneous Combustion.

Even if spontaneous combustion did present a problem here, the Judge recognized that Riley determined that the dual-entry system enables better monitoring of conditions in the gob. 39 FMSHRC at 648. Indeed, Riley testified that an air monitoring sensor in the dual-entry system "gives the true air concentrations and the gas that they detect from the back[-around] return" and "give[s] earlier detection . . . from the gob at this sensor versus not having the back[-around] return and having the sensor hung right here on the last shield only about two foot from the working face and the gob gases would be out into the working area before they were detected by the detection system." RH Tr. 40-41.

Beiter testified that detecting spontaneous combustion early would be more difficult in a single-entry system because of the increased dilution that would occur, which could mask the existence of the carbon monoxide. Beiter further explained that, in the dual-entry system, "the contaminants are elevated in that back return airflow. They're less diluted . . . from a detection standpoint, the less dilution you have, the more likely you are to find an indication of the beginning of a heating, of a spontaneous combustion event as opposed to a more diluted atmosphere," providing earlier detection of spontaneous combustion. Tr. 18-22, 43; *see also* Sec. Ex. 10(a) at 3. The Judge expressly credited Beiter's testimony, finding that he had "significant experience with spontaneous combustion." 39 FMSHRC at 650.

Signal Peak argues that the dual-entry system does not provide a reliable method of early detection of spontaneous combustion. The operator points to testimony by Vice President of Engineering Farinelli stating that the monitoring advantage of the back-around system described by Beiter is minimal because the atmospheric monitoring sensor in the back return only measures the *percentage* of CO in the tailgate entry – which is relative to how much oxygen is present in the air. Tr. 146-50. According to Farinelli, if only a relatively low amount of oxygen exists, the concentration of CO showing up on the sensor is higher. By contrast, higher levels of oxygen will dilute the concentration of CO, which paints a misleading picture of how much CO is actually present in the gob.

The Judge chose to rely on the testimony of Riley and Beiter. We find that substantial evidence, i.e., evidence capable of persuading a reasonable mind, exists to support the Judge's finding that the dual entry system provides a better method of early detection of spontaneous combustion.

4. Substantial Evidence Supports the Judge's Finding that the Single-Entry Plan Would Only Minimally Reduce Material Handling and Roof Control Hazards.

Although Signal Peak's proposed plan would obviously reduce material handling and roof control hazards by eliminating the need to maintain tailgate entry number 2, the Secretary has demonstrated that the resulting reduction in hazards would be minimal. According to Riley, the operator has done a "pretty good job" in mitigating the hazards that relate to roof control and material handling. RH Tr. 43-45, 81-83. According to Beiter's report, discussions with the operator's personnel did not indicate a history of accidents involving material handling during the installation of standing support in the No. 2 headgate entry of previous longwall panels. Sec. Ex. 10(a) at 6. Thus, Beiter reasonably concluded that the operator was doing a good job of installing support in a safe manner. Tr. 14-15, 49-50.

Additionally, Beiter testified that he "was not made aware" and "[n]o records were provided" that there were any issues regarding safe access to construct seals in the dual-entry system. Tr. 12-13. Indeed, as Farinelli himself testified, "we feel we are doing an excellent job at managing our roof control." Tr. 176. As a result, substantial evidence supports the Judge's finding that the reduction in material handling and roof control hazards would be minimal under the single-entry system.

Conclusion

Accordingly, we would hold that under the appropriate standard of review, the Judge's decision affirming the District Manager's rejection of the plan is supported by substantial evidence.

/s/ Mary Lu Jordan
Mary Lu Jordan, Commissioner

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

Acting Chairman Althen and Commissioner Young, in favor of reversing:

We would find that the Judge applied the wrong legal standard and that substantial evidence[8] does not support a finding that the operator's ventilation plan was not suitable — that is, was not appropriate to meet the requirement to provide safe and healthful ventilation at the specific mine. Accordingly, we would reverse the decision of the Administrative Law Judge and approve the operator's plan.

Legal Principles

The focal point of this case is the requirement of section 303(o) of the Mine Act that an operator must prepare and MSHA must approve a ventilation plan "suitable to the conditions and the mining system of the coal mine . . . ." 30 U.S.C. § 863(o).[9] In turn, the issue narrows further to the meaning of the term "suitable" and whether substantial evidence supports the Judge's determination that the plan prepared by the operator was not suitable.

The Mine Act does not define "suitable." Courts of appeal and the Commission have held that in the absence of a statutory definition or a technical usage of the term "suitable," we apply the ordinary or dictionary meaning of the word. *Canyon Fuel Co., LLC v. Sec'y of Labor*, 894 F.3d 1279, 1288 (10th Cir. 2018); *Peabody Coal Co.*, 18 FMSHRC 686, 690 (May 1996). Consequently, for our purposes, "suitable" means "adapted to a use or purpose," "having the necessary qualifications: meeting requirements" and "fitted for, adapted or appropriate to a person's . . . needs." *Canyon Fuel*, 894 F.3d at 1288.

The purpose of a ventilation plan is to provide safe and healthful atmospheric conditions. MSHA has stated correctly "[a] sound ventilation plan is essential to maintaining adequate ventilation and respirable dust control in the mine." MSHA Handbook Series, Handbook Number PH13-V-2, Mine Ventilation Plan Approval Procedures (Apr. 2013). MSHA further correctly identified the test for acceptance stating, "[p]lans adopted by the mine operator and approved by the district manager define minimum safety and health requirements for the mine." *Id.* Therefore, a suitable ventilation plan — a plan that MSHA must approve — is one that

[8] "Substantial evidence" means "such relevant evidence as reasonable minds might accept as adequate to support [the Judge's] conclusion even if it is possible to draw two inconsistent conclusions from the evidence." *Landes Const. Co. v. Royal*, 833 F.2d 1365, 1371 (9th Cir. 1987); *see also Rochester & Pittsburgh Coal Co*., 11 FMSHRC 2159, 2163 (Nov. 1989) *quoting Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938). In reviewing the whole record, an appellate tribunal must consider anything in the record that "fairly detracts" from the weight of the evidence that supports a challenged finding. *Midwest Material Co*., 19 FMSHRC 30, 34 n.5 (Jan. 1997) (quoting *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951)).

[9] Signal Peak was issued a technical citation alleging a violation of 30 C.F.R. § 75.370(a)(1), which mirrors the language of the Mine Act and provides in relevant part that "[t]he operator shall develop and follow a ventilation plan approved by the district manager" and that "[t]he plan shall be designed to control methane and respirable dust and shall be suitable to the conditions and mining system at the mine."

achieves safety and health requirements for adequate ventilation and respirable dust control at the specific mine.[10]

The obligation that a plan must be appropriate for its purpose (suitable) is a consistent and repeated theme in the Mine Act and underground coal mine regulations. Title III of the Mine Act contains 14 specific requirements for "suitable" equipment or a "suitable" plan. The regulations of underground coal mines at 30 C.F.R. Subchapter O, Part 75 contain more than 30 "suitability" requirements.

When an operator presents a ventilation plan to MSHA for approval, the only question for MSHA is whether the plan provides adequate safety and health protections for the specific mine. MSHA has promulgated extensive mandatory standards for ventilation. 30 C.F.R. §§ 75.300-75.389. Those regulations establish mandatory standards that a ventilation plan must meet in order to be suitable. Given the purpose and effect of those standards, a ventilation plan that is adequate for operation of the mine in compliance with those regulations achieves the conditions for maintaining adequate ventilation and respirable dust control in the specific mine. Such a plan is therefore suitable.

This case turns upon the issue of substantial evidence — namely, whether substantial evidence supports the Judge's decision. Nonetheless, it is useful to review briefly the development of burden of proof issues in plan approval cases so that we may place the substantial evidence issue in the proper context.

Unquestionably, the Secretary bears the burden of proof in Commission suitability proceedings. However, the Commission has taken shifting positions on the standard of proof. Prior to 2012, the Commission consistently held that the Secretary bore the burden of establishing by a preponderance of the evidence that the operator's plan was unsuitable for the mine in question. *See, e.g.*, *Peabody Coal Co.*, 18 FMSHRC 686, 690 (May 1996) ("*Peabody II*"); *Peabody Coal Co.*, 15 FMSHRC 381, 388 (Mar. 1993) ("*Peabody I*") ("[t]he Secretary bears the burden of proving that the plan provision at issue was suitable to the mines in question"); *C.W. Mining Co.*, 18 FMSHRC 1740, 1748-53 (Oct. 1996).

[10] Use of the term "minimum" by MSHA in conjunction with safety and health requirements appropriately gives one pause. But the agency's use of the term "minimum" most certainly does not connote in any way an insufficient system. It means, as MSHA says, that the ventilation plan must maintain adequate ventilation and respirable dust control in the mine. If the plan maintains adequate ventilation and respirable dust control, it is suitable. MSHA obviously and correctly recognizes that there may be many ways of accomplishing a goal. The critical requirement is that the ventilation plan is appropriate and fit for providing a safe and healthful atmospheric condition in the specific mine. In this matter, the agency has not analyzed the operator's plan from that standpoint, nor has it made a persuasive case that it fully considered the relative health and safety benefits of the operator's plan in a way that is not self-contradictory or superficial.

In a 3–2 decision issued in 2012, a Commission majority held that the Secretary's burden consisted of showing that MSHA's disapproval of the suitability of a plan was not an abuse of his discretion and was not arbitrary and capricious. *Mach Mining, LLC*, 34 FMSHRC 1784, 1790 (Aug. 2012), *aff'd*, 728 F.3d 643, 658 (7th Cir. 2013). That standard requires that the Secretary show MSHA "examine[d] the relevant data and articulate[d] a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made."' *Id.* at 1790-91, *citing Twentymile Coal Co.*, 30 FMSHRC 736, 754, 773-74 (Aug. 2008). The decision did not remove the burden of proof from the Secretary, but adjusted the standard of proof to an abuse of discretion test. The abuse of discretion standard of proof does not affect the application of the substantial evidence test as applied to a Judge's findings of fact.

The Commission reaffirmed *Mach* in *Prairie State Generating Co., LLC*, 35 FMSHRC 1985, 1989 (July 2013). Subsequently, the United States Court of Appeals for the District of Columbia Circuit affirmed the Commission's decision. *Prairie State Generating Co., LLC v. Sec'y of Labor*, 792 F.3d 82, 92 (D.C. Cir. 2015).[11] The circuit court did not find the Mine Act mandated use of the abuse of discretion standard, but instead accepted the Commission's deferential use of that standard stating "[w]e therefore hold that the standard of review applied by the Commission was at least a permissible one." *Id.* at 93. Again, the circuit court's decision left in place the substantial evidence requirement that requires MSHA to support a denial of a plan through presentation of facts pertaining to the proffered plan that sustain a reasonable conclusion that the plan did not provide for the safety and health requirements at the specific mine.[12]

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[11] In doing so, the circuit court commented upon the expertise of MSHA in reviewing ventilation plans. With all respect for the circuit court, the Commission and its Judges often deal with complex issues involving expert witnesses. For example, disputes regarding whether a violation is significant and substantial turn on the evidence for the Secretary and operator of the reasonable likelihood of a hazard and the reasonable likelihood of an injury if the hazard occurs. In S&S cases, the Secretary must establish a preponderance of the evidence demonstrating the reasonable likelihood of a hazard or injury. Often this involves disputed testimony between contending experts. Such inquiries call for determinations by Judges very much in the nature of whether a ventilation plan is fit for providing ventilation in accordance with MSHA's mandatory standards.

[12] We continue to believe that *Prairie State Generating Co*., 35 FMSHRC 1985 (July 2013), *aff'd*, 792 F.3d 82 (D.C. Cir. 2015) and *Mach Mining, LLC*, 34 FMSHRC 1784, 1790 (Aug. 2012), *aff'd*, 728 F.3d 643 (7th Cir. 2013), were wrongly decided. Contrary to our colleagues' assertions (slip op. at 7 n.2), we recognize that those decisions were upheld by the circuit courts as permissible interpretations by the Commission, and we do not "reject" the holdings in those decisions because it is unnecessary to do so. Here, the outcome does not turn upon the standard of review but rather the fact, demonstrated below, that MSHA's decision to reject the operator's proposed plan was not analyzed under the safety standard provided by the statute and was not supported by substantial evidence.

Most recently, in a case particularly relevant here, the United States Court of Appeals for the Tenth Circuit reviewed a Commission decision regarding whether an escapeway met the suitability requirements of 30 C.F.R. § 75.380(d)(5).[13] The Commission, by a 2–2 vote, left standing an Administrative Law Judge's finding that the escapeway used by the operator was not the most direct, safe and practical route to the nearest mine opening "suitable" for the safe evacuation of miners. *Canyon Fuel Co., LLC*, 39 FMSHRC 1578, 1578-79 (Aug. 2017), *aff'd in part and vacated in part*, 894 F.3d 1279 (10th Cir. 2018).

On appeal, the circuit court addressed the Secretary's burden of establishing a violation of the escapeway standard:

> To establish a violation of § 75.380(d)(5), however, "[i]t is insufficient for the Secretary to merely cite the designated route as being out of compliance with the regulation." *S. Ohio Coal*, 14 FMSHRC at 1785. Rather, "it is the Secretary's burden to prove that, as compared to the designated route, there is at least one other escapeway route that [he] has determined more closely complies with the standard's requirement." *Id.*

894 F.3d at 1295-96. The circuit court then turned to an analysis of whether the Secretary had presented substantial evidence in support of its position. The court found that the Secretary had failed to carry his burden and reversed the Judge's decision. *Id.* at 1296-1300.

Pertinent to this case, the circuit court soundly rejected any notion that a Judge or the Commission must accept MSHA disapproval of a plan merely because MSHA finds another plan to be preferable. Even more pertinent, the court's decision illustrates a point of fundamental importance to this case — namely, the test of suitability is not which plan MSHA might prefer, but instead whether the plan (i.e., route in *Canyon Fuel*) proffered by the operator is suitable. In other words, the suitability determination is not an opportunity for MSHA to design a route or develop a plan for the operator. MSHA's duty is to review the plan submitted by the operator and determine whether it achieves the requisite safety and health requirements at the specific mine.[14]

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[13] 30 C.F.R. § 75.380(d)(5) provides "[e]ach escapeway shall be . . . [l]ocated to follow the most direct, safe and practical route to the nearest mine opening suitable for the safe evacuation of miners."

[14] Section 75.380(d)(5) is an unusual suitability provision. It does not require MSHA to determine only whether an escapeway is sufficient to reach a mine opening "suitable" for safe evacuation. Instead, if there are more than one escapeways to a suitable evacuation point, MSHA must decide whether the escapeway designated by the operator is "the most direct, safe and practical route." Therefore, unlike section 303(o) that mandates only that the ventilation plan be suitable, section 75.380(d)(5) may require comparison of alternative "suitable" escapeways. In the present case, MSHA has not analyzed the operator's plan in terms of its suitability. As in *Canyon Fuel*, this is a fatal flaw. It is self-evident from the record evidence in the case and the specious and, at times, contradictory, rationales offered by the agency that the District Manager

(continued…)

The circuit court's first inquiry in examining the substantial evidence issue was whether the operator's exit point was suitable when examined on its own and without reference to the MSHA plan. After the court determined that the point of exit under the operator's plan was suitable, it then turned to the unique aspect of comparing routes of exit under the governing standard. *Id.* at 1297-98.

In *Canyon Fuel*, there was no dispute that the escapeway preferred by the Secretary provided a preferable location for exiting the mine. It had more room and quicker access to medical assistance. However, the operator's escapeway was "suitable" notwithstanding the better conditions at the point of exit under MSHA's preferred route.

Canyon Fuel, therefore, perfectly illustrates that MSHA must make its suitability determination based on the operator's specific plan. Even in the unusual circumstances where the mandatory safety standard required a comparison of escapeways, MSHA could not conclude an escapeway was unsuitable because it preferred certain characteristics of an alternate escapeway. It could not compare escapeways and find one "more suitable" than the other. The court required an initial determination of whether the escapeway developed by the operator was suitable. Only then did the comparison aspect of this specific regulation come into play.

This is a critical point for this case. Here, MSHA's duty was not to determine which of two plans it preferred or to evaluate the proffered plan as though it were a possible alternative to the existing plan. MSHA's task was to determine whether the plan submitted by the operator was suitable. This task does not require or permit formulation by MSHA of a new plan or comparison by MSHA with an existing plan. The operator's presentation of the plan calls for a freestanding, fact-based determination of whether the proffered plan is suitable — that is, whether it is appropriate for achieving the safety and health requirements at the specific mine. Where, as in this case, there has been no finding or evidence showing that the operator's plan

[14] (… continued)
made up his mind that he preferred the existing plan and then cobbled together whatever support he could find to purport that MSHA's plan was preferable, without holding the operator's plan to be unsuitable. Contrary to our colleagues' claim in footnote 3 of their opinion, MSHA never made a determination that safety would be unacceptably compromised, taking into account the relative risks and benefits of both plans. The agency relied on evidence that does not support its position, such as the fan test results; dismisses without explanation legitimate and evidence-based concerns about material handling safety concerns; and asserts simultaneously that its plan is superior – again, using the wrong standard – because it provides better response to spontaneous combustion, while diminishing the operator's concerns about the occurrence of spontaneous combustion – which is better addressed by the operator's plan. In short, the decision is hobbled by the kind of incoherent and erratic rationalizing that marks arbitrary and capricious agency actions.

has failed to meet those requirements, MSHA's rejection of the operator's suitable plan and demand of a different plan, even applying the *Prairie State* standard, is an abuse of discretion.[15]

From the foregoing, we discern that the outcome of a suitability determination in this case does not depend upon a didactic characterization of the standard of review as beyond a preponderance of the evidence or abuse of discretion. Instead, at the end of the day, MSHA must base a refusal to accept a ventilation plan only upon substantial evidence that the proffered plan would not meet the safety and health requirements at the specific mine. Certain principles become clear.

First, the Secretary bears the burden of introducing evidence to support the proposition that the proffered plan does not achieve the safety and health ventilation requirements at the specific mine.

Second, there is not a presumption that the Secretary's opinion is correct. Under any standard of proof, the Secretary must present substantial evidence to support his position. That evidence must be sufficient for a reasonable person to conclude that usage of the plan under review is not appropriate to achieve the safety and health ventilation requirements at the specific mine.

Third, in reviewing a proposed ventilation plan, MSHA does not have a right or responsibility to determine whether an alternative plan — or even an existing plan — would also achieve the safety and health ventilation requirements at the specific mine. Section 303(o) expressly divides responsibilities between the operator and MSHA. The operator has the duty to develop a plan for maintaining adequate ventilation and respirable dust control in the specific mine. MSHA has the duty to review the plan. But the mine is not federal property: it is the operator's investment-backed business, and under the law it retains the right to have its mining plans approved unless they fail to conform to duly-promulgated federal and state standards and regulations, including the health and safety standards imposed by and under the Mine Act.

An operator's desire to maximize mining efficiency is thus acceptable — or "suitable" — provided it maintains adequate ventilation and respirable dust control in the specific mine. Section 303(o) does not require, and indeed does not permit, MSHA to design the ventilation plan. Section 303(o) does not call for a "comparability" analysis of potentially different ventilation plans. Thus, section 303(o) does not call for MSHA to develop a plan of its own and impose such plan upon the operator. Suitability is the standard. If the operator's plan is suitable – that is, is appropriate for maintaining adequate ventilation and respirable dust control, then it meets the requirements of section 303(o).

[15] To be sure, because good faith negotiations are required before MSHA rejects a plan, if MSHA does not find a plan suitable, MSHA must discuss the plan and suggest changes that would satisfy its concerns with achieving the requisite safety and health. But MSHA may not reject a suitable plan — that is, one that will achieve adequate ventilation and respirable dust control in the specific mine — simply because MSHA prefers a different plan.

The Judge's error here is that she failed to evaluate the District Manager's decision and the evidence in support of that decision under the correct legal standard, i.e., whether the operator's plan was suitable, and instead, simply considered whether MSHA abused its discretion in rejecting the operator's plan. The problem with this analysis is that it ignores the language of the statute and implementing standard and conflates the District Manager's decision with the Secretary's burden of proof at trial. If the Secretary is permitted to simply endorse the District Manager's decision with post hoc rationalization and evidence adduced at trial, then an operator would never prevail where the agency has rejected its proposed plan.[16]

Application of Legal Principles

The record in this case reveals that MSHA did not review the operator's plan for suitability. Instead, MSHA compared the proffered plan to the existing plan and decided it preferred for the operator to maintain the existing plan. MSHA made a comparability analysis rather than a suitability analysis. The Secretary did not find, or even offer evidence showing the new plan proposed by the operator was not suitable — that is, would not meet the requirements for a safe and healthful environment.

MSHA refused to approve the operator's proposed plan, despite the fact that the evidence shows it addressed well the major concerns of the standard, provided a lower risk of spontaneous combustion, lower risk of exposure to roof control hazards, better adaptability to the escapeway plan, and equivalent insufficiency to the dual-entry system in terms of what the fan stoppage test revealed — a problem of noxious gases and low oxygen that MSHA's alternative plan also failed to satisfy and that the operator committed to fix. Tr. 50, 70-72, 79, 118-19, 120, 126, 128, 163; RH Tr. 78-79, 89-90; Sec. Ex. 15(a).

MSHA based its denial of the operator's proposed plan, and the Judge and our colleagues base their approving opinions, on comparison-based claims — namely, that (1) the dual-entry system was more effective at removing noxious gases from the tailgate area where miners work, (2) the dual-entry system enabled better monitoring of conditions in the gob and earlier detection of noxious gases before the gases reach the working face, (3) the dual-entry system did not present substantially greater material handling hazards, (4) there was a suitably low risk of spontaneous combustion under the dual-entry system, and (5) fan stoppage tests did not strongly favor either plan.

[16] Even under the more deferential standard applied in *Mach* and *Prairie State*, substantial evidence does not support the Judge's conclusion that MSHA's District Manager Riley did not abuse his discretion in rejecting the operator's proposed plan in this case because he failed to consider whether the operator's proposed plan was suitable under section 303(o).

The fan stoppage tests were inconclusive and at best, favored the operator's plan.[17] As to points 3 and 4 above, those factors demonstrate that MSHA was making a comparability analysis rather than a suitability analysis. These factors consider whether the operator's plan has benefits that make it "more suitable" than the plan preferred by MSHA.[18] The only issue that bears upon the suitability of the operator's single-entry plan is whether substantial evidence shows that the operator's plan is not sufficient to achieve safety and health requirements related to the possibility of entry of noxious gases into areas where miners work.[19]

Rather, MSHA's disapproval of the operator's proposed plan was based largely on the conclusion that the single-entry plan doesn't justify that it will be "as effective at minimizing risks" and thus "[w]e *feel*" that the dual-entry return is the "best option." Sec. Ex. 4 (emphasis added). Further considering the pros and cons, MSHA stated in a subsequent rejection that "it has been decided that dual tailgate entry is in the best interest for health and safety of the miners" in part because "air course resistance of the tailgate would be four times the value of a dual return." Sec. Ex. 7. MSHA provided no explanation as to how this makes the operator's plan "unsuitable," and the record does not support a conclusion that it is.

Citing a report prepared by Dennis Beiter, MSHA's Senior Mining Engineer in the Ventilation Division ("Beiter's report"), finding that the dual tailgate return resulted in better protection of miners through earlier detection of spontaneous combustion, MSHA rejected the operator's plan Sec. Ex. 10; Sec. Ex. 10a (the Beiter report). This finding makes no sense. MSHA found that the risk of spontaneous combustion under the existing blowing system was so low that the advantage of the operator's plan to the prevention of a spontaneous combustion was irrelevant. Beiter expressly testified "the present system is effectively slowing the potential for spon com to occur in the workout areas of the longwall panels." Tr. 106. Then, having found very little or no risk of spontaneous combustion and no reason for a plan providing additional preventative advantages, the agency cites possible better detection of a potential combustion as a

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[17] The results of the fan stoppage tests were inconclusive and certainly did not support that the operator's single-entry system was unsuitable to the conditions at the mine. The Secretary's own witness, MSHA engineer Thomas Morley, concluded that the fan stoppage test results for both the dual-entry and single-entry system were similar — which undermines Riley's testimony that the dual-entry system is better at preventing gob air from coming out onto the face than the single-entry system. Tr. 70-72.

[18] As *Canyon Fuel* illustrates, if the operator's plan was unsuitable, the cited benefits would not make it suitable. In *Canyon Fuel*, if the exit point of the operator's route were not suitable, the much better conditions of the route of egress would not have made it the most direct route to a suitable exit. *Canyon Fuel*, *supra*, 849 F.3d at 1295-96.

[19] Nonetheless, we must comment that the Secretary and Judge's casual disregard for the possibility of a spontaneous combustion in a mine with the potential for and history of such events is troubling. Having had a combustion event, the operator took prudent steps to reduce the chance of a repeat event. We would not easily dismiss any prudent steps at further reducing the possibility of such an event.

reason for preferring its plan. Therefore, in the agency's view, outright protection was not useful but earlier detection was. It is impossible to reconcile these theories.[20]

Beiter's report did not find or even suggest that the operator's ventilation plan was not suitable. It reads from beginning to end as a "comparison" report. Substantial evidence does not support that the operator's plan was unsuitable, or even that MSHA's plan was more suitable. Rather, the evidence will indicate that District Manager Riley's decision to reject Signal Peak's proposed plan was arbitrarily driven by a preference for MSHA's dual-entry system, as MSHA Official Kevin Stricklin had instructed Riley not to approve the operator's plan regardless of the results of the fan stoppage test. Tr. 161-62.

Detection and Removal of Noxious Gases

The Judge found that District Manager Riley had explained in his testimony and letters to Signal Peak that the dual-entry system is "more effective" because it helps to prevent noxious gas accumulations in the gob from entering the working areas. 39 FMSHRC at 652. Note the clear determination that MSHA and the Judge engaged in a comparison study rather than suitability analysis. MSHA provided no evidence that Signal Peak's plan was not adequate for operation of the mine in compliance with all mandatory safety standards for ventilation. In particular, the Judge cited three different events that MSHA said could cause the release of noxious gases or low oxygen to occur: (1) a fan stoppage; (2) the air pressure in the tailgate entries and face becoming lower than the gob's air pressure — which would create a path of least resistance for the gases to travel from the gob to the working areas — or (3) a delayed rock fall that could push gob air out on the face. RH Tr. 36-37, 111-12.

MSHA's rejection of the single-entry system was premised on the erroneous assumption that a single-entry would permit low-oxygen gob air to enter the face. Tr. 79, 131, 143, 145-46. The Beiter report is based upon "expectations." However, these expectations failed to take into account the nature of the blowing ventilation system employed at Signal Peak. As Signal Peak pointed out, the blowing ventilation system was distinguishable from an exhausting ventilation system.[21] In the latter, it is more common to encounter higher levels of methane at the tailgate drive, because the tendency is to pull air from the gob.[22] SP Br. at 21-22; Tr. 131. In fact, prior to

[20] As a matter of commonsense as well as safety, the operator clearly desires and designs a system that provides the best chance of avoiding spontaneous combustion. In response to a question of why any heating incident is a major event, Fairnelli responded, "[b]ecause [of] the potential it has to catastrophically destroy the mine and, also, the danger it presents to every person underground." Tr. 119.

[21] An "exhausting system" means a fan pulls or draws air through the mine. The danger of an exhausting system, however, is that it may pull air into the gob through cracks in the mine surface, which increases the danger of spontaneous combustion in the gob. Tr. 250-51. Under the current "blowing system," this danger is reduced when fans push and direct the air through the mine.

[22] Significantly, Signal Peak's mine did not have elevated levels of methane. *See* Stip. 3.

employing the blowing ventilation system, the operator did experience lower levels of oxygen coming out of the gob onto the face, prompting the change from the exhausting system to the blowing system. Tr. 188. Because the air pressure at the face is greater than in the gob, under normal mining, noxious gases do not leak out of the gob onto the face under the blowing system. Tr. 130, 143.

Moreover, very importantly, the actual conduct of the fan stoppage tests demonstrated that even when the system was not functional, the oxygen levels were better with the single-entry system, contrary to MSHA's unsubstantiated speculation. Tr. 163; RH Tr. 89-90; Sec. Ex. 15(a). The actual tests, therefore, contradict the "expectation" basis for the incorrect supposition in the Beiter report thereby undercutting MSHA's rationale for preferring the dual entry system. Certainly, they do not support a finding that the single entry system was not suitable in the context of this case.

MSHA presented no evidence other than a wholly theoretical opinion without any supporting data, examples, other similar mines, or prior events about a possibility to support that theory.[23] MSHA's witnesses provided conclusory opinions as to the potential of noxious gases exiting onto the face in a single-entry system. However, their opinion testimony fails to consider the evidence pertaining to the air pressure differential employed in the blowing ventilation system, the high volume of air being pushed across the face in the blowing system, or the fact that no noxious gases exited the gob during the fan stoppage tests. Tr. 79, 131, 143, 145-46.

Farinelli explained that the operator had a carbon monoxide detection unit at the mouth of the panel and that it detected not only the amount of carbon monoxide in the airflow but more importantly the quantity of carbon monoxide. Tr. 149. Therefore, it created a baseline for the amount of carbon monoxide. Tr. 149. With that information, the operator could trend the amount of carbon monoxide separate from just measuring amounts in airflow at any given point. Tr. 149. As the testimony established it is important to know the quantity of CO present in the gob and the sensor in the No. 1 entry makes that determination. Tr. 148.

The evidence supports that the single-entry system was more effective at addressing the potential concerns MSHA identified. One type of event posited by MSHA as disrupting the operator's ventilation system and potentially allowing for the release of noxious gases was a fan

[23] Riley testified about one instance of a concentration of carbon monoxide at the headgate (opposite side of the longwall from the tailgate) in 2011 before the mine switched to the blowing ventilation system to help alleviate the danger of a spontaneous combustion. There is no evidence that MSHA even considered this information in preferring the double entry system.

stoppage.[24] As noted above, fan stoppage tests did not show an advantage for the existing plan. In fact, the test revealed that the results were slightly better under the operator's single-entry plan. District Manager Riley acknowledged that the oxygen levels fell to a slightly lesser degree under the test for the single-entry plan. Tr. 163; RH Tr. 89-90; Sec. Ex. 15(a). Thomas Morley, MSHA Mining Engineer in the Ventilation Division, who performed the fan stoppage tests, acknowledged on cross-examination that, if miners are "traveling . . . coming off the longwall face and turning right [onto tailgate entry number 1], . . . if there are contaminants coming out of the gob at that corner, the more air there is to dilute them, [which would exist under the single-entry system], the better." Tr. 79. This evidence does not support the decision to prefer the dual entry system and detracts from the Judge's finding that the dual-entry system was better suited at preventing gob air from coming out onto the face. Most importantly, there is not a finding or evidence that the volume of air would not be suitable for the miners. The Judge accepted an unproven MSHA preference and failed to cite substantial evidence that the single entry system would not provide suitable atmospheric conditions.

The other type of hypothesized events that would disrupt the blowing ventilation system were that a rock fall in the gob might push gob air out on the tailgate area or that, if air pressure in the tailgate entry fell below the gob's air pressure, gases might travel out from the gob to the tailgate where miners occasionally are present. Signal Peak witnesses testified that there was no evidence that a rock fall pushing gases into the tailgate had ever occurred or that such an event was even likely to occur, and the Secretary did not contradict that testimony. Tr. 146, 155 (Farinelli's testimony that no gob air was pushed onto the face due to falls in the gob).

With regard to a change in the air pressure differential allowing gob air to be pushed out into the working area, Vice President of Engineering Farinelli testified that air pressure in the active workings and gob are very similar and that air pressure in the gob would stay lower than at the face. Tr. 145-46. Farinelli testified that even when the barometer has dropped, meaning that the pressure in the gob was greater than in the mine generally, there had not been low oxygen concentrations on the longwall face. Tr. 145. A blowing system avoids this issue by providing air into the mine at higher than atmospheric pressure. Tr. 108, 145-46. Further, the blowing system pushed a large volume of air across the longwall.

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[24] Although the Secretary disputes the results of the fan stoppage tests, his theory is unfounded and speculative. It is undisputed that the tests were still run three days apart, and that the gob gases had the entire three-day period of time to build back up after the first test, consistent with the test plan protocols. Sec. Ex. 15. The Secretary has adduced no evidence to suggest that the gas build-up was affected in any way by the operator's half-day delay in converting the tailgate into a single-entry system. In fact, the testimony shows the opposite to be more likely. The Secretary's own witness, MSHA engineer Morley, conceded on cross-examination that normal mining operations occurred for all three days in between the tests, as planned. Tr. 70-71. Furthermore, Morley conceded that having one of the three days of mining being run as "normal" (i.e., under a dual-entry system) should not have negatively impacted the gob's ability to have a sufficient build-up of noxious gases by the time the second test was due. Tr. 70-72. As such, it seems highly unlikely that the operator's slight deviation from the testing protocol in any way interfered with the validity of the test results.

The mine typically has approximately 80,000 cubic feet per minute (cfm) of air movement along the longwall face. Tr. 19. MSHA ventilation standards require 30,000 cfm across the face of a longwall. 30 C.F.R. § 75.325(c)(1). In a single return, all 80,000 cfm is sent through one return. MSHA did not provide any evidence showing how a low quantity of nitrogen or some other gas introduced into this flow by a single, never before occurring and highly unlikely rock fall could cause the oxygen on the system to fall below an adequate level. Further, there was no evidence of how long this entirely theoretical shortage of oxygen would exist.

Finally, as for detection, Farinelli testified that in a single-entry system, the operator collects weekly bag samples around the perimeter of the gob and at the tailgate to monitor for early indicators of spontaneous combustion, which would serve the same purpose as the tube bundle under the dual-entry system. Tr. 105-07, 147-48. Signal Peak also tests for air velocity at the mouth of the tailgate. Tr. 147-48. Because the location of the monitoring in the single-entry system is stationary, the operator contends that it would be more effective at providing accurate readings of the trend of carbon monoxide ("CO"), which is a more accurate measure of potential spontaneous combustion, whereas the monitor in the dual-entry system would be continuously moved in the No. 2 entry and hence, less accurate of current trends. S. Br. at 27. Thus, the evidence suggests that the operator's plan would be as effective as the Secretary's at detecting noxious gases. Again, and most importantly, MSHA did not present any evidence that the operator's system was insufficient or not suitable. MSHA states only that it prefers its concept to the operator's, a position that fails to provide the substantial evidence necessary to sustain the Secretary's burden of proof to show the operator proposed plan was inadequate to maintain adequative ventilation and respirable dust control.

Spontaneous Combustion

Even if one accepts MSHA's inherently contradictory position that prevention of a spontaneous combustion was not important but early detection was, no actual evidence supports a finding that the operator's plan was not suitable — that is, did not achieve the purpose of a ventilation plan. First, as noted, MSHA's witnesses admitted that the risk of spontaneous combustion was low given the operator's change to a bleederless system in Janaury 2010. Tr. 185, 253. The operator did so because it had been experiencing elevated levels of CO in the gob. Stip. 5. The "bleederless" system limits the CO and oxygen in the gob, thus reducing the potential for spontaneous combustion. *Id*.

Second, the introduction of nitrogen into the gob served to reduce the level of oxygen in the gob, thereby further reducing the possibility of spontaneous combustion. Stip. 6; RH Tr. 79-80; Tr. 31. In December 2011, Signal Peak experienced a spontaneous combustion event near the inby end of the headgate on the 2R panel. Tr. 252; Stip. 6. It was caused by oxygen pulled in by the mine's exhausting ventilation system through subsidence cracks on the surface into the rider seam above the main seam being mined. As a result of the event, Signal Peak, with the approval of MSHA, instituted additional measures on subsequent longwall panels, including lowering the gob's oxygen levels by injecting nitrogen into the gob about 10-15 crosscuts inby the face while monitoring the oxygen levels on an ongoing basis. Stip. 6; RH Tr. 79-80; Tr. 31. In addition, in January 2013, the operator replaced its exhausting system with a blowing ventilation system. Tr.

185. By making these changes, the operator has prevented any more occurrences of spontaneous combustion. RH Tr. 176.

As Signal Peak noted, the dual-entry system directs a certain amount of air inby in the No. 1 entry of the tailgate for a distance of one crosscut (approximately 200 feet or more). Tr. 34, 47, 128. This introduces more oxygen into the gob than the single-entry system, which is counter to the goal of reducing oxygen in order to prevent spontaneous combustion. MSHA's witnesses conceded this point. Tr. 50, 128; RH Tr. 78-79. The operator's proposed plan would omit the "T-split" and "back-around return" in the tailgate and seal off the No. 2 entry, and instead have the air leave the mine in just one entry, tailgate No. 1 entry. SP Ex. M. According to Farinelli, the single-entry system would better control spontaneous combustion by reducing the amount of air introduced into the longwall gob both on the headgate side and through the back return. Tr. 118-19, 126. Because in a single-entry system the gob isolation seals would be built during the longwall retreat in the crosscuts between the Nos. 1 and 2 entries, rather than between the Nos. 2 and 3 entries after the longwall face passes, air is not introduced into the gob along the headgate side.[25] Tr. 109-10; RH Tr. 83-86.

The Judge relied on MSHA's witnesses, who testified about measures to prevent airflow from the gob into the working face in the dual-entry system. However, Beiter stated that "a curtain was typically installed in the crosscut inby the longwall face where the headgate seal would later be constructed. That curtain was described as 'not tight.'" Sec. Ex. 10(a), at 4. In Beiter's view, "[c]onstruction of a more substantial control such as a permanent stopping or framed check curtain (temporary stopping) instead of a curtain described as 'not tight' would reduce the quantity of intake air leaking into the worked-out area." *Id.*; Tr. 10.

While this would prevent air from flowing through any opening into the gob on the headgate side before the seal is constructed, such measure would be temporary and susceptible to failure. Farinelli testified that the operator had tried to tighten the curtain in the past but had encountered difficulties from roof falls occurring behind the longwall face which would blow down the curtain, requiring mine personnel to have to go back in to rebuild it, creating significant safe-access risks for miners. Tr. 153-54.

Thus, based on the record, we conclude that substantial evidence does not support MSHA's preference for the dual entry system let alone support an unmade finding that the single-entry system was not adequate for reducing the potential for spontaneous combustion.

Material Handling and Roof Hazards

While the Judge found that Riley had a reasonable basis to believe that material handling did not pose a significant hazard at the mine and that roof hazards were not more likely to occur under the dual-entry system, 39 FMSHRC at 650, 652, the evidence is uncontroverted that the

[25] There is no evidence in the record that Riley considered the operator's concern that the dual-entry system would increase the risk of spontaneous combustion on the tailgate side. Although Beiter testified that he had considered this concern at the time he drafted his report, he conceded that his report failed to explicitly address the issue. Sec. Ex. 10(a) at 2; Tr. 27.

operator's plan would minimize the risks to miners of material handling and roof control hazards associated with the construction of seals immediately adjacent to the unsupported longwall gob. Sec. Ex. 6 at 2. By not requiring the operator to maintain the tailgate No. 2 entry, miners would not be exposed to roof control hazards. Tr. 82, 120. It appears that the Judge failed to recognize the significant risk involved in maintaining the second entry. Under the operator's current dual-entry plan, over 100 seals are constructed each year immediately adjacent to the gob. Sec. Ex. 6. Beiter even conceded that it is preferable to build the seal in advance of the longwall rather than right next to the gob. Tr. 12, 48.

Although MSHA's witnesses testified that the operator has been doing a "pretty good job" in mitigating the hazards that relate to roof control and material handling, RH Tr. 43-45, 81-83; Tr. 14-15, 49-50, an operator's diligent efforts at ensuring miners' safety is not tantamount to a conclusion that the dual-entry system is itself suitable, let alone support for the conclusion that the single-entry system is unsuitable. Such a conclusion would penalize the operator for its safety record and would undermine the Act's purpose.

Ultimately, we conclude that substantial evidence supports that the Secretary only presented evidence arguing, and even failing there, for MSHA's preference for the MSHA endorsed system and did not introduce substantial evidence to show that, in the words of MSHA's ventilation plan manual, the operator's proposed plan was not appropriate to achieve the safety and health requirements for the mine. This is precisely the same sort of decisionmaking the Tenth Circuit found unacceptable in *Canyon Fuel*. Here, as in that case, MSHA has utterly failed to address competing risks and benefits or to support its rejection of an operator's plan with competent evidence.

CONCLUSION

Based on the foregoing, we conclude that the Judge erred in applying the wrong legal standard and conclude that substantial evidence does not support that the operator's ventilation plan was not suitable. Accordingly, we would vacate and reverse the Judge's decision.

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

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

COMMISSION ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1331 PENNSYLVANIA AVE., N.W., SUITE 520N
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July 16, 2018

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) v. MARK AUGUSTINE, employed by METZGER REMOVAL, INC.[1]	Docket No. SE 2018-113-M A.C. No. 31-00057-0444267 A

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act"). On March 15, 2018, the Commission received a motion seeking to reopen a penalty assessment against Mark Augustine, an employee of Metzger Removal, Inc., under section 110(c) of the Mine Act, 30 U.S.C. § 820(c), that has become a final order of the Commission. Subsequently, the Secretary requested that the Commission grant the motion to reopen in order to facilitate a global settlement of all outstanding citations against Metzger Removal and Mr. Augustine.

Having reviewed the movant's request and the Secretary's response, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.

[1] When initially docketed, the caption in this matter listed Metzger Removal, Inc., as the Respondent. The caption has been modified to reflect that the penalty assessment at issue was assessed against Mark Augustine, an employee of Metzger Removal, rather than the operator.

Consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28. In order to effectuate the settlement identified as the basis of the unopposed motion to reopen, the parties should promptly file a motion to approve settlement after the Secretary files the petition for assessment of penalty.[2]

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

/s/ Mary Lu Jordan
Mary Lu Jordan, Commissioner

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

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

[2] We note that the motion to reopen was filed by counsel for Metzger Removal, without any indication that Mr. Augustine had been consulted or that he had been served with the motion. We caution that the other parties must ensure that Mr. Augustine is aware of any motion to approve settlement and that he concurs in that motion. A motion for settlement approval must represent a genuine agreement between all parties. *See Sec'y of Labor on behalf of Pendley v. Highland Mining Co., LLC*, 29 FMSHRC 164, 165-66 (Apr. 2007) (vacating a settlement agreement which had been jointly proposed by the Secretary and the operator, because the miner on whose behalf the Secretary had filed the discrimination complaint had not been consulted).

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July 16, 2018

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) v. CANYON FUEL COMPANY, LLC	Docket No. WEST 2018-0273-M A.C. No. 42-01566-455974

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act"). On March 13, 2018, the Commission received a motion from Canyon Fuel Company, LLC ("Canyon Fuel") seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

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

Records of the Department of Labor's Mine Safety and Health Administration ("MSHA") indicate that the proposed assessment was delivered on January 12, 2018, and became a final order of the Commission on February 12, 2018.[1]

Canyon Fuel states that it did not receive the proposed assessment until March 13, 2018, when outside counsel contacted MSHA and requested a copy of the assessment form by email. Canyon Fuel states that MSHA claims that the assessment form was delivered, but that U.S. Postal Service ("USPS") records indicated that the assessment was "left at/in the mailbox." Canyon Fuel therefore contends that its failure to timely contest the penalty assessment was due to inadvertence or mistake in mail processing, either on the part of USPS (for failing to properly deliver mail which was presumably certified and therefore required a signature), or on the part of Canyon Fuel (for failing to sufficiently monitor mail processing).

The operator further explains that the delay may have been due in part to a mistaken belief that the assessment for the citation at issue would be included in the same contest form as another citation issued during the same inspection. On or about March 12, 2018, Canyon Fuel received the proposed assessment for the other citation and realized it did not address the citation at issue. Counsel for Canyon Fuel accessed MSHA's Mine Data Retrieval System, discovered that the citation at issue was listed as a final order, requested a copy of the relevant proposed assessment from MSHA, and filed a motion to reopen on March 13, 2018.

The Secretary does not oppose the motion, although he urges greater care in ensuring future penalties are timely contested, and cautions that he may oppose future motions to reopen.

[1] The Secretary's response to the motion says that this was the delivery date. However, MSHA has not provided a delivery confirmation receipt.

Having reviewed Canyon Fuel's request and the Secretary's response, we find that Canyon Fuel's failure to timely contest the assessment was the result of mistake or inadvertence resulting from confusion regarding the issuance of separate assessments for the two citations and, possibly, an error in mail delivery or processing. We also note that Canyon Fuel acted promptly and proactively to address the problem. In the interest of justice, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.

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

/s/ Mary Lu Jordan
Mary Lu Jordan, Commissioner

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

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

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August 2, 2018

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) v. THE OHIO COUNTY COAL COMPANY	Docket No. WEVA 2018-0165

ORDER GRANTING REVIEW AND APPROVING SETTLEMENT

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012). On May 7, 2018, an Administrative Law Judge issued a decision denying a motion to approve settlement. On June 1, 2018, the Secretary of Labor filed a motion asking the Judge to certify the ruling for interlocutory review. The Judge granted this request on June 4, 2018.

Commission Procedural Rule 76(a), 29 C.F.R. § 2700.76(a), provides that interlocutory review is not a matter of right but of the sound discretion of the Commission. In addition, Rule 76(a)(2) requires a majority of Commission members to conclude that the Judge's interlocutory ruling involves a controlling question of law and that immediate review may materially advance the final disposition of the proceeding.

This standard having been satisfied, we grant review. The question on review is whether the Judge abused his discretion in denying the Secretary's motion to approve settlement. We conclude that he did, reverse his decision, and approve the settlement.

Factual and Procedural Background

This case involves five citations, for which the Secretary of Labor initially proposed a total penalty of $10,075. On May 4, 2018, the Secretary filed a settlement motion agreed to by both parties. By the terms of that settlement, all five citations would be affirmed, four of them as issued. For those four citations, the penalty amounts would remain as proposed by the Secretary.

Pursuant to the settlement, the remaining citation (Citation No. 9090883) would be modified to change the negligence level from moderate to low. The proposed penalty for that citation would be reduced from $5,426 to $2,438. This is the penalty amount that the Secretary would have assessed pursuant to his penalty regulations, 30 C.F.R. Part 100, had the negligence initially been assessed as low. The overall penalty for the docket would be reduced from $10,075 to $7,087, constituting approximately 70 percent of the total proposed initial penalty assessment.

Citation No. 9090883 charged the operator with a violation of 30 C.F.R. § 75.202(b), which prohibits miners from working or traveling under unsupported roof. It alleged in pertinent part that both pads of the automated temporary roof support equipment ("ATRS") were not in contact with the roof while roof bolting was being performed. It stated that since both pads need to be touching the roof to create a supported area, the miner working on roof bolting would have been reaching past roof support into the unsupported area (because one pad was not in contact with the roof).

The settlement motion noted the operator's argument that it was not aware of this practice,[1] which was committed by an hourly employee. The motion further acknowledged that the inspector's notes confirmed that the foreman was not present when the violation occurred.

The Judge denied the settlement on the basis that it was insufficiently supported. Dec. Denying Settlement Mot. at 2. He reasoned that the justification for the penalty reduction for Citation No. 9090883 was inconsistent with information involving one of the other citations (Citation No. 9090884).

Citation No. 9090884 charged the operator with a violation of 30 C.F.R. § 75.1725(a), which requires that machinery and equipment be maintained in safe operating condition. The citation alleged that the automatic temporary roof support (ATRS) on the machine would not pivot to allow both pads to contact the roof when uneven roof was present. The negligence level was marked as low. The Secretary proposed a penalty of $1,096 for the violation, and under the settlement, the operator agreed to pay the full amount of the proposed penalty.

In denying the settlement, the Judge stated that:

> The two citations, 9090883 and 9090884 were issued on October 27, 2017, within minutes of one another. The problem is that the justification for the 55 % reduction for No. 9090883 does not square with the information contained in Citation No. 9090884, unless the Secretary is asserting that these citations *do not* relate to the same piece of equipment. This is so because, for Citation No. 9090883, the Secretary declares that the Respondent "argue[s] that the operator was unaware of *the cited practice*, which was committed by an hourly employee." Motion at 4 (emphasis added). Yet, Citation No. 9090884 does not indicate an incorrect practice. Rather it indicates *a defect* with

[1] Since "practice" connotes something which is done on a usual or regular basis, it might have been clearer and more accurate if the Motion for Settlement had referred to the miner's use of the roof bolt machine under unsupported roof as an "action" rather than a "practice."

> the machine's ATRS, as it would not pivot to allow both pads to contact the roof, a function which the machine should have the ability to do.
>
> Therefore the Motion is insufficiently supported.

Dec. Denying Settlement Mot. at 2.

Disposition

The Commission reviews a Judge's denial of a proposed settlement under an abuse of discretion standard. *Sec'y of Labor on behalf of Shemwell v. Armstrong Coal Co.*, 36 FMSHRC 1097, 1101 (May 2014).[2] When the Commission and its Judges evaluate settlement motions, we consider "whether the settlement of a proposed penalty is fair, reasonable, appropriate under the facts, and protects the public interest." *American Coal Co.*, 38 FMSHRC 1972, 1976 (Aug. 2016).

We conclude that the Judge's denial of the settlement motion constituted an abuse of discretion. First, he did not refer to the applicable standard set forth above. In fact, he failed to articulate any standard under which he evaluated this settlement.

Moreover, the Judge's reason for rejecting the settlement is unsound. His order states that he denied the settlement motion, even though four out of five citations stand as written by the inspector and the accompanying penalties are those originally assessed by the Secretary, because the fifth citation was reduced from moderate to low negligence (with a corresponding reduction in penalty) based on a rationale which he found inconsistent with the wording of one of the other citations.

We readily find an explanation for the wording in the motion that the Judge found so troubling. Both citations were based on the following scenario: a miner was bolting in an entry of a mine. The basis for Citation No. 9090884, which alleges a failure to maintain machinery in safe working condition, was that the ATRS on the roof bolting machine was defective in that it did not properly pivot so as to allow both pads to contact the roof when uneven roof was present (the situation at the time of the violation). This is a defect in the mining equipment. The negligence was alleged as "low." Citation No. 9090883, for which the negligence and penalty would be reduced under the terms of the settlements, alleges a violation for working under unsupported roof: Despite the fact that only one of the two pads of the ATRS was in contact with the roof, the roof bolter operated the machine anyway. This was an action or "practice" by the roof bolt operator. The citation alleges "moderate" negligence. In the settlement, MSHA agreed to change the citation to "low" negligence because the foreman was not present.

[2] An abuse of discretion may be found where there is no evidence to support the Judge's decision or if the decision is based on an improper understanding of the law. 36 FMSHRC at 1101.

The Judge cited an alleged conflict between the explanation in the motion for the reduced negligence level for Citation No. 9090883, in which the Secretary referenced a "practice," and Citation No. 9090884, which does not indicate that an illegal practice occurred, but instead charges that there was a defect in the machinery. We do not see a conflict in the citations or their explanation in the Motion for Settlement. Section 75.1725(a) (the standard that Citation No. 9090884 alleges was violated) mandates that machinery be maintained in good condition. Therefore, as one would anticipate, this citation describes a defect in machinery and not the conduct of a miner.

In short, Citation No. 9090883 was issued because of an action or "practice" by an individual machine operator (charged with working under unsupported roof) while Citation No. 9090884 was issued for a different reason (a defect in the machine itself). The fact that the practice (working under unsupported roof) occurred in the context of the second violation (the defective machinery) does not mean that both citations must be described in similar terms, nor would we expect them to be. There is thus no conflict between these assertions, which are reconciled by a simple and logical explanation.

The operator's knowledge (actual or constructive) is a key component of a negligence determination. Here, the Secretary has acknowledged that a supervisor was not present when the miner worked under unsupported roof. In light of this, the Secretary has agreed to reduce the negligence level for that citation to "low."[3] Similarly, the Secretary has alleged "low" negligence for the operator's failure to fix a defect in the roof bolter. The parties' requested settlement therefore would align the negligence alleged for the cited action or practice with the negligence alleged against the operator for the equipment defect. We therefore do not discern an internal inconsistency in the settlement terms that undermines the parties' agreement. The Judge's conclusion to the contrary cannot stand.

[3] The actions of a foreman may be attributable to an operator, but the actions of a rank-and-file miner alone may not be so attributable. *See, e.g., Midwest Material Co.*, 19 FMSHRC 30, 35 (Jan. 1997) ("a foreman . . . is held to a high standard of care."); *Fort Scott Fertilizer-Cullor, Inc.*, 17 FMSHRC 1112, 1116 (July 1995) (holding that the conduct of a rank-and-file miner is not imputable to the operator in determining negligence for penalty purposes and that, instead, the operator's supervision, training, and disciplining are relevant).

Conclusion

In denying the settlement motion, the Judge abused his discretion. Consequently, we reverse his decision. We conclude that the proposed settlement meets the standard set forth above, grant the motion for review of the Judge's decision, and approve the settlement.

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

/s/ Mary Lu Jordan
Mary Lu Jordan, Commissioner

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

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

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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August 20, 2018

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	
v.	Docket No. SE 2018-95-M A.C. No. 40-03343-442373
DURACAP MATERIALS LLC	

BEFORE: Althen, Acting Chairman; Jordan, and Young, Commissioners[1]

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act"). On February 20, 2018, the Commission received from Duracap Materials LLC ("Duracap") a motion seeking to reopen a penalty assessment that had appeared to become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

On July 5, 2017, Duracap received a proposed penalty assessment from the Secretary. On August 4, 2017, the proposed assessment was deemed a final order of the Commission, when it appeared that the operator had not filed a Notice of Contest within 30 days. MSHA mailed a delinquency notification to the operator on October 14, 2017, and the case was referred to the U.S. Department of Treasury for collection on December 14, 2017.

The operator claims that it timely mailed a contest to MSHA. As evidence of the timely contest, the operator provides a certified mail receipt. Records from the US Postal Service indicate that the contest was received at the post office in Arlington, Virginia, but was never delivered to the Secretary. The Secretary does not oppose the request to reopen. Significantly, the Secretary does not dispute that the contest was received by MSHA on July 13, 2017, before it purportedly became a final order of the Commission.

Section 105(a) states that if an operator "fails to notify the Secretary that he intends to contest the . . . proposed assessment of penalty . . . the citation and the proposed assessment of penalty shall be deemed a final order of the Commission." 30 U.S.C. § 815(a). Here, the evidence indicates that Duracap timely notified the Secretary of the contest.

[1] Commissioner Cohen has elected not to participate in this matter.

Therefore, having reviewed Duracap's request and the Secretary's response, we conclude that the proposed penalty assessment did not become a final order of the Commission because the operator timely contested the proposed assessment. This obviates any need to invoke Rule 60(b).

Accordingly, the operator's motion to reopen is moot, and this case is remanded to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.

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

/s/ Mary Lu Jordan
Mary Lu Jordan, Commissioner

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

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August 21, 2018

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

v.

BEELMAN TRUCK CO.

Docket No. SE 2018-84-M
A.C. No. 01-00040-448729

BEFORE: Althen, Acting Chairman; Jordan, and Young, Commissioners[1]

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act"). On February 7, 2018, the Commission received from Beelman Truck Co. ("Beelman") a motion seeking to reopen a penalty assessment that had appeared to become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

On September 23, 2017, the U.S. Postal Service attempted to deliver a proposed penalty assessment from the Secretary to the operator. However, the assessment was returned unclaimed. On October 23, 2017, the proposed assessment was deemed a final order of the Commission, when it appeared that the operator had not filed a Notice of Contest within 30 days. Subsequently, a delinquency notification was mailed to the operator on December 11, 2017.

The operator claims that it filed a timely contest for a citation underlying the proposed assessment but claims that it never received the assessment itself. The Secretary does not oppose the request to reopen. Significantly, the Secretary concedes that the assessment was returned unclaimed and does not argue that the operator refused to accept delivery of the assessment.

Section 105(a) states that if an operator "fails to notify the Secretary that he intends to contest the . . . proposed assessment of penalty . . . the citation and the proposed assessment of penalty shall be deemed a final order of the Commission." 30 U.S.C. § 815(a). Here, the evidence indicates that Beelman never received the assessment and thus, did not have an opportunity to notify the Secretary that it intended to contest the assessment.

[1] Commissioner Cohen has elected not to participate in this matter.

Having reviewed Beelman's request and the Secretary's response, we conclude that the proposed penalty assessment did not become a final order of the Commission because the operator never received the assessment. This obviates any need to invoke Rule 60(b).

Accordingly, the operator's motion to reopen is moot, and this case is remanded to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.

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

/s/ Mary Lu Jordan
Mary Lu Jordan, Commissioner

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

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August 28, 2018

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) v. POCAHONTAS COAL COMPANY, LLC	Docket Nos. WEVA 2014-395-R WEVA 2014-1028 WEVA 2015-854

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

ORDER

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

These cases involve a notice of contest and two civil penalty proceedings arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012). On December 31, 2015, Pocahontas Coal Company, LLC ("Pocahontas") filed a petition for discretionary review ("PDR"), which the Commission granted. On July 10, 2018, Pocahontas filed a motion to dismiss its PDR. On July 17, 2018, the Secretary of Labor filed a response in support of Pocahontas' motion.

Upon consideration of Pocahontas' motion and the Secretary of Labor's response, the direction for review issued by the Commission is hereby VACATED and Pocahontas' appeal is DISMISSED. The Administrative Law Judge's summary decision is final and unappealable.[1]

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

/s/ Mary Lu Jordan
Mary Lu Jordan, Commissioner

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

[1] These pleadings were initially labeled "under seal." In an Order issued on July 19, 2018, the Commission directed the parties to explain why the documents had been designated as such. The Secretary's response explained that he had been unaware that Pocahontas was going to file its motion under seal and did not believe there was any reason for such designation. Pocahontas agreed to lift its request to seal its prior filing.

Commissioner Cohen, dissenting:

Although Pocahontas Coal Company's motion to the Commission nominally seeks merely to withdraw the operator's appeal of this matter and gain dismissal of the proceedings, the parties' filings make clear that Pocahontas's request is part of a broader agreement in which the Secretary of Labor ("Secretary") seeks to unilaterally relieve Pocahontas's Affinity Mine of its pattern of violations designation. Such a settlement is directly contrary to the express language of the Mine Act and the Secretary's own regulations, and approving the settlement only provides cover for an unlawful agreement by the current administration. I dissent.

I.

Section 104(e) of the Mine Act, 30 U.S.C. § 814(e), sets forth the provisions for the Mine Safety and Health Administration's ("MSHA's") issuance and termination of a notice of pattern of violations ("POV").[1] *Pocahontas Coal Co.*, 38 FMSHRC 176, 177 (Feb. 2016). Under those provisions, if an operator has demonstrated a pattern of violating mandatory health or safety standards, MSHA inspectors "shall issue an order" withdrawing miners from the area affected by any discovered significant and substantial ("S&S") violation.[2] 30 U.S.C. § 814(e)(1). Section 104(e)(3) provides the method by which a mine may exit from the POV provisions:

> If, upon an inspection of the entire coal or other mine, an authorized representative of the Secretary finds no violations of

[1] Section 104(e)(1) provides:

> If an operator has a pattern of violations of mandatory health or safety standards in the coal or other mine which are of such nature as could have significantly and substantially contributed to the cause and effect of coal or other mine health or safety hazards, he shall be given written notice that such pattern exists. If, upon any inspection within 90 days after the issuance of such notice, an authorized representative of the Secretary finds any violation of a mandatory health or safety standard which could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard, the authorized representative shall issue an order requiring the operator to cause all persons in the area affected by such violation . . . to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated.

30 U.S.C. § 814(e)(1).

[2] An "S&S" violation is a serious violation which is "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).

> mandatory health or safety standards that could significantly and substantially contribute to the cause and effect of a coal or other mine health and safety hazard, the pattern of violations that resulted in the issuance of a notice under paragraph (1) shall be deemed to be terminated and the provisions of paragraphs (1) and (2) shall no longer apply.

30 U.S.C. § 814(e)(3). The Secretary's regulations on termination of a pattern of violations notice effectively repeats the statute. *See* 30 C.F.R. § 104.4(a); Pattern of Violations, 78 Fed. Reg. 5,056 (Jan. 23, 2013) ("The final POV rule . . . [m]irrors the provision in the Mine Act for termination of a POV.").

II.

In this case MSHA notified Pocahontas that a pattern of violations existed at its Affinity Mine pursuant to section 104(e) of the Mine Act, and issued Written Notice No. 7219153 on October 24, 2013. The Notice charged two separate patterns. One of the alleged patterns included 24 separate S&S roof and rib support citations and orders issued within the preceding 12-month period. The other alleged pattern included 16 separate S&S citations and orders involving emergency preparedness and escapeway hazards issued within the preceding 12-month period. Sec'y Memo of Point & Auth. in Support of Mot. for Part. S.D. at 14-15, 24.

MSHA began issuing withdrawal orders pursuant to section 104(e) of the Mine Act, and these were contested by Pocahontas.[3] Pocahontas filed a motion for summary decision and the Secretary filed a motion for partial summary decision. On November 3, 2015, a Commission Judge issued an "Order Denying Pocahontas' Motion for Summary Decision and Granting the Secretary's Motion for Partial Summary Decision." 37 FMSHRC 2654 (Nov. 2015) (ALJ). The Judge found that the Secretary had proven the existence of a pattern of violations at the Affinity Mine, and upheld the validity of POV Written Notice No. 7219153. *Id.* at 2673. After the Judge issued a subsequent Summary Decision affirming two section 104(e) orders predicated on the POV notice, the Commission granted Pocahontas's petition for discretionary review. Then, after the case was fully briefed, Pocahontas submitted its "Motion to Withdraw Petition for Discretionary Review", which included – and was expressly dependent on the approval of – a proposed settlement agreement between Pocahontas and the Secretary.

The parties' settlement agreement in this matter provides:

> 4. In exchange for Pocahontas filing a Motion to Withdraw Appeal in the Proceeding, and the Commission's issuance of a full, clear, and unambiguous dismissal of the Proceeding, MSHA agrees to immediately terminate Notice of Pattern of Violations Number 7219153 issued at the Affinity Mine on October 24, 2013, and

[3] Pocahontas also directly contested the issuance of the POV notice itself, but the Commission ruled that it does not have jurisdiction to review a direct challenge to a POV notice independent of a section 104(e) withdrawal order. *Pocahontas*, 38 FMSHRC at 185.

> provide prompt written acknowledgement of the same to Pocahontas.

Pocahontas Mot. at Ex. 1. The motion makes no mention of the statutory provision for obtaining relief from a POV notice. The Secretary's response in support of Pocahontas's motion is similarly silent toward the law's plain requirement that Pocahontas pass an inspection free of any S&S citations before it can be relieved of the POV designation. There is no indication that Pocahontas's Affinity Mine has received such a clean inspection.[4] Rather than providing a clear indication to the Commission that the parties are proceeding within the framework of the Mine Act, the parties attempted to shield their actions from the public by initially filing pleadings before us in secret (i.e., "under seal").[5]

III.

Lacking any evidence that Pocahontas's Affinity Mine has passed an entire inspection without receiving any S&S citations, the parties' settlement agreement is legally unsupportable. Congress directed that when a mine is in POV status, "a withdrawal order *shall be issued*" for "*any* violation of a mandatory health or safety standard" that is S&S. 30 U.S.C. § 814(e)(2) (emphasis added). The plain meaning of this language, combined with the express enumeration of the method by which an operator may exit from the POV provisions, forecloses other avenues of relief.

The legislative history supports this plain reading of the language. The Senate Report on the Mine Act explains that an operator that has received its first withdrawal order from the POV provisions "is subject to the issuance of further [POV] withdrawal orders until an inspection of

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[4] Indeed, MSHA's Mine Data Retrieval System indicates that federal mine inspectors issued section 104(e)(2) withdrawal orders for S&S violations at the Affinity Mine in August 2018. *See* MSHA, *Mine Data Retrieval System*: *Mine Citations, Orders, and Safeguards*, https://arlweb.msha.gov/drs/ASP/MineAction.asp (searchable by mine name).

[5] Although courts may place documents filed with them under seal to protect sensitive information, federal courts have recognized the common law right of public access to public records and documents, including judicial records. *See Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 597–98 (1978). Such access is critical to allow the public and the press to keep a watchful eye on the workings of public agencies. Here, Pocahontas filed its Motion to Withdraw Petition for Discretionary Review publicly, but the motion stated, "[a] copy of the Settlement Agreement is filed separately under seal to this motion as Exhibit 1." Mot. at 2. A week later the Commission received the "Secretary's Response in Support of Pocahontas' Motion to Withdraw Petition for Discretionary Review", on which was imprinted "*FILED UNDER SEAL*". Upon receipt of the parties' filings in this matter, the Commission issued an order directing the parties to "explain how sealing these pleadings is consistent with Congressional intent that settlements under the Federal Mine Safety and Health Act of 1977 take place with sufficient transparency so that the public will be aware of the process." July 19, 2018 Ord. at 1. In response, the Secretary and Pocahontas filed pleadings removing the "under seal" designation from their previous filings. Neither Pocahontas nor the Secretary have ever explained or attempted to provide justification for their attempt to shield the Settlement Agreement from the public in a cloak of secrecy.

the mine in its entirety discloses no violations of any safety and health standards which could significantly and substantially contribute to the cause and effect of a mine health or safety hazard." S. Rep. No. 95-181, at 32-33 (1977), *reprinted in* Senate Subcomm. on Labor, Comm. on Human Res., *Legislative History of the Federal Mine Safety and Health Act of 1977* at 620-21 (1978) ("*Legis. Hist.*").[6] The report further elaborates that section 104(e)(3) requires "an inspection of the mine in its entirety in order to break the sequence of the issuance of orders." *Id.* at 622.

Congress limited the method for ending POV status for good reason. In enacting the pattern of violations provisions, Congress provided the Secretary with its most powerful tool for protecting the lives of the nation's miners. Congress explicitly recognized that the POV provisions were necessary to "provide an effective enforcement tool to protect miners when the operator demonstrates [its] disregard for the health and safety of miners through an established pattern of violations." *Id.* at 620. Congress thus recognized that the POV designation was necessary to ensure compliance with safety regulations at those mines where the other tools in the Mine Act's graduated enforcement scheme proved insufficient to curb an operator's dangerous behavior. The POV designation signals to an operator that "the mere abatement of violations as they are cited is insufficient." *Id.* at 621.

Congress determined such a powerful enforcement tool was necessary after the investigation of the 1976 Scotia mine disaster revealed that the mine had a recurring history of violations that the existing enforcement scheme had failed to address. *Id.* at 620. But for 35 years, MSHA utterly failed to successfully exercise its authority under the POV provisions. *See* 78 Fed. Reg. at 5,058 (Jan. 23, 2013). The Secretary did not even issue regulations implementing the POV provisions until 1990. *See* Pattern of Violations, 55 Fed. Reg. 31,128 (July 31, 1990). The 1990 rule contained gaping holes. It counted only citations that had become final orders of the Commission. 30 C.F.R. § 104.3(b) (1990). And when screening of the final orders identified mines that had a pattern of disregarding safety regulations, MSHA first provided those chronically unsafe operators with warning letters of their "potential" POV ("PPOV") and an opportunity to improve prior to receiving a POV notice. 30 C.F.R. § 104(a) (1990); 78 Fed. Reg. at 5,058. As described below, unscrupulous operators such as Massey Energy manipulated the system, putting profit above the safety of their miners.

Following the disasters at the Sago, Darby, and Aracoma mines in 2006, MSHA began to develop new screening criteria to better identify mines with recurring safety issues. Even then, however, enforcement of the POV provisions was completely ineffective. After the catastrophic explosion at the Upper Big Branch Mine in April 2010, the Secretary's Office of Inspector General ("OIG") conducted a performance audit to evaluate MSHA's implementation of the pattern of violations authority conferred under section 104(e) of the Mine Act. The results of the audit were distinctly summarized in its title: "In 32 Years MSHA Has Never Successfully Exercised Its Pattern of Violations Authority." U.S. Dep't of Labor, O.I.G. Report No. 05-10-005-06-001. The OIG Report stated that during the 32 years since passage of the Mine Act, MSHA had only once issued a POV notice to an operator. *Id.* at 2. In that one instance, the

[6] In contrast, the legislative history makes clear that Congress intended to give the Secretary "broad discretion in establishing criteria for determining when a pattern of violations exists." *Legis. Hist.* at 621.

Commission subsequently modified some of the citations and orders on which the POV notice was based, and as a result, MSHA did not enforce the order. *Id.* at 4. The report included several recommendations, the first of which was: "Evaluate the appropriateness of eliminating or modifying limitations in the current regulations, including the use of only final orders in determining a pattern of violations and the issuance of a warning notice prior to exercising POV authority." *Id.* at 24; *see also Brody Mining, Inc.*, 36 FMSHRC 2027, 2030 (Aug. 2014).

The cogency of the OIG Report is illustrated by the Mine Act enforcement history leading up to the deadly explosion at Massey Energy's Upper Big Branch Mine. As noted by Commissioner Young and me in *Brody Mining*, 36 FMSHRC at 2040-41 n. 11, in 2007 MSHA put Upper Big Branch on a PPOV because its S&S rate was 11.6 per 100 inspection hours. The mine then got an improvement plan, and lowered its S&S rate to 5.6 per 100 inspection hours. Since this was a greater than 30% reduction, MSHA withdrew the POV threat pursuant to the then-existing regulations. With the threat gone, the mine's S&S rate went back up.[7] Thus, Upper Big Branch management evaded a pattern of violations notice by bringing down its rate of S&S violations after receiving a PPOV and achieved removal from that status. It then reverted to its prior behavior, incurring an excessive number of S&S violations after the POV threat was lifted. If management had the ability to dramatically reduce the rate of S&S violations, it obviously had the ability to maintain a reduced level. It chose not to do so, and thus endangered the lives of miners.[8] The deaths of 29 miners would probably have been avoided if the Secretary had enforced the pattern of violations provisions of the Mine Act as Congress intended.

The Upper Big Branch disaster and the subsequent OIG Report compelled the Secretary to amend its POV regulations to close the loophole operators had relied upon to evade a POV notice. With the changes in 2013, MSHA finally established an effective implementation of the POV regulations, screening mines on an open database and considering all of an operator's pending S&S citations.[9]

IV.

The POV screening criteria are extremely restrictive, and capture only a handful of mines. But, because of their deterrent effect, the positive impact on mine industry safety has been

[7] In the next screening cycle, Upper Big Branch would have received another PPOV notice except for an MSHA computer error. U.S. Dep't of Labor, Internal Review of MSHA's Actions at the Upper Big Branch Mine-South, Performance Coal Co., at 56-57 (Mar. 6, 2012), https://www.msha.gov/PerformanceCoal/UBBInternalReview/UBBInternalReviewReport.pdf.

[8] The mine's former superintendent pled guilty to conspiring to hide safety violations from MSHA inspectors, and Massey Energy's chief executive ultimately was convicted of conspiring to willfully violate mine safety regulations. *U.S. v. Blankenship*, 846 F.3d 663, 666-67 (4th Cir. 2017).

[9] The Commission has affirmed the key aspects of the Secretary's updated POV regulations. *Brody Mining*, 36 FMSHRC at 2054 (holding that POV regulations are facially valid), *appeal dismissed*, No. 14-1171 (D.C. Cir. Nov. 2, 2015); *Brody Mining, LLC*, 37 FMSHRC 1914, 1924 (Sep. 2015) (finding the Secretary's implementing regulations and definition of "pattern" consistent with section 104(e) of the Mine Act).

much broader, with a sharp reduction in the number of total violations and S&S violations and an even sharper drop in the number of operators that chronically violate safety standards. News Release, Mine Safety and Health Administration, MSHA Chief: Pattern of Violations Reforms Have made Mines Safer (Oct. 2, 2014), https://www.dol.gov/newsroom/releases/msha/msha20141867. At last, vigorous enforcement of the POV provisions as Congress intended has had the intended effect of reducing the number of the violations that are most dangerous to miners.

In releasing the Affinity Mine from its POV notice without Pocahontas first satisfying the statutory requirement of an S&S-free inspection, the Secretary threatens to undermine the positive impact of these now-effective POV regulations. Abandoning the POV regulation's strict application sends the dangerous message that an operator who has chronically disregarded safety, thus gaining an unfair advantage over safer competitors in the process, may nevertheless obtain reprieve from the Mine Act's heaviest sanctions by the grace of a friendly administration no longer committed to enforcing those sanctions. That message endangers miners. Already in 2017, we witnessed deaths among coal miners nearly double from 2016 despite sagging activity in the mining industry. *See* U.S. Dep't of Labor, MSHA, 2018 Comparison of Year-to-Date and Total Fatalities for M/NM & Coal (Jun. 5, 2018), https://arlweb.msha.gov/stats/daily-bar-chart.pdf.

The Secretary's illicit reconsideration of Pocahontas's POV status is not the only threat to undermine the current POV regulations. For over a year, the administration has engaged in settlement negotiations with mining industry groups challenging the Secretary's POV rulemaking. *See Ohio Coal Ass'n v. Perez*, No. 2:14-cv-2646 (S.D. Ohio May 9, 2017) (order granting stay of proceedings for parties to engage in settlement negotiations). Any settlement that alters the key elements of the current POV regulations could again relegate those critical provisions of the Mine Act to dormant status.

I recognize that the POV notice has been in effect at Pocahontas's Affinity Mine for five years. Reasonable minds may disagree over whether the enhanced enforcement for such a period of time is sufficient and withdrawal of the POV notice appropriate. But that is a question of policy, which is a matter for Congress to determine. In enacting the Mine Act, Congress did not allow for such a discretionary reprieve.[10] If the Secretary wishes to alter the terms of the Mine Act, he may propose such changes to Congress where the issue may be debated and considered

[10] The Secretary suggests that the termination of a POV notice is committed to his discretion, and therefore not subject to review. Sec'y Resp. to Mot. to Withdraw PDR at 1-2. However, this matter is within the jurisdiction of the Commission by virtue of the pending appeal from the Judge's Decision. Moreover, although an agency's decision not to take enforcement action may be presumed immune from judicial review, "presumptively unreviewable" expressions of prosecutorial discretion nonetheless "may be rebutted where the substantive statute has provided guidelines for the agency to follow in exercising its enforcement powers." *Heckler v. Chaney*, 470 U.S. 821, 831–33 (1985). The plain language and statutory history of the Mine Act make clear that the Secretary here cannot refuse to issue withdrawal orders for S&S violations at a mine that has been placed on a POV notice and has not yet passed a full inspection without the issuance of an S&S citation.

in the public eye. Such dramatic deviations from the plain meaning of the law should not be attempted in discrete filings made "under seal" before the Commission.

In passing the Mine Act, Congress declared that "the first priority and concern of all in the coal or other mining industry must be the health and safety of its most precious resource—the miner." 30 U.S.C. § 801(a). In seeking to abandon the POV provisions at the Affinity Mine, this administration threatens to subvert the first principle of the Mine Act.

The de facto settlement of this matter directly conflicts with the plain language of section 104(e) of the Mine Act. As an independent agency charged with reviewing enforcement actions brought by the Secretary, this Commission should not assent to such an illegal act. To the extent that the Commission's dismissal of these proceedings provides cover to the administration's corrupted reading of the law, I dissent.

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

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

August 28, 2018

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	
v.	Docket No. YORK 2017-136
R. J. MCDONALD, INC.	

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

ORDER

This case arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act"). The matter is before us upon the Judge's July 10, 2018 certification of his April 30, 2018 decision denying the Secretary's motion to approve settlement and his May 11, 2018 decision denying the Secretary's amended motion to approve settlement of one citation and one order.[1] *See* Commission Procedural Rule 76(a)(1)(i), 29 C.F.R. § 2700.76(a)(1)(i). The Judge denied the motions to approve the settlement because he concluded that the Secretary had failed to provide sufficient information to support the proposed settlement.

The citation alleges a "significant and substantial" (S&S) violation of the standard at 30 C.F.R. § 56.14101(a)(3) and an unwarrantable failure to comply. In the settlement motion, the Secretary proposed removing both the S&S and unwarrantable failure designations and reducing the proposed penalty from $2,314 to $1,107. The order alleges an S&S violation of the standard at 30 C.F.R. § 46.7(a) that was attributable to a high degree of negligence. The Secretary originally proposed a $10,500 penalty using his special assessment procedures. In the settlement motion, the Secretary proposed reducing the penalty to $4,377 (using the regular penalty procedures at 30 C.F.R. § 100).

Procedural Rule 76 provides that "the Commission, by a majority vote . . . may grant interlocutory review upon a determination that the Judge's interlocutory ruling involves a controlling question of law and that immediate review may materially advance the final disposition of the proceeding." 29 C.F.R. § 2700.76(a)(2). Rule 76 further provides 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).

[1] On June 7, 2018, the Secretary filed an unopposed motion requesting that the Judge certify his decisions denying the motions to approve settlement for interlocutory review by the Commission. On July 10, 2018, the Judge certified his rulings for review.

Upon consideration of the Judge's July 10, 2018 order, as well as his April 30 and May 11 decisions, we decline to exercise our right of review and deny interlocutory review. Denial of interlocutory review does not suggest or require any specific action by the Judge or parties in this case. The Secretary may file a new settlement motion. Accordingly, the case is hereby remanded to the Judge for further proceedings consistent with the Mine Act, our procedural rules, and case law.

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

/s/ Mary Lu Jordan
Mary Lu Jordan, Commissioner

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

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

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1331 PENNSYLVANIA AVE., N.W., SUITE 520N
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August 30, 2018

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	
v.	Docket No. CENT 2017-444-M A.C. No. 39-00020-435753
PETE LIEN & SONS INC.	

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act"). On August 2, 2017, the Commission received from Pete Lien & Sons, Inc. ("Pete Lien") a motion seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

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

Records of the Department of Labor's Mine Safety and Health Administration ("MSHA") indicate that the proposed assessment was delivered on April 13, 2017, and became a final order of the Commission on May 15, 2017. MSHA sent a delinquency notice to the operator on June 28, 2017 for the remaining unpaid amount of the assessment.

Pete Lien asserts that it intended to contest the penalties for three of the twelve citations, but that it mistakenly mailed its contest along with the payment of the uncontested penalties to MSHA's St. Louis Payment Processing Center.[1] The Secretary does not oppose the request to reopen, and confirms that MSHA internal records show that it processed a partial payment for this assessment on May 16, 2017, the day after the assessment became a final order. Pete Lien filed its motion to reopen on August 2, 2017, after receiving the delinquency notice.

Therefore, having reviewed Pete Lien's request and the Secretary's response, we find that Pete Lien's failure to timely contest the assessment was the result of a mistake regarding the proper address for filing a contest with MSHA.[2] In the interest of justice, we hereby reopen this

[1] Contests of proposed penalties should be sent to the MSHA Civil Penalty Compliance Office in Arlington, Virginia, as indicated on the Notice of Contest Rights and Instructions, included with the proposed assessment.

[2] However, we note that this is Pete Lien's third motion to reopen in two years where the operator sent their contest to the incorrect address. Therefore, we urge the operator to take steps to ensure that future penalty contests are timely filed to the MSHA Civil Penalty Compliance Office in Arlington, Virginia. *See* 39 FMSHRC 1781 (Sept. 2017); 39 FMSHRC 1001 (May 2017). If Pete Lien does not take steps to remedy the faults in its processing of penalty contests, future motions to reopen may be denied. *See*, *e.g. Oak Grove Res., LLC,* 33 FMSHRC 103, 104 (Feb. 2011) (an operator has not established grounds for reopening when the failure to contest a proposed assessment results from an inadequate or unreliable processing system).

matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.

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

/s/ Mary Lu Jordan
Mary Lu Jordan, Commissioner

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

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

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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August 30, 2018

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	
v.	Docket No. CENT 2017-515 A.C. No. 16-01551-440549
SOUTHERN AGGREGATES, LLC	

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act"). On September 19, 2017, the Commission received from Southern Aggregates, LLC. ("Southern Aggregates") a motion seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

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

Records of the Department of Labor's Mine Safety and Health Administration ("MSHA") indicate that the proposed assessment was delivered on June 14, 2017, and became a final order of the Commission on July 14, 2017. On August 29, 2017, MSHA sent a delinquency notice to the operator alerting it that a timely contest had not been properly filed.

Southern Aggregates asserts that it intended to contest the penalties for two of four citations but that it mistakenly mailed its contest along with the payment of the uncontested penalties to MSHA's St. Louis Payment Processing Center.[1] The Secretary does not oppose the request to reopen, and confirms that MSHA internal records show that it processed a partial payment for this assessment on July 5, 2017, before the assessment became a final order. Significantly, Southern Aggregates has not filed any other motions to reopen with the Commission in the last two years and filed its motion to reopen on September 19, 2017, less than 30 days after MSHA sent the delinquency notice.

[1] Contests of proposed penalties should be sent to the MSHA Civil Penalty Compliance Office in Arlington, Virginia, as indicated on the Notice of Contest Rights and Instructions, included with the proposed assessment.

Therefore, having reviewed Southern Aggregates' request and the Secretary's response, we find that the operator's failure to timely contest the assessment was the result of a mistake regarding the proper address for filing a contest with MSHA. In the interest of justice, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.

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

/s/ Mary Lu Jordan
Mary Lu Jordan, Commissioner

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

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

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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August 30, 2018

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	
v.	Docket No. LAKE 2017-333 A.C. No. 11-03189-431867
M-CLASS MINING, LLC	

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act"). On June 30, 2017, the Commission received from M-Class Mining, LLC ("M-Class") a motion seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

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

Records of the Department of Labor's Mine Safety and Health Administration ("MSHA") indicate that the proposed assessment was delivered on February 21, 2017, and became a final order of the Commission on March 23, 2017. MSHA sent a delinquency notice to the operator on June 2, 2017.

M-Class asserts that it failed to timely contest the assessment because, effective January 1, 2017, its prior Safety Director was reassigned to a different position, and a new individual was assigned to handle proposed assessments. The newly assigned employee had difficulty in locating some of the citations underlying the assessment at issue, resulting in his failure to timely contest the assessment. Since then, he has been retrained regarding how to handle proposed assessments.

The Secretary does not oppose the request to reopen, but urges the operator to take steps to ensure that future penalty contests are timely filed. The operator claims to have done so, having retrained the newly assigned employee on handling assessments. In addition, we recognize that the operator promptly filed its motion to reopen within 30 days of receiving the delinquency notice.

Therefore, having reviewed M-Class's request and the Secretary's response, we find that the operator's failure to timely contest the assessment was excusable. In the interest of justice, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.

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

/s/ Mary Lu Jordan
Mary Lu Jordan, Commissioner

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

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

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August 30, 2018

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), v. CUMBERLAND CONTURA, LLC	Docket No. PENN 2017-153 A.C. No. 36-05018-421418

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act"). On April 14, 2017, the Commission received from Cumberland Contura, LLC ("Cumberland") a motion seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

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

Records of the Department of Labor's Mine Safety and Health Administration ("MSHA") indicate that the proposed assessment was delivered on October 5, 2016, and became a final order of the Commission on November 4, 2016. MSHA records further indicate that a delinquency notice was mailed to the operator on February 7, 2017, and the case was referred to

the U.S. Department of Treasury for collection on April 3, 2017. The Secretary does not oppose the motion to reopen.

On July 26, 2016, a new parent company for the operator was created as a result of the bankruptcy of Alpha Natural Resources, the operator's prior parent company. Press Release, Alpha Natural Resources, Alpha Natural Resources Successfully Emerges from Bankruptcy (July 26, 2016), http://ir.alphanr.com/Cache/1500088921.PDF. The operator asserts that when it received the proposed assessment several months later, it had not fully established a process for contesting penalties and that "many of the personnel who . . . oversaw and monitored civil penalty contests previously" remained with Alpha. Mot. to Reopen at 1-2. The operator suggests that its failure to timely contest the assessment at issue was a direct result of the aforementioned situation. Specifically, the operator claims that although it promptly completed the contest form on October 6, 2016, it failed to timely file the contest with MSHA because of "a new system" and "newly assigned personnel."[1] The operator claims that a new system for handling assessments did not become functional until December 2, 2016.

On or about February 13, 2017, the operator received a delinquency notice alerting it of its failure to pay or contest $28,034 in penalties related to the case at hand. Cumberland claims that it "began to investigate" the failure to timely contest the penalties after receiving the delinquency notice. However, the operator took no steps to reopen the assessment at issue until being notified on or about April 13, 2017 that the matter had been referred to the U.S. Department of Treasury for collection and additional late fees were applied.

The Commission has made it clear that where a failure to contest a proposed assessment results from an inadequate or unreliable internal processing system, the operator has not established grounds for reopening the assessment. *Shelter Creek Capital, LLC*, 34 FMSHRC 3053, 3054 (Dec. 2012); *Oak Grove Res., LLC*, 33 FMSHRC 103, 104 (Feb. 2011); *Double Bonus Coal Co*., 32 FMSHRC 1155, 1156 (Sept. 2010); *Highland Mining Co.*, 31 FMSHRC 1313, 1315 (Nov. 2009); *Pinnacle Mining Co.*, 30 FMSHRC 1066, 1067 (Dec. 2008); *Pinnacle Mining Co.*, 30 FMSHRC 1061, 1062 (Dec. 2008). It is the operator's responsibility to properly train all personnel who handle proposed assessments. Each proposed assessment sets forth the deadline for contesting proposed assessments and provides clear instructions on how to file said contest with MSHA.

In determining whether inadequate procedures warrant denial of a motion to reopen, we review an operator's procedures for handling proposed MSHA assessments. We also consider the reasons for the failure of the internal processing system and the operator's efforts to correct any such flaws. Here, the operator does not explain why it needed an extended period of time to implement a functional internal processing system, or why, after implementing this purportedly functional system, it failed to take any action on the assessment for a significant period of time, even after receiving a delinquency notice. In the absence of such explanation, the multiple failures of the operator's internal processing system between July 2016 and April 2017 indicate that the operator made little, if any, effort to correct flaws in its internal procedures.

[1] The operator paid the uncontested penalties with a check. However, this check was not issued until January 12, 2017, two months after the assessment had become a final order of the Commission.

We find that the operator failed to implement a functional system for handling proposed assessments despite having ample opportunity to do so. The assessment was delivered in October, several months after the creation of the operator's parent company. Therefore, before the assessment was delivered, the operator had ample time to implement a functional system for contesting penalties. Yet, for more than four months, Cumberland continued to operate its mine without fully establishing contest procedures. The operator does not provide any reason as to why it needed an extended period of time to implement a functional system for contesting penalties.

Furthermore, we are troubled that, after purportedly implementing a functional system for handling assessments, the operator nevertheless failed to take any action regarding the assessment for a significant period of time. The new system for handling proposed penalties was implemented by December 2, 2016. However, the operator failed to file a motion to reopen until April, despite the fact that the assessment concerned approximately $28,000 in penalties. Moreover, there is no evidence that the operator made any effort to contact MSHA between December and April regarding the status of the assessment. The operator's long delay in taking any action on a large penalty assessment belies its claim that its system became "fully functional" in December.

Moreover, we find no explanation for the operator's delay in responding to the delinquency notice. We have long held that motions to reopen filed more than 30 days after receipt of notice of delinquency must explain the reasons why the operator waited to file a reopening request, and lack of explanation is grounds for the Commission to deny the motion. *See*, *e.g.*, *Left Fork Mining Co.*, 31 FMSHRC 8, 11 (Jan. 2009); *Highland Mining Co.*, 31 FMSHRC at 1316-17. Here, the operator received a delinquency notice on or about February 13, 2017. However, it did not respond to this notice until April 14, a day after receiving a collections notice from the Department of Treasury. The operator does not bother to explain why it waited two months to respond to the delinquency notice.

The evidence suggests that the operator's internal system for handling penalties failed during three distinct time periods—when it received the proposed assessment, then when it implemented its new functional processing system, and then again when it received the delinquency notice. The operator does not provide a sufficient excuse for such failures or any evidence of efforts to correct such flaws in the system. Therefore, given the multiple unexplained failures of the internal system, we must conclude that the operator's failure to contest the assessment at issue was a direct result of an inadequate or unreliable internal processing system.

Accordingly, we find that the operator has failed to demonstrate an entitlement to extraordinary relief, and thus we deny Cumberland's motion.

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

/s/ Mary Lu Jordan
Mary Lu Jordan, Commissioner

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

/s/ Robert F. Cohen, Jr.
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August 30, 2018

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), v. OAK GROVE RESOURCES, LLC	Docket No. SE 2017-212 A.C. No. 01-00851-431085

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act"). On June 27, 2017, the Commission received from Oak Grove Resources, LLC ("Oak Grove") a motion seeking to reopen a penalty assessment that had appeared to become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

On February 13, 2017, Oak Grove received a proposed penalty assessment from the Secretary. On March 15, 2017, the proposed assessment was deemed a final order of the Commission, when it appeared that the operator had not filed a Notice of Contest within 30 days.

Oak Grove asserts that it has a centralized internal process for handling proposed assessments. Under this process, when any assessment is received from MSHA, they are scanned and e-mailed to the safety manager who reviews the assessments and underlying violations. The safety manager then marks those violations the company intends to contest on the assessment form, and mails the form to MSHA when he leaves work for the day.

In an affidavit, the safety manager asserts that, consistent with the process above, he timely mailed a contest of seven of the citations and orders within the assessment at issue to MSHA's Civil Penalty Compliance Office on February 22, 2017. The operator believes that an error by the postal service resulted in the contest not being delivered to MSHA. The Secretary does not oppose the request to reopen or dispute the operator's assertion that it timely mailed the contest to MSHA. We accept Oak Grove's representation that it timely mailed a contest of seven of the citations and orders to MSHA.

Under section 105(a) of the Mine Act, an operator who wishes to contest a proposed penalty must notify the Secretary of Labor no later than 30 days after receiving the proposed penalty assessment. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of the Commission. 30 U.S.C. § 815(a). However, here Oak Grove, by timely mailing the contest of the assessment, effectively contested seven of the citations and orders, and their associated proposed penalties.

Having reviewed Oak Grove's request and the Secretary's response, we conclude that the proposed penalty assessment did not become a final order of the Commission because the operator timely contested seven of the proposed penalties within the proposed assessment. Accordingly, the operator's motion to reopen is moot, and this case is remanded to the Chief Administrative Law Judge for further proceedings on these seven citations and orders pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.

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

/s/ Mary Lu Jordan
Mary Lu Jordan, Commissioner

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

/s/ Robert F. Cohen, Jr.
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August 30, 2018

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) v. BARNETTE CONTRACTORS, INC.	Docket No. VA 2017-176 A.C. No. 44-06045-427215

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act"). On June 7, 2017, the Commission received from Barnette Contractors, Inc. ("Barnette") a motion seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

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

Records of the Department of Labor's Mine Safety and Health Administration ("MSHA") indicate that the proposed assessment was delivered on December 27, 2016, and became a final order of the Commission on January 26, 2017. Barnette asserts that on January 2, 2017, counsel for the operator sent a letter objecting to the proposed penalty assessment to the Executive Director of the Federal Mine Safety and Health Review Commission in Washington, D.C., with a copy to the MSHA District Office in Norton, Virginia.

USPS records indicate that the operator's January 2, 2017 letter was received by the Federal Mine Safety and Health Review Commission in Washington, D.C. on January 9, several weeks before the assessment became a final order. *See* Attachment C to the Secretary's Non-Opposition (receipt indicating delivery date of letter). However, the proposed assessment instructs the operator to send any contest to the MSHA Civil Penalty Compliance Office in Arlington, Virginia. Therefore, while the operator mailed its contest before the assessment became a final order, it incorrectly sent its contest to the wrong agency (i.e., the Commission) and to an MSHA District Office rather than to the MSHA Civil Compliance Office in Arlington, Virginia.

We recognize that the operator timely mailed its contest, albeit to the wrong address. Furthermore, we recognize that the Secretary does not oppose the request to reopen, but urges the operator to take steps to ensure that future penalty contests are timely filed.

Therefore, having reviewed Barnette's request and the Secretary's response, we find that the operator's failure to timely contest the assessment was a result of mistake, inadvertence, or excusable neglect under Rule 60(b). In the interest of justice, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.

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

/s/ Mary Lu Jordan
Mary Lu Jordan, Commissioner

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

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

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August 30, 2018

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	Docket No. WEST 2017-292-M A.C. No. 35-03532-416565
v.	Docket No. WEST 2018-269-M A.C. No. 35-03532-419038
CHAVARRIA CONSTRUCTION, INC.	

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act"). On March 10, 2017, the Commission received from Chavarria Construction, Inc. ("Chavarria") a motion seeking to reopen two penalty assessments that had become final orders of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a). [1]

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

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

[1] For the limited purpose of addressing these motions to reopen, we hereby consolidate docket numbers WEST 2017-292-M and WEST 2018-269-M involving similar procedural issues. 29 C.F.R. § 2700.12.

Records of the Department of Labor's Mine Safety and Health Administration ("MSHA") indicate that the proposed assessment for WEST 2017-292 M was delivered on August 10, 2016, and became a final order of the Commission on September 9, 2016. In addition, MSHA records indicate that the proposed assessment for WEST 2018-269-M was delivered on September 9, 2016 and became a final order of the Commission on October 11, 2016.

Chavarria asserts that it intended to contest portions of these assessments, and that it mailed the sheet entitled "Notice of Contest Rights" to Arlington, Virginia. However, the chart, indicating which violations an operator intends to contest, was mailed along with payment of the uncontested penalties, presumably to MSHA's St. Louis Payment Processing Center.[2] The Secretary supports the operator's reopening request so that the parties may enter into a settlement agreement in this matter.

[2] Contests of proposed penalties should be sent to the MSHA Civil Penalty Compliance Office in Arlington, Virginia, as indicated on the Notice of Contest Rights and Instructions, included with the proposed assessment.

Therefore, having reviewed Chavarria's request and the Secretary's response, we find that the operator's misunderstanding regarding where to send the chart was a mistake under Rule 60(b). In the interest of justice, we hereby reopen these matters and remand them to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.

Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.

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

/s/ Mary Lu Jordan
Mary Lu Jordan, Commissioner

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

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

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August 30, 2018

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	
v.	Docket No. WEVA 2015-932 A.C. No. 46-09105-387887A
THOMAS L. PUCKETT, employed by FRASURE CREEK MINING, LLC	

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act"). On March 26, 2018, the Commission received a motion seeking to reopen this civil penalty case involving Thomas Puckett under section 110(c) of the Mine Act, 30 U.S.C. § 820(c). Puckett is concerned because, although he timely contested a proposed assessment sent to him by the Department of Labor's Mine Safety and Health Administration ("MSHA") in 2015, and although the proposed assessment was not further processed by MSHA, he received a letter from MSHA dated March 9, 2018 informing him that the civil penalty had become delinquent and he owed the government over $8000.

MSHA records indicate that the proposed assessment was delivered on July 28, 2015, and contested by Puckett on or about August 10, 2015.

On November 21, 2017, the Chief Administrative Law Judge issued an Order requiring the Secretary to show cause as to why a petition for assessment of penalty had not been filed within 45 days of Puckett's timely contest, as required by the Commission's Procedural Rules. The Secretary failed to timely file a penalty petition or to otherwise respond to the Show Cause Order. Accordingly, pursuant to the terms of the Order, the proceeding against Puckett was dismissed on December 22, 2017. *See* 29 C.F.R. §§ 2700.28(a), 2700.66(a).

In his motion, Puckett asserts that the proposed assessment was timely contested in August 2015. He further states he did not receive any further documents from MSHA until March 2018, when the Secretary issued a letter stating that the assessment had become a final order and that he was delinquent in paying the assessed penalty.

The Secretary does not oppose the motion to reopen. According to the Secretary, MSHA's records indicate that the case was "in contest" on August 10, 2015, but was "closed by default on January 3, 2018." The Secretary contends that the assessment became a final order on February 1, 2018. Presumably relying on these records, the Secretary mailed a delinquency notice to Puckett on March 9, 2018.

MSHA's records and the Secretary's response to the motion before us do not accurately describe the status of this case. The Chief Administrative Law Judge dismissed this matter because of the Secretary's failure to file a civil penalty petition. There was no failure to act by Puckett. Accordingly, the Secretary's proposed penalty assessment did not become a final order.

Because this matter was dismissed as a result of the Secretary's failure to prosecute, Puckett does not owe anything to the government. Accordingly, reopening this matter is unnecessary.

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

/s/ Mary Lu Jordan
Mary Lu Jordan, Commissioner

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

/s/ Robert F. Cohen, Jr.
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1331 PENNSYLVANIA AVE., N.W., SUITE 520N
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August 30, 2018

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	
v.	Docket No. WEVA 2016-284-M A.C. No. 46-00007-403449
ESSROC CEMENT CORPORATION	

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act"). On October 7, 2016, the Commission received from Essroc Cement Corp. ("Essroc") a motion seeking to reopen a penalty assessment proceeding and relieve it from the default order entered against it.

On April 11, 2016, counsel for the Secretary of Labor filed a petition for assessment of civil penalty in this matter.[1] According to the Secretary's mailing records, a representative for Essroc received the petition at the operator's plant in Martinsburg, WV, on April 15, 2016. Essroc failed to file an Answer to the penalty petition. On May 23, 2016, the Chief Administrative Law Judge issued an Order to Show Cause directing Essroc to file an answer in this matter within 30 days of the order or be held in default. By its terms, the Order to Show Cause was deemed a Default Order on June 23, 2016, when the operator failed to file an answer within 31 days. On July 11, 2016, Christine Blackston, Essroc's manager for safety and regulatory compliance, attempted to file an Answer in this matter with the Commission. The following day, an employee in the Commission's docket office responded to Blackston, explaining that the operator had defaulted in this matter by failing to timely file a response and directing Essroc's representative to the Commission's guidance on how to request reopening of a closed case.[2]

[1] On the same day, the Secretary issued a separate civil penalty petition to Essroc in Docket No. WEVA 2016-350. Essroc also defaulted in that matter and has requested the Commission reopen that docket. As in this matter, we have rejected Essroc's request to reopen Docket No. WEVA 2016-350-M.

[2] In a cover letter accompanying Essroc's late-filed Answer, the operator acknowledged that its response was late, but that it had forgotten to file an answer.

In the October 2016 Motion to Reopen, counsel for Essroc asserts that the citations in this matter "became a final order for a reason unknown to Essroc," and further that "Essroc never received a Petition for Assessment of Civil Penalty." Essroc supports its motion with an affidavit by the safety manager at Essroc's Martinsburg Plant. The safety manager asserts that "[n]either I nor anyone at Essroc received any additional paperwork from MSHA such as a Petition for Assessment of Civil Penalty." He adds that Essroc only learned of the default upon receiving a delinquency notice from MSHA on around August 8, 2016.

On November 8, 2016, the Secretary filed a response opposing Essroc's motion to reopen. Emphasizing that an Essroc employee had signed for the civil penalty petition, the Secretary asserted that Essroc's motion to reopen rested "on an assertion that appears to be factually incorrect."

On January 9, 2017, Essroc filed a response conceding that it received the civil penalty petition but explaining that the individual responsible for filing an answer was unable to do so because of an unusual surge in work duties. Essroc supported its response with an affidavit from Christine Blackston, the safety and regulatory compliance manager who attempted to file a late answer in July 2016. She stated that she failed to timely file an answer because of her business travel schedule, a possible change in corporate ownership, and new administrative duties. Aff. at 1.

The Judge's jurisdiction in this matter terminated when the default occurred. 29 C.F.R. § 2700.69(b). Under the Mine Act and the Commission's procedural rules, relief from a judge's decision may be sought by filing a petition for discretionary review within 30 days of its issuance. 30 U.S.C. § 823(d)(2)(A)(i); 29 C.F.R. § 2700.70(a). If the Commission does not direct review within 40 days of a decision's issuance, it becomes a final decision of the Commission. 30 U.S.C. § 823(d)(1). Consequently, the Judge's order here has become a final decision of the Commission.

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

The party seeking to reopen a final penalty bears the burden of showing that it is entitled to such relief, through a detailed explanation of its failure to timely contest the penalty or answer the Secretary's petition, and any delays in filing for reopening. *See Dynamic Energy, Inc.*, 39 FMSHRC 1560, 1561 (Aug. 2017); *Higgins Stone Co.*, 32 FMSHRC 33, 34 (Jan. 2010); *Lone Mountain Processing, Inc.*, 35 FMSHRC 3342, 3345 (Nov. 2013).

We find that Essroc has failed to meet its burden here. Essroc failed to timely respond to both the Secretary's civil penalty petition and the Commission Chief Administrative Law Judge's subsequent show cause order, despite receiving both documents. When the operator's representative attempted to file an answer late in July 2016, a Commission docket office employee promptly informed the operator of its default and resultant need to request reopening. Nevertheless, Essroc failed to file its motion to reopen this matter for another three months. Indeed, Essroc did not request reopening for approximately two months after the operator received a delinquency notice from the Secretary.[3] Once it did file its request to reopen, the operator erroneously represented that it had never received any of the prior filings. Upon notification of its material misrepresentations, the operator took nearly two months to identify its errors and correct the inaccuracies in Essroc's filings with the Commission.

The safety and regulatory compliance officer's additional duties and travel schedule did not justify Essroc's failure to timely respond to the penalty petition and the order to show cause. This, coupled with the operator's unexplained delays in requesting reopening, leads us to conclude that the operator has failed to meet its burden of establishing good cause for failing to meet the deadline in the order to show cause. Accordingly, we find that that it has failed to demonstrate an entitlement to extraordinary relief, and thus we deny Essroc's motion.

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

/s/ Mary Lu Jordan
Mary Lu Jordan, Commissioner

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

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

[3] The Commission has held that an operator who files a motion to reopen more than 30 days after receiving notice of its default must explain its delay in requesting relief. *See Highland Mining Co.*, 31 FMSHRC 1313, 1316-17 (Nov. 2009). Failure to provide such an explanation may be grounds for denying the motion. *Id.* Essroc failed to provide such explanation here.

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August 30, 2018

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), v. ESSROC CEMENT CORPORATION	Docket No. WEVA 2016-350-M A.C. No. 46-00007-405740

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act"). On October 3, 2016, the Commission received from Essroc Cement Corp. ("Essroc") a motion seeking to reopen a penalty assessment proceeding and relieve it from the Default Order entered against it.

On April 11, 2016, counsel for the Secretary of Labor filed a Petition for Assessment of Civil Penalty in this matter. According to the Secretary's mailing records, a representative for Essroc received the petition at the operator's plant in Martinsburg, WV, on April 15, 2016. Essroc failed to file an Answer to the penalty petition. On May 18, 2016, the Chief Administrative Law Judge issued an Order to Show Cause directing Essroc to file an answer in this matter within 30 days of the order or be held in default. By its terms, the Order to Show Cause was deemed a Default Order on June 20, 2016, when the operator failed to file an answer within 31 days.

In its Motion to Reopen, Essroc alleged that it never received the Secretary's April 11 Petition for Assessment of Civil Penalty. In support of its motion, Essroc provided an affidavit by the safety manager at Essroc's Martinsburg Plant who avers that he filed the contest paperwork in this matter but, "[n]either I nor anyone else at Essroc received any additional paperwork from MSHA such as a Petition for Assessment of Civil Penalty." The affidavit further asserted that the operator learned of the default in this matter when it received a notice of delinquency from MSHA on around August 8, 2016.

On November 8, 2016, the Secretary filed a response opposing Essroc's motion to reopen. Emphasizing that an Essroc employee had signed for the civil penalty petition, the Secretary asserted that Essroc's motion to reopen rested "on an assertion that appears to be factually incorrect."

On January 9, 2017, Essroc filed a Response to the Secretary's opposition to the motion to reopen. In its response, Essroc conceded that it received the Secretary's civil penalty petition but asserted that the individual responsible for filing an answer in the case was unable to do so because of an unusual surge in work duties. Essroc supported its Response with a new affidavit from Christine Blackston, the safety and regulatory compliance manager at the mine's parent company who was in charge of coordinating the operator's responses to MSHA civil penalty petitions.

The Judge's jurisdiction in this matter terminated when the default occurred. 29 C.F.R. § 2700.69(b). Under the Mine Act and the Commission's procedural rules, relief from a judge's decision may be sought by filing a petition for discretionary review within 30 days of its issuance. 30 U.S.C. § 823(d)(2)(A)(i); 29 C.F.R. § 2700.70(a). If the Commission does not direct review within 40 days of a decision's issuance, it becomes a final decision of the Commission. 30 U.S.C. § 823(d)(1). Consequently, the Judge's order here has become a final decision of the Commission.

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

The party seeking to reopen a final penalty bears the burden of showing that it is entitled to such relief, through a detailed explanation of its failure to timely contest the penalty or answer the Secretary's petition, and any delays in filing for reopening. *See Dynamic Energy, Inc.*, 39 FMSHRC 1560, 1561 (Aug. 2017); *Higgins Stone Co.*, 32 FMSHRC 33, 34 (Jan. 2010); *Lone Mountain Processing, Inc.*, 35 FMSHRC 3342, 3345 (Nov. 2013).

We find that Essroc has failed to meet its burden here. Essroc failed to respond to both the Secretary's civil penalty petition and the Commission Chief Administrative Law Judge's subsequent show cause order, despite receiving both documents. Although Essroc learned of its default in this matter in early August 2016, the operator did not file a motion to reopen with the Commission for approximately two months.[1] Even then, Essroc's motion to the Commission and the sworn affidavit supporting the operator's request contained material misstatements about these proceedings. After the Secretary notified Essroc of these errors, the operator still took nearly two months to identify its errors in this matter and correct the inaccuracies in Essroc's

[1] Essroc's motion to reopen does not explain why the operator delayed in filing its motion to reopen for nearly two months after receiving a delinquency notice from the Secretary. *See, e.g., Left Fork Mining Co.*, 31 FMSHRC 8, 11 (Jan. 2009); *Highland Mining Co.*, 31 FMSHRC 1313, 1316-17 (Nov. 2009) (holding that motions to reopen filed more than 30 days after receipt of notice of delinquency must explain the reasons why the operator waited to file a reopening request, and lack of explanation is grounds for the Commission to deny the motion).

filings with the Commission. As a result, we find that Essroc failed to meet its burden of establishing good cause for failing to meet the deadline contained in the Order to Show Cause. Accordingly, we find that the operator has failed to demonstrate an entitlement to relief, and thus we deny Essroc's motion.

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

/s/ Mary Lu Jordan
Mary Lu Jordan, Commissioner

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

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

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August 30, 2018

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	
v.	Docket No. WEVA 2017-412 A.C. No. 46-09152-432866
ROCKWELL MINING, LLC	

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act"). On May 26, 2017, the Commission received from Rockwell Mining, LLC ("Rockwell") a motion seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

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

Records of the Department of Labor's Mine Safety and Health Administration ("MSHA") indicate that the proposed assessment was delivered to P.O. Box 57, Wharton, West Virginia, on March 6, 2017, and became a final order of the Commission on April 5, 2017. A contest was filed on April 6, 2017, a day after the assessment became a final order of the Commission.

Rockwell concedes that MSHA mailed the proposed assessment to the P.O. Box and that the P.O. Box was not checked until March 21, 2017, a couple of weeks after the assessment was delivered. However, Rockwell claims that MSHA caused undue delay by sending the assessment to a P.O. Box rather than to its address of record, 54912 Pond Fork Road, Wharton, West Virginia 25208, and that this contributed to the delay in contesting the assessment. Furthermore, the operator claims that when the assessment was retrieved from the P.O. Box, it was given to a receptionist newly hired by the operator. Rockwell implies that the receptionist's inexperience with company policies further contributed to the delay in contesting the assessment.

The Secretary does not oppose the request to reopen and does not dispute Rockwell's claim that the assessment was not sent to the address of record. Therefore, we find that the assessment was erroneously delivered to an incorrect address and that Rockwell filed its contest only a day late.

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

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

/s/ Mary Lu Jordan
Mary Lu Jordan, Commissioner

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

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

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August 30, 2018

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	
v.	Docket No. WEVA 2017-476 A.C. No. 46-09230-437793
PANTHER CREEK MINING, LLC	

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act"). On June 30, 2017, the Commission received from Panther Creek Mining, LLC ("Panther Creek") a motion seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

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

Records of the Department of Labor's Mine Safety and Health Administration ("MSHA") indicate that the proposed assessment was delivered on May 17, 2017, and became a final order of the Commission on June 16, 2017.

Panther Creek asserts that the assessment was not timely contested because the assessment was mishandled at the mine. The operator did not realize that the assessment had

been delivered until June 20, when an employee noticed the envelope containing the assessment in a file tray at a mine. In response to its failure to timely contest this assessment, the operator is changing its service address for proposed assessments from P.O. Boxes at mines to the company office.

The Secretary does not oppose the request to reopen, but urges the operator to take steps to ensure that future penalty contests are timely filed. We recognize that the motion to reopen was received by the Commission merely two weeks after the assessment became a final order. In addition, we recognize that the operator is changing its internal procedures to ensure that future penalty contests are timely filed.

Therefore, having reviewed Panther Creek's request and the Secretary's response, we find that the operator's failure to timely contest the assessment was a result of mistake, inadvertence or excusable neglect under Rule 60(b). In the interest of justice, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.

Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.

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

/s/ Mary Lu Jordan
Mary Lu Jordan, Commissioner

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

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

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August 30, 2018

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), v. ROCKWELL MINING, LLC	Docket No. WEVA 2018-30 A.C. No. 46-06618-449006

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act"). On March 27, 2018, the Commission received from Rockwell Mining, LLC ("Rockwell") a motion seeking to reopen a penalty assessment proceeding and relieve it from the Default Order entered against it.

On December 4, 2017, the Chief Administrative Law Judge issued an Order to Show Cause in response to Rockwell's failure to answer the Secretary of Labor's October 17, 2017, Petition for Assessment of Civil Penalty. By its terms, the Order to Show Cause became a Default Order on January 3, 2018, once Rockwell failed to file an answer to the penalty petition within 30 days. The Default Order has since become a final decision of the Commission. 30 U.S.C. § 823(d)(1).

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

The two alleged violations at issue in this matter are also at issue in a related proceeding (Docket No. WEVA 2017-425) brought against an agent of Rockwell under section 110(c) of the Mine Act, 30 U.S.C. § 820(c). Rockwell asserts that it mistakenly believed it had responded to the penalty petition in this matter, because the parties had already begun litigating the related docket when the penalty petition for this proceeding was received. Rockwell states that once it

realized in February 2018 it had not filed an answer in this proceeding, it immediately did so.[1] Rockwell further asserts that it has no record of receiving a copy of the Show Cause Order.

The Secretary does not oppose the request to reopen. The Secretary further represents that he has moved to vacate the citation and order in question and dismiss the proceeding in the related docket.[2] Accordingly, the Secretary requests that the instant case be reopened, so that MSHA may also move to dismiss this proceeding.

Having reviewed Rockwell's request and the Secretary's response, we hereby reopen the proceeding, vacate the default order, and remand to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 CFR Part 2700. Given that an answer has already been filed and the Secretary has elected to vacate the violations in the related docket, we expect a prompt resolution to this proceeding.

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

/s/ Mary Lu Jordan
Mary Lu Jordan, Commissioner

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

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

[1] The answer was received by the Commission on February 7, 2018.

[2] Because the Secretary elected to vacate the civil penalty proceeding against Rockwell's agent, the Judge in that case issued an Order of Dismissal for WEVA 2017-425 on April 5, 2018.

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ADMINISTRATIVE LAW JUDGE DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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July 20, 2018

THE DOE RUN COMPANY, Contestant, v. SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent.	CONTEST PROCEEDINGS Docket No. CENT 2015-318-RM Citation No. 8680899; 03/11/2015 Docket No. CENT 2015-319-RM Citation No. 8680900; 03/11/2015 Mine ID 23-00409 Fletcher Mine and Mill
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner, v. THE DOE RUN COMPANY, Respondent.	CIVIL PENALTY PROCEEDINGS Docket No. CENT 2015-441-M A.C. No. 23-00409-379896 Docket No. CENT 2016-55-M A.C. No. 23-00409-392975 Mine: Fletcher Mine and Mill

DECISION

Appearances: Susan J. Willer, Esq., Office of the Solicitor, U.S. Department of Labor, Kansas City, Missouri, for the Secretary of Labor

Ryan Seelke, Esq., for The Doe Run Co., Respondent

Before: Judge Lewis

STATEMENT OF THE CASE

These cases arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §801 *et seq.* (the "Act" or "Mine Act"). A hearing was held in St. Louis, Missouri, where the parties presented testimony and documentary evidence. After the hearing, the parties submitted post-hearing briefs and reply briefs, which have been fully considered.

FINDINGS OF FACT AND CONCLUSION OF LAW

The findings of fact are based on the record as a whole and the undersigned's careful observation of the witnesses during their testimony. In resolving any conflicts in the testimony, the undersigned has 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, the undersigned has also relied on his demeanor. Any failure to provide detail as to each witness's testimony is not to be deemed a failure on the undersigned's 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. JOINT STIPULATIONS

1. The Doe Run Company produces lead -zinc ore from its underground mine operations, and these mining operations affect interstate commerce.

2. The Doe Run Company is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977, as amended (the Act).

3. The Administrative Law Judge has jurisdiction over the disputes in these consolidated matters.

4. The Doe Run Company is, and has been at all relevant times to the inspection, the owner and operator of the Fletcher Mine/Mill, Mine ID No. 23-00409, located in Reynolds County, MO.

5. The Fletcher Mine is a mine as that term is defined by the Act.

6. The MSHA Assessed Violations History accurately reflects the history of Doe Run's Fletcher Mine/Mill for fifteen months prior to the date of the contested Citations.

CENT 2016-0055-M

7. On January 21, 2015, a fatal accident occurred at the Fletcher Mine when falling material from the roof struck a Getman Mechanical Scaler operating in Section RC3PO Northeast Working Area of the mine.

8. At the time of the accident, the operator of the Getman Mechanical Scaler was inside a closed protective structure which was positioned underneath a section of mine roof that was supported by six foot long 1 ½ inch diameter friction stabilizer roof bolts.

9. During the date of the accident, Mine Safety and Health Administration ("MSHA") Inspector Jeremy Kennedy was at the Fletcher Mine conducting a quarterly E01 inspection.

10. During the day shift on January 21, 2015, Inspector Kennedy traveled to and inspected the RC3PO Northeast Working Area.

11. During his January 21, 2015, inspection, Inspector Kennedy observed the roof that would later fall.

12. At the time of the roof fall, approximately 25% of the roof fall cavity was supported with six foot long 1 ½ inch diameter friction stabilizer-type roof supports.

13. The Mine Safety and Health Administration ("MSHA") inspected The Doe Run Company's Fletcher Mine /Mill following the accident.

14. MSHA Inspector Jeremy Kennedy was acting in his official capacity as an authorized representative of the Secretary when he inspected said mine.

15. MSHA Inspector Michael R. Van Dorn was acting in his official capacity as an authorized representative of the Secretary when he inspected said mine.

16. MSHA issued a Section 104(a) Citation, No. 8680899, to The Doe Run Company on March 11, 2015, alleging a violation of 30 C.F.R. § 57. 3201.

17. Citation No. 8680899 has been terminated, as the affected area has been abandoned and fenced off

18. MSHA also issued a Section 104(a) Citation, No. 8680900, to The Doe Run Company on March 11, 2015, alleging a violation of 30 C.F.R. § 57. 3360.[1]

19. Citation No. 8680900 has been terminated, as the affected area has been abandoned and fenced off

20. The subject Citations were properly served by a duly authorized representative of the Secretary upon Contestant's agent on the date and place stated in the Citations.

21. The Citations may be admitted into evidence for the purposes of establishing their issuance and not for the truthfulness or relevancy of any statements asserted therein.

CENT 2015-441-M

22. The Mine Safety and Health Administration ("MSHA") inspected The Doe Run Company's Fletcher Mine /Mill after the occurrence of a fatal accident on January 21, 2015.

23. MSHA issued a Section 104(a) Citation, No. 8680902 to The Doe Run Company on March 12, 2015, alleging a violation of 30 C.F.R. § 48.7(a).

[1] The Joint Stipulations submitted mistakenly listed the Citation Number as Citation No. 86870900.

24. The subject Citation was properly served by a duly authorized representative of the Secretary upon Contestant's agent on the date and place stated in the Citation.

25. The Citation may be admitted into evidence for the purposes of establishing its issuance and not for the truthfulness or relevancy of any statements asserted therein.

26. The proposed penalties in these proceedings will not affect Respondent's ability to continue in business.

27. The exhibits offered by Contestant and Respondent are stipulated to be authentic, but no stipulation is made as to their relevance or the truth of the matters asserted therein. The parties stipulate that the exhibits may be admitted into evidence. Except R, S & T and 4, 5 and 6.[2]

JX-1

II. SUMMARY OF TESTIMONY

Jeremy Kennedy

At hearing Jeremy Kennedy appeared and testified on behalf of the Secretary.

He had been a MSHA inspector for nine years. His duties included E16 spot inspections, E04 compliance, E06 fatality and E08 non-fatality investigations. (Tr. 28). He had inspected a variety of different type mines, including sand and gravel, small and large limestone, zinc and copper. (Tr. 28-29).[3]

In 1999 he began working for Respondent. (Tr. 29). During his over eight years of employment, he worked at various Doe Run mines, including the Fletcher Mine, where he worked both as a surveyor's assistant and surveyor. (Tr. 29-30). His job duties included administering the mine's bonus program, measuring the advancement of face for tons removed, and measuring roof bolters' linear feet of advancement. (Tr. 30).

Kennedy had received training at MSHA's National Mine Academy in Beckley, West Virginia. (Tr. 31). Over his career he had inspected the Fletcher Mine on eight different occasions. He had conducted regular, follow-up, and spot inspections. (Tr. 32). The Doe Run operation consisted of six mines in all. (Tr. 34). Four were interconnected and two were satellites. (Tr. 34). Lead, copper and zinc were mined out of Fletcher, utilizing the room and pillar style.[4] (Tr. 35).

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[2] The last sentence to this stipulation was added by hand.

[3] He had also earned a LPN certificate after completing one year of college.

[4] Room and pillar mining is a process whereby the miners advance a drift and, while advancing through the ore body, take slab rounds to both sides and create an intersection. If the ore body is wide enough, "you will go ahead and turn and make a pillar." (Tr. 36).

Kennedy had gone to Fletcher Mine on January 21, 2015, as part of his E01 regular inspection. (Tr. 38). His inspection had been going on for approximately one week. (Tr. 39). Ground conditions, equipment, electrical conditions, and housekeeping were all inspected. (Tr. 39). He actually travelled through the area where the roof fall was to occur, visually inspecting the site. (Tr. 40).

Fletcher mining operations consisted of a drill cycle, charging or blasting cycle, a load haul cycle, a scaling cycle, and then a bolting cycle. (Tr. 41). Kennedy noted that no mining was going on in the area of the impending accident during his inspection. (Tr. 41). He actually observed the scaler[5] that would be involved in the coming fatality. (Tr. 43). During his inspection of the headings, Kennedy looked for any ground control issues. (Tr. 46). Given his eight and a half years' employment by Respondent, Kennedy was familiar with Doe Run's ground control practices. (Tr. 46). Ground control is a systematic method of maintaining the back and ribs through scaling, rock bolting, and other means to ensure safety. (Tr. 47; *see also* GX-7 Re: Respondent's underground roof and ground control policy.)

Test holes may be drilled to evaluate the stability of a back and to look for geological conditions in the area. (Tr. 47-48). Drillers look at the returns to find what color the cuttings are. (Tr. 49). The percussion of the drill may cause the rock to give off different sounds depending upon its condition. (Tr. 49). A drummy sound—like a kettle drum—could be indicative of unconsolidated material. (Tr. 49-50).

Doe Run's ground control plan provided for test holes to be drilled in the middle of intersections.[6] (Tr. 51). Part of Fletcher's ground control plan called for rock bolting.[7] (Tr. 53; GX-7). Two types of bolts were used at Fletcher Mine: "split set" and resin.[8] Split set bolts are driven into drill holes whose diameter is somewhat smaller than the bolts, friction being used to keep them in place. (Tr. 55; GX-14). Resin bolts come in pre-packaged casings and are shot into the back, utilizing an epoxy to stay in place. (Tr. 55).

During his inspection of the area of the roof fall, Kennedy observed split set bolts in a 5 foot by 5 foot pattern. (Tr. 56). None of the bolts were sticking out. (Tr. 56-57). Kennedy did not conduct any soundings. (Tr. 57). He did "not observe anything that was not typical." (Tr. 57).

When miners enter an area they typically perform a visual inspection. (Tr. 58). If they have the needed equipment, they may perform other testing methods. (Tr. 58). They will also fill out work inspection cards. (Tr. 58). On Respondent's work inspection cards there were sections

[5] A mechanical scaler is a piece of equipment that is used to remove unconsolidated material from the roof and ribs of the mine. (Tr. 43).

[6] Intersections are the areas between the rooms and pillars. (Tr. 52).

[7] Bolts are pieces of steel inserted into holes drilled into the mine back (roof) to stabilize the back from rib to rib. (Tr. 53).

[8] Split sets are faster and cheaper to use than resin bolts. (Tr. 55). Resin bolts, which have to be spun into place, have a stronger capacity. (Tr. 55).

to note loose rock but no sections to report if soundings or test holes were performed. (Tr. 59; GX-7, p. 5).

Kennedy could not recall observing any "churned" or "disrupted" rock in the RC3PO area, the back appearing "smooth" without "unusual features." (Tr. 59-60).

When disrupted rock is encountered, a scaler might tighten up the pattern of bolts. (Tr. 60). A 4 foot by 4 foot or 3 foot by 3 foot pattern might be used. Sometimes extra-large face plates might be added to the bolts. (Tr. 60).

There had been recent blasting in the area of the fall (RC3PO) on the Monday prior to the accident. (Tr. 61). However, Kennedy did not observe any loose rock in the heading. (Tr. 61).

Kennedy had been called on January 21, 2015, because there had been a fatal accident at Fletcher Mine. (Tr. 62). He arrived at the site shortly after midnight. (Tr. 63). A 103(j) order had been issued by a district staff member. (Tr. 63). The verbal 103(j) order had been reduced to a written 103(j) order and then modified to a 103(k) order. (Tr. 64; GX-17). The Respondent's rescue and recovery plan had been approved—with modifications—for scaling and rock removal to effectuate the recovery of John Hoodenpyle. (Tr. 65-66).

Kennedy stayed at the mine for the entire MSHA investigation which lasted approximately two weeks. (Tr. 67). He took various photographs of the accident site, including pictures of the scaler involved in the fatality. (Tr. 67-68; GX-3).

The roof fall was approximately 125-200 tons in size. (Tr. 69). The roof height in the fall area was 18 to 19 feet. The size of the fallen face was 55 feet long by 20 feet wide by 6 feet thick at its deepest point. (Tr. 73).

The scaler involved in the accident had both a rollover protective system (ROPS) and a falling object protective system (FOPS)—but they were of no benefit in the instant catastrophic fall.[9] (Tr. 77-78).

The split set bolts in the area had failed and had completely pulled out of the ceiling. (Tr. 79-81; GX-14). There had been no test drilling prior to the roof fall. (Tr. 84).

Kennedy agreed that split set bolts were often used in "brecciated" conditions such as those found at Fletcher Mine. When he conducted his pre-accident inspection on January 21, 2015, Kennedy was competent enough to recognize hazardous unconsolidated material and to issue a citation for such. (Tr. 90). Kennedy was unaware of any ground falls at Fletcher Mine prior to January 21, 2015, which had involved the failure of split sets in brecciated ground. (Tr. 91). During his time as an inspector at Fletcher Mine, he had never issued a § 57.33 EO ground

[9] Kennedy noted that, though the scaler's protective systems had not prevented a fatality, the victim's body had been recovered "intact." (Tr. 78). The victim had not sustained certain injuries that one would expect to see from a catastrophic failure. (Tr. 78).

control citation. (Tr. 91). Nor had he noticed any ground control issues in the roof fall area at the time of his November 2014 EO1 quarterly inspection. (Tr. 92).

The ground support system that he had observed was that of patterned split set bolts. (Tr. 93). The ground appeared stable and competent. (Tr. 93). No citations were issued in either November 2014 or January 2015 for Respondent's failure to document workplace examination training on 5000-23. (Tr. 94-95).

During his prior inspections of the northeast working area, Kennedy had not observed any violations involving ground support or control, including faulty bolts or bolt patterns. (Tr. 97-101). Kennedy had actually walked through the roof fall area on January 21, 2015, prior to the accident. (Tr. 102). He noted no hazardous conditions, changes, or anything else that would cause him concern. (Tr. 102). The last 2 rows of bolts—bordering the unbolted roof where the fall occurred—appeared adequate, flush to back. (Tr. 105-106). No ground popping nor cracking nor unusual noises were heard. (Tr. 106). The active faces and active roadway were free of adverse conditions. (Tr. 108).

Kennedy's inspection took place approximately 8 hours before the fatal accident. (Tr. 109).

Scaler operators at Doe Run normally placed the cabs of their units under bolted ground with the remainder of their units under unbolted grounds, usually positioning themselves 60 feet from the face. (Tr. 111).

During his inspection of Fletcher Mine, Kennedy had not looked for test hole sites, but rather focused on bolt patterns and the presence of unconsolidated rock. (Tr. 112). Typically a driller drills test holes in the back, drilling as vertical as possible. (Tr. 113). Test holes have a greater height than bolt holes. (Tr. 121). One might be able to examine 3 or 4 feet of return in the back with a test hole. (Tr. 121-122). Whether drilling bolt or test holes, drill operators look for abnormal sounds, observe how fast the drill goes up into the rock, and check to see if there is a void where the steel will jump. (Tr. 113).

Prior to bolting the back, a scaler will scale for unconsolidated rock—which Mr. Hoodenpyle was doing prior to the roof fall. (Tr. 115). Prior to scaling a scaler will normally take the tooth of his scaling rig and sound the back. (Tr. 116).

Kennedy opined that, based upon his experience, split set bolts were cheaper and faster to install as compared to resin bolts. (Tr. 117). However, MSHA had established no set policy as to which type to use. (Tr. 117). Kennedy knew of no bolts that had failed, separating above the anchor point. (Tr. 120). Considering Doe Run's operating history, he found nothing that should have placed Respondent on notice of inadequate ground control in the fall area. (Tr. 120).

Resin bolts had greater strength than split set bolts. The split set bolts in the fall area had not broken above the anchorage point but had been stripped out. (Tr. 129). The installation of resin bolts was more involved than the installation of split sets. (Tr. 130). Resin needed to be placed inside the drill hole with bolts being spun to mix the two-part epoxy. (Tr. 130-131). If a

bolt was over-spun, the bolt was rendered useless. (Tr. 131). Split set bolts, with proper test hole drilling and hole size, required only friction to remain in place. (Tr. 130-131).

James Vadnal Direct Examination

James Vadnal also appeared and testified upon behalf of the Secretary.

At the time of hearing, Vadnal worked for MSHA in the technical support group, roof control division. In this capacity he participated in accident investigations, including the fatality at issue.[10] (Tr. 140).

Vadnal had first gone underground into Fletcher Mine on January 23, 2015. (Tr. 150). He viewed the Getman scaler that had been involved in the fatality.[11] (Tr. 151). He traveled to the fall area located between pillars 7516 and 7517. (Tr. 151). Immediately upon walking up to the edge of the fall area, Vadnal had noticed that "the rocks had changed." (Tr. 152). They had gone from a "layered,'' "bedded" look to a look where "everything was all jumbled up" or had "disturbed bedding." (Tr. 152).

The center of the fall cavity revealed a horizontal bedding plane. (Tr. 154; GX-14, p. 2). The dolomite at Doe Run had several distinctive beds. (Tr. 154). Each bed was separated from the ore above or below by a bedding plane. (Tr. 154). Hydro-thermal fluid had been pushed along these bedding planes; this is where the bulk of the brecciation had taken place. (Tr. 155). The dolomite rock at Doe Run had been broken apart in the geologic past by the pressures associated with the injection of lead and zinc ore. (Tr. 155). Angular blocks of dolomite surrounded by lead and zinc ore could be seen in the area being mined. (Tr. 155). Usually these blocks were rather small. (Tr. 155). However, in the fall area there was disrupted bedding; it appeared all the beds had been picked up and jumbled around. (Tr. 156). The blocks of dolomite that are referred to in brecciation as the "inner class" were feet on a side—as opposed to the usual inches on side size. (Tr. 155-156).

The changed geology in the accident area was not only inside the fall cavity. (Tr. 157). The disturbed bedding from the roof fall cavity had carried on over to the face in the left rib and a portion of the face. (Tr. 157). Photographs of the fall area demonstrated the difference in

[10] *See also* GX-11 for Vadnal's resume. He had received a bachelor of science in geology in 1975 and later attained a Master's Degree in 2007-2008 in safety with an emphasis in mining. (Tr. 140-141). Vadnal had been hired by MSHA in 2004, becoming an authorized mine safety inspector. (GX-11). He had gotten his job with the technical support roof control division in January 2007. (Tr. 147). As a roof control specialist, he had reviewed ground control and roof control plans and had investigated approximately 100 roof fall accidents. (Tr. 147-148). Prior to being hired by MSHA, Vadnal had worked for approximately 30 years in the mining industry. (GX-11). He had worked as a geologist for environmental engineering firms. (Tr. 142). He had worked in various positions for Arch Coal, including vice president, geology and exploration, manager of safety and administration, director of geology and exploration, and senior geologist. (Tr. 141-145; *see also* GX-11).

[11] Vadnal found no evidence that the canopy of the scaler had been compromised.

brecciated ground versus churned or larger inner class ground. (Tr. 158; GX-3). Horizontal bedding lines were essentially the same color. (Tr. 158; GX-3, p. 9). Such horizontal bedding was the normal look of Fletcher Mine. (Tr. 158-159). The ground around the roof fall had gray areas with larger class of dolomite that appeared to have "no orientation," and were jumbled up and disturbed. (Tr. 159; GX-3, p. 10).

Vadnal opined that the changes he had observed would have been obvious to others as the changes were "dramatic" in nature. (Tr. 162).

Vadnal helped to prepare a fatal accident report, which contained a graphic representation of Fletcher Mine's geologic strata. (Tr. 162; GX-12, p. 3). The report recommended that where the roof or back of Fletcher Mine had "brecciated dolomite or other hazardous conditions," a "change in the density and type of ground support might be warranted." (Tr. 163-164; GX-12, p. 2). In areas containing highly brecciated ground or disrupted bedding, Vadnal recommended that test drilling be performed. (Tr. 165). If the test drilling revealed changes in the composition of the roof, management could be alerted.[12] (Tr. 165-166).

Drill holes (for production) look different than test holes. (Tr. 169). Vadnal found no test drill holes in the area of the fall. (Tr. 168).

In addition to drilling test holes to ascertain possible hazardous conditions, a miner can also visually inspect an area for changes in texture and color. (Tr. 166-167). Vadnal detected dramatic changes in the highly brecciated area of the accident site. (Tr. 167).

The ore deposits found at Fletcher Mine were formed by a hydrothermal process: hot, very mineralized water was pushed directly in and around the dolomite. (Tr. 167-168). Extraction required both the removal of dolomite and ore. (Tr. 168).

Areas that looked "shaley" would be significant. When there were small shale layers (on the roof) at Doe Run, this would constitute a hazardous condition. (Tr. 170-171).

If a change in a mine's geology is observed, an evaluation for possible hazardous conditions should be performed. (Tr. 171). An evaluation would be an integral part of a ground or roof control plan. (Tr. 172).

In churned, highly brecciated zones (such as the fall area) the operator's policy should require fully grouted resin bolts to be installed for roof support at a maximum spacing of 5 feet by 5 feet. (Tr. 172; GX-12, p. 2). Number 7 fully grouted resin bolts have approximately three times the capacity of split set bolts. (Tr. 172). In Vadnal's opinion a reasonably prudent miner would recognize the need for a (roof) evaluation in a highly brecciated and churned area. (Tr. 179). It was Vadnal's further opinion that, considering the approximate 175 to 250 tons of material that had fallen, an adequate number of resin bolts in the bolted area "could have" supported the roof area over the scaler. (Tr. 179-180).

[12] A test drill hole should extend minimally a foot longer than the longest bolt hole.

Typical bolting patterns of 5 by 5 would mean 5 feet between each bolt with 5 feet across the drift and 5 feet down the drift. (Tr. 180). In tightening a bolt pattern the density of the ground support could be increased to 4 by 4 pattern. (Tr. 181). By going to a 4 by 4 pattern or adding a bolt in the center (like the number 5 on dice), the ground control system is made more robust and is able to carry heavier loads. (Tr. 181). When hazardous conditions are detected, a mine's roof control system can be increased by shrinking the bolt pattern or adding a bolt to the center of a pattern. (Tr. 181-182).

The MSHA fatality report further recommended training of miners to identify brecciated geologic zones because of the hazards associated with disturbed bedding. (Tr. 182; GX-12, p. 2). Such training would include presentation of "very good" pictures showing disturbed bedding and having experts explain what differences (in ground conditions) should be looked for as part of annual retraining. (Tr. 182). Drillers, in performing test holes, would be advised to immediately report to management anything found out of the ordinary. (Tr. 183). Further, test holes should be drilled at the beginning of each drilling cycle to determine separations in the back strata. (Tr. 183). The holes should be drilled as vertical as possible, be a minimum of one foot longer than the support installed. (Tr. 183). The holes should be marked and the results of the examinations should be reported to management. (Tr. 183).

Vadnal further found the Doe Run area inspection cards to be inadequate in that they did not notify the mine regarding conditions detected by visual or audio examinations. (Tr. 184; GX-7, pp. 5-6). The cards had no space for the description of abnormal ground condition or for the results of test drill holes. (Tr. 185).

In the fatality report Vadnal had also recommended that the back should be supported (bolted) within 30 feet of the drift at all times. (Tr. 185; GX-12, p. 2). This would reduce the exposure of miners to unbolted ground. (Tr. 186).

Despite having been advised that there had been three other falls at Fletcher Mine prior to the fatality at issue, Vadnal was unable to visit any of the sites, as Doe Run management was unable to find or locate such. (Tr. 186).

Vadnal opined that the victim was in a location that exposed him to falling material because the "accident occurred" and "the material fell." (Tr. 187). Vadnal further opined that the accident was preventable: "with proper evaluation and observations, the change in geology could have been detected and a change in the roof support system could have been made." (Tr. 187).

In certain areas of Fletcher Mine there were relatively thin shale layers that were indicative of a weaker roof. (Tr. 187-188; GX-8, p. 4). Persons interviewed stated that roof bolt operators had been instructed to change from friction stabilizers to 6 foot long fully grouted resin bolts in these areas. (Tr. 188; GX-8, p. 4). It would be left to the judgement and discretion of the roof bolt operators to decide ground support spacing and the need for fully grouted bolts.[13] (Tr. 188; GX-8, p. 4).

[13] Roof bolt operators are not supervisors. (Tr. 189).

Most of the scaler involved in the accident was under unbolted ground. (Tr. 190; GX-12, p. 5). A photograph of the fall area (GX-12, p. 6) revealed how the roof had changed from typically layered brecciated dolomite to churned disrupted bedding. (Tr. 192). A picture of the intersection next to the fall area showed the various layers of roof that was referred to as "typical layered breccia dolomite roof." (Tr. 197; GX-13, p. 11).

In its *Root Cause Analysis*, MSHA concluded that Doe Run management had "failed to establish policies and procedures for identifying hazardous conditions." (Tr. 199; GX-8, p. 6). Before the subject fatality, miners had not been required to drill test holes at each intersection in order to identify adverse ground conditions. (Tr. 199; GX-8, p. 6).

Drilling test holes after an intersection was completed would be too late in the process. (Tr. 199). Rather test holes should be drilled at the beginning of each drill cycle. (Tr. 200; GX-8, p. 6). Further, test hole results should be written down and the hole visibly marked. (Tr. 200). The written observations should be communicated to management. (Tr. 200). Respondent work area inspection cards should be modified so that test hole results could be recorded. (Tr. 200; *see also* GX-7, p. 5).

Doe Run management had also failed to design and install adequate support to control the roof in areas where there was disrupted bedding of the brecciated zone. (Tr. 200): such as existed in the RC3PO northeast area where persons worked and travelled. (Tr. 200-201; GX-8, p. 6).

It was further recommended that the roof and ribs be supported with 6 foot fully grouted number 7 resin bolts or bolts with greater strength and anchorage capacity. (Tr. 202). Bolting should be within 30 feet of the drift in breccia zones with disrupted bedding.[14] (Tr. 202; GX-8, p. 6).

It was further recommended as a corrective action that "management"—someone other than the bolting machine operator—should determine the type of roof support to be installed to insure adequate face support. (Tr. 202-203; GX-8, p. 7).

The final root cause of the accident was found to be management's failure to ensure that miners performed scaling operations from a safe location that did not expose them to falling materials.[15] (Tr. 203; GX-8, p. 7). As a corrective action it was recommended that new roof control procedures be established requiring limited distances for unbolted areas to ensure a safe location for scaling operations. (Tr. 203). Miners should be trained in these procedures. (Tr. 203).

[14] In areas with stable back conditions, bolts were to be kept within 100 feet of the work face. (GX-8, p. 6).

[15] Vadnal estimated that 75% to 80% of the victim's scaler was outside of the bolted area. (Tr. 205; GX-13, p. 5).

Vadnal Cross Examination

On cross examination Vadnal agreed that he had not observed what the back looked like in the time period immediately prior to the fall. (Tr. 206). He assumed that the changes he had observed in the fall cavity area were observable prior to the accident. (Tr. 206-207). He had attempted to learn more about the other falls that had reportedly occurred at Fletcher Mine but had been unable to obtain further information from Doe Run management, including the mine geologist. (Tr. 207-208). Vadnal did not know if these other falls had involved bolted ground or similar ground conditions as involved in Hoodenpyle's death. (Tr. 208). He had not observed any shale when he had traveled to the accident area. (Tr. 209).

Although his title was mining engineer, Vadnal did not have a degree in mine engineering or any other engineering degree. (Tr. 209). In view of his past mining and engineering work experience, however, the Federal Government had deemed him qualified to be classified as a mining engineer. (Tr. 209-210). His exposure to brecciated ground conditions,[16] prior to the Doe Run accident, was limited to a zinc mine, St. Lawrence Zinc, in New York and Willow Lake Coal Mine[17] in Illinois which had experienced a large number or roof falls. Prior to the within hearing Vadnal had not ever testified as an expert regarding the holding capacity of split set bolts. (Tr. 215). Nor had Vadnal, prior to the within matter, ever been retained as an expert with respect to brecciated ground conditions. (Tr. 215).

Vadnal agreed that not all brecciated ground is adverse. (Tr. 216). He could not say with any certainty that when breccia is re-cemented back together it would be stronger than what the rock was before it broke apart. (Tr. 216). He agreed that the "country rock or host rock" at Doe Run was dolomite and that dolomite was a strong, chemically stable rock. (Tr. 217).

Prior to his first visit on January 22, 2015, Vadnal had never examined the brecciated ground conditions at Fletcher Mine. (Tr. 218). He concurred that "as a whole" the ground conditions at Fletcher Mine were stable. (Tr. 218).

There are varying degrees of brecciation. (Tr. 220). A layer of dolomite that has not been disrupted, when pinned together by roof bolts, forms a (stable) beam that spans the mine opening. (Tr. 220). However, when layers are no longer present and "everything is all broken," the beam is "a lot" harder to establish. (Tr. 220). Nonetheless, a beam may still be established in highly brecciated ground, if there is adequate bolting. (Tr. 220-221).

Vadnal saw nothing that alerted him as to possible hazardous conditions while travelling to the accident scene. (Tr. 221, 223). The very edge of the fall between 7508 and 7517 was "pretty ratty" and Vadnal did not come close to the fall cavity in that area. (Tr. 223).

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[16] At hearing Respondent's counsel objected to this Court's acceptance of Vadnal as an expert witness based in part upon Vadnal's lack of experience as to brecciated ground and the usage of split set bolts. (Tr. 149, 152).

[17] Willow Lake had elected not to continue mining in its brecciated areas as opposed to Doe Run which dealt with such ground conditions regularly. (Tr. 213).

He did not interview any of Respondent's employees or MSHA personnel as to the appearance of the fall area prior to the accident. (Tr. 232-233). He accorded only "minimal credit" to Kennedy's statements that nothing appeared unusual or caused him concern in the cave area eight hours before the accident. (Tr. 235). Kennedy's visual inspection would only be part of an evaluation for hazardous ground conditions, only the start of the evaluation. (Tr. 235). Vadnal's opinion would not be altered—even if scalers had been working in the area of fall prior to the accident. (Tr. 237). Conditions could have changed over time.[18] (Tr. 237).

Changes in the size of the inner class would dictate a deeper evaluation of the situation. (Tr. 239).

Vadnal had not found any areas of change—similar to that observed in the fall area—at other sites in Fletcher Mine. He had not interviewed any rib bolters at Fletcher Mine. (Tr. 239). Nor had he travelled the whole of Fletcher Mine or other Doe Run mines. (Tr. 241).

The rubble that fell out of the fall cavity was consistent with large inner class. (Tr. 242). Vadnal did not see any flat tubular pieces in the rubble. (Tr. 242). He was unable to find any test holes in the fall area and had been told by an unnamed employee of Respondent that none had been drilled. (Tr. 244).

Eight bolts had been found in the rubble pile and a ninth bolt in the fall area. (Tr. 245-246).

The purpose of test hole drilling was to assess ground conditions. (Tr. 247). If individuals paid attention, they might also detect changes during "production drilling" but the purpose of such was to "hurry up and get it down." (Tr. 247).

A dead weight calculation is computed to determine the amount of ground control fixtures required to support a certain amount of tonnage that is not moving or is "static." (Tr. 248). "Dynamic" loads, as opposed to static loads, are more difficult to calculate. (Tr. 248).

Vadnal did not know how the roof fall at issue had occurred. (Tr. 249). The force which was placed on the bolts that fell was gravity. (Tr. 249). Vadnal had not made calculations as to the precise number of resin bolts that would have been required to have prevented the ground fall. (Tr. 250). He did opine that if No. 7 fully grouted 6 foot bolts[19] had been installed with a tighter pattern, there would have "at some point" been sufficient bolts to have held the roof up. (Tr. 250-251).

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[18] Vadnal, however, agreed that not all change indicates the existence of adverse ground conditions. Change can go from bad to good. (Tr. 237-238).

[19] Vadnal estimated that resin bolts were three times stronger than friction stabilizers. (Tr. 250).

Vadnal further opined that if the split set bolts in the failed roof had been replaced with the same number or resin bolts in the same 5 foot by 5 foot pattern, the roof would have held.[20] (Tr. 251).

Vadnal conceded that he had no idea, however, if a static or dynamic load had ripped out the bolts. (Tr. 252). He further agreed that it was possible that the ground fall had caused a cantilever effect on the bolts that were over Mr. Hoodenpyle. (Tr. 253). He further conceded that he had previously stated that the "best" indicator for present ground conditions was past operating history in similar ground conditions. (Tr. 254). Vadnal had found no reportable ground falls at Fletcher Mine in the prior five year operating history. (Tr. 255).

Prior to the accident, the manufacturer had conducted pull tests of the friction stabilizers in the RC3PO area and they had met spec. (Tr. 256). Surface holes had been drilled at the mine but were too far from the accident site to the relevant.[21] (Tr. 256).

Vadnal had been advised by the individual handing him Doe Run's ground control plan that employees had to read the plan and sign it at the end of retraining. (Tr. 257-258). He himself had never attended any Doe Run training session. (Tr. 258).

Other than the fact that the roof fell, Vadnal based his conclusions that Doe Run was not following its ground control policy based upon his inability to find any test holes and the information he had received that none had been drilled. (Tr. 260-261).

Vadnal did not know how or if Doe Run was making calculations in its decisions to use bolts. (Tr. 262).

It was not a violation of a mandatory safety standard for Doe Run to have had 75% of the fall area unbolted. (Tr. 264). The ground did not fail above the anchor point of the bolts. (Tr. 265).

Vadnal was "surprised" that a test hole had not been drilled. (Tr. 266). A test driller would have proceeded "a lot" slower than a production driller and would have watched for changes in colors in cuttings. (Tr. 268). He would have noted different penetration rates and would have looked for jumps in the steel that might indicate a crack or void. (Tr. 268). He would have recorded these findings and conveyed such to management. (Tr. 269).

Vadnal had not spoken to the roof bolter who had bolted the accident site or to any other hourly employee. (Tr. 269).

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[20] See Tr. 250-251 for Vadnal's "in my head" calculations supporting his opinions.

[21] Vadnal estimated the closest surface hole to be hundreds of feet from the fall site. (Tr. 256).

Vadnal Redirect Examination

The fallen inner class that contained certain of the roof bolts appeared larger than the inner class circling the opening where the fall occurred and down the rib. (Tr. 269; GX-14, photograph 9). It was "very possible" that this fallen inner class would have been even more visible than that remaining on the roof. (Tr. 270).

Vadnal was unaware at the time of his investigation that the roof bolters at Fletcher Mine were being paid a bonus for how many bolts they installed in a given time frame. (Tr. 270).

Vadnal Examination by the Court

Assuming that a different scaler with a 20 foot longer arm had been used by the victim, Vadnal opined that a fatality may possibly not have occurred. (Tr. 273).

Michael Van Dorn

At hearing Michael Van Dorn, MSHA field office supervisor, appeared and testified.

Van Dorn had worked as a field office supervisor for 15-16 years. (Tr. 280). He supervised seven employees in three states. (Tr. 280). He performed regular inspections, conducted hazard complaint and accident investigations. (Tr. 280). His fatal accident investigations included fatalities involving heavy equipment, roof falls, and falls from heights. (Tr. 280).[22]

Van Dorn headed the investigation of the Fletcher Mine accident. After being telephoned by Robert Seelke of the fatality, Van Dorn arrived at the mine to learn that Hoodenpyle's body had already been recovered and brought to the surface. (Tr. 286). Going underground he headed to the RC3PO area where he observed that the scaler had been pulled out to the side. (Tr. 288). Individuals were trimming and cleaning up materials. (Tr. 288).

Along his way to the site, Van Dorn noticed in some places the roof bolts had looked like the rock had either fallen from around them or had been trimmed from around them. (Tr. 288). Wherever the roof was domed out at the fall site, the rock had different colors. (Tr. 289).

"Shaley" was a term used by people to describe a layer of shale at Fletcher Mine. (Tr. 289). Van Dorn believed that the different colors he had observed in the dome were due to the presence of shale.[23] (Tr. 289).

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[22] *See* Tr. 280-284 for full curriculum vitae. Van Dorn had worked as an MSHA inspector in various field offices. (Tr. 281). He had earned associate degrees in general business and applied safety sciences. (Tr. 282). He had inspected Doe Run mines in the past but not Fletcher Mine. (Tr. 282). Prior to coming to MSHA, he had worked in underground limestone mines for nine years, including jobs as a scaler and safety representative. (Tr. 283).

[23] Van Dorn had noticed two other areas exhibiting shaley different colors on his way to the roof fall site. (Tr. 289-290).

Van Dorn had interviewed miners during the course of his investigation. (Tr. 290). A miner named Ryan Bowden had advised him that the roof at Fletcher Mine appeared in places to be shaley. (Tr. 292). Another miner reported a roof fall over by the sump that had taken place approximately a year ago. (Tr. 292-293). Sam McCabe, a production driller, reported that he knew of no test drilling in the general RC3PO area. (Tr. 294). Bowden, who was the powder man in the area, further indicated that there had been blasting in the area. (Tr. 294). Rather than having a 17 millisecond delay between drifts—a technique that Van Dorn was familiar with—the pre-accident blasting had involved the tying together of the drifts with detonator cord creating a lot more vibration.[24]

In interviewing miners about task training, Van Dorn was advised by scaling machine operators that they were performing workplace examinations with their cap light. (Tr. 295). None of the scalers reported that they were sounding the back. (Tr. 295). Task training was conducted at Doe Run by having an experienced miner train the next person to do the task training or workplace exam.[25] (Tr. 295-296).

Review of Doe Run's work area inspection cards prior to the accident did not reveal any information that the miners recognized any changes in ground conditions. (Tr. 298; GX-7). In looking at other areas of the mine, Van Dorn noticed that the drift next to where the accident took place had a "domed out" space. (Tr. 299). Van Dorn however was unable to determine what had caused the space—whether it was due to blasting, scaling, or a falling materials. (Tr. 299).[26]

Based upon the information gathered by the routine accident investigation team, Van Dorn had helped to author the final report of investigation that was signed in June 2015. (Tr. 300-302; GX-8). In its discussion of "roof conditions" the report described the predominant type of roof at Fletcher Mine as horizontally-bedded (layered dolomite) which created favorable roof conditions. (Tr. 302; GX-8, p. 4). Roof bolt operators had been instructed to change from six-foot-long friction stabilizers[27] to six-foot-long fully grouted resin rock bolts in shaley areas. (Tr. 302; GX-8, p. 4).

Pull tests had been conducted to gauge the support capacity of different types of bolts. (Tr. 304). Resin bolts were shown to have a greater support capacity than friction stabilizers, being three times as strong. (Tr. 305). The split sets "yielded" approximately 18,000 pounds or 9 tons as opposed to resin bolts which yielded 40,000 pounds.[28] (Tr. 305).

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[24] Multiple blasts are required to create intersections, creating vibrations through the rocks that can shake rock loose. (Tr. 294-295).

[25] This type of training is called "pass training" or on-the-job training. (Tr. 296).

[26] *See also* GX-13, p. 3 for map location of area between pillars 7507-7517.

[27] Friction stabilizers are split set bolts. (Tr. 304).

[28] *See also* GX-8, p. 5, where yield is defined as the maximum anchorage capacity of a bolt. Testing by the roof bolt manufacturer disclosed six foot long, 1 ½ inch diameter friction stabilizers yielded at a range of 6-8 tons of force; six foot long, fully grouted, No. 6 headed-rebar rock bolts yielded at 14 tons; six foot long, fully grouted, No. 7 headed-rebar rock bolts yielded at 20 tons.

In the root cause analysis of the accident it was determined that management had failed to establish policy and procedures for identifying hazardous ground conditions in that, prior to the accident, miners were not required to drill test holes at each intersection in order to identify adverse ground conditions.[29] (Tr. 306; GX-8). Test holes were not being drilled; there was not a good relay of information; if someone found changes in the rock, there was no good way to get back to management to take any corrective actions needed to stabilize the roof. (Tr. 306-307).

The second root cause of the fatality was determined to be management's failure to design and install adequate support to control the roof in the disrupted bedding of the brecciated zone of the back (roof) in the RC3PO northeast area. (Tr. 307; GX-8). The basis of this opinion was that Respondent had a roof fall in the area and hadn't been able to control the roof. (Tr. 307). The recommended corrective action was for management to establish new policies and procedures for identifying hazardous ground conditions and for training miners to drill test holes at the beginning of each drilling cycle to identify any separation in the roof strata. (Tr. 308). The test holes were required to be drilled, as near to vertical as possible, and should extend not less than one foot larger than the support installed. (Tr. 308; GX-8). The test holes should be visibly marked and identified and the examination results recorded on the workplace examination record. (Tr. 308; GX-8). It had been tech support's determination that the fall area had, in fact, contained disrupted bedding. (Tr. 308).

Fletcher Mine had different roof types, including shale, which Van Dorn observed while travelling in the mine. (Tr. 308-309). Although the mine had areas of water, he saw no areas where the mine was seeping through the roof. (Tr. 309).

The final root cause of the accident was determined to be management's failure to ensure that miners perform scaling operations from a safe location that would not expose them to falling material. (Tr. 310; GX-9). When the subject accident took place, the back quarter of the scaler was located under the last row of roof bolts. (Tr. 310-311; GX-13, p. 3). Van Dorn opined that if the scaler had been set further back toward the existing intersection—up toward pillars 7508 and 7516, Hoodenpyle would not have been injured. (Tr. 311-312; GX-13, p. 3).

GX-6 contained "Fatalgrams" regarding the roof fall accidents, including an accident at a Doe Run mine in January 1998, in which a surveyor was crushed in a roof fall.[30] (Tr. 313-314). The "Best Practices" listed as a result of this roof fall were that ground conditions should be tested, as well as visually examined after blasting and prior to work commencing or as ground conditions warrant. (Tr. 314; GX-6). With further roof fall deaths, it was further recommended that test holes and examinations be performed after each blast. (Tr. 314-315). Sounding, test holes, and visual examinations are tools that can be utilized to ascertain possible hazardous conditions. (Tr. 315). The advisories regarding such are readily available to operators on MSHA's website. (Tr. 316-317).

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[29] The tech support group supplied the primary opinion. (Tr. 306).

[30] Fatalgrams are accident reports that can be found at MSHA's website (www.MSHA.gov). They describe the results of fatality investigations and make recommendations to miners and mine operators so that similar such fatal accidents may not reoccur.

In reference to § 57.3360 "Ground support use," MSHA issued "Rules to Live By" standards for metal/nonmetal, alerting mine operators of the fatal hazards posed by roof and rib falls. (Tr. 317-319).

Van Dorn had issued Citation No. 8680899 to Respondent for violation of § 57.3201. (Tr. 319; GX-1). The citation, dated March 11, 2015, was issued because there was a Getman scaler that was being operated in an area of the Fletcher Mine where the roof fell, hitting the miner and the machine. (Tr. 320).[31]

The cab had not provided adequate protection for the miner. (Tr. 322).

The citation had been modified to extend time periods to "get everything terminated."[32] (Tr. 323). The citation was finally terminated with the area being posted, barricaded, and being abandoned. (Tr. 323; GX-14, p. 14). Given that an accident involving a death had in fact taken place, the gravity levels assessed were "occurred" in section 10(a), "fatal" in section 10(b), and 1 person affected in section 10(d). (Tr. 324). The level of negligence was determined to be moderate.[33] (Tr. 325).

The violative conduct was found to be S&S in nature. (Tr. 325). The standard was violated; there was a discrete safety "factor" (hazard) of rocks falling from an 18 foot roof; it was likely that such a rock fall would result in injury. (Tr. 326; GX-1). The likelihood of rocks or the ceiling falling was based upon the failure to perform "all the tests and examinations" and the failure to follow MSHA policies. (Tr. 326). An experienced person was needed to evaluate any changes and to act accordingly. (Tr. 326). The hazard of rocks falling and striking a person created the reasonable likelihood of injury. (Tr. 326; GX-1).

Van Dorn also issued Citation No. 8680900 for violation of standard § 57.3360. (Tr. 327; GX12). This was also a 104(a) S&S citation. (Tr. 327; GX-2).[34] This standard required that operators design, install, and maintain roof bolts to control the ground. (Tr. 328).

In order to develop an adequate ground control plan, mine geologists, engineers, and others should be consulted. (Tr. 328). They would have to know the ground, know the changes in it, what kind of material was on the roof, perform appropriate testing, and install long enough bolts. (Tr. 328-329).

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[31] See GX-3 for photograph of scaler similar to the one involved in miner's death. (Tr. 321).

[32] Such included the scaling and bolting of the area. (GX-1, pp. 2-13).

[33] Van Dorn's rationale for such is as follows—"the operator, the foreman of the mine at that time, wasn't in the area. He didn't know that this was going to happen. And I just put him at moderate because high says they knew or should have known." (Tr. 325).

[34] There were no 104(d) citations issued nor were there any special assessment penalties proposed. (Tr. 327).

Van Dorn had issued the citation for violation of § 57.3360 because there had been a roof fall and roof bolts pulled out. (Tr. 329).

In "good" ground, split set bolts could be used, but resin bolts should be used wherever there were "bad" ground conditions. (Tr. 330). By performing visual examinations, sound testings, and drilling test holes, a miner could know if he was entering bad ground. (Tr. 330-331).

Based upon his observations and tech support information, Van Dorn concluded that split set bolts appeared to be exclusively used at Fletcher Mine. (Tr. 332). Given the reports of another fall over by a sump, Doe Run should have considered changing to resin bolt support. (Tr. 332-333). Tighter bolting patterns to support more weight might also be indicated as a result of an evaluation and testing of a particular area. (Tr. 333).

As roof bolt(s) had come out and an accident involving death had actually taken place, the gravity of the injury was assessed as "occurred" and "fatal." (Tr. 333; GX-2). The operator's level of negligence was determined to be "high" because the operator knew or should have known of the existing conditions. (Tr. 334; GX-2). The citation was marked as S&S because there was a violation of the mandatory safety standard: the roof had fallen causing injury. (Tr. 334). It was likely that an accident would occur because the operator wasn't conducting testing for roof conditions and using resin bolts in the fall area. (Tr. 335).

Van Dorn also issued Citation No. 8680902 for violation of § 48.7(a). (Tr. 335; GX-9). This citation was amended to reflect a violation of § 48.9 (Records of training). (Tr. 336). This amended citation had been issued because MSHA had not received MSHA form 5000-23 from Respondent, recording and certifying that its miners had been task trained on workplace examinations. (Tr. 336-337). Without such training documentation, MSHA could not ascertain whether adequate training had been afforded. (Tr. 336). MSHA's Part 48(a) Training Plan for Fletcher Mine required in part that any person designated to conduct or supervise workplace examinations should receive appropriate training relative to this task. (Tr. 337; GX-10). This training was to be documented on an MSHA Form 5000-23. (Tr. 337; GX-10). The training plan was to go into effect in October of 2014. (Tr. 338).

The original citation for violation of § 48.7(a) had been issued on March 12, 2015. (Tr. 339; GX-9). No records of refresher training had been provided to MSHA as of March 12, 2015, approximately five months after the training plan's effective date in October 2014. (Tr. 339). With the amendment to § 48.9, the gravity was assessed as "no likelihood" with no lost workdays and one person affected. (Tr. 340). The violative conduct was determined to be non-S&S. (Tr. 340). The amended citation still listed the negligence level as "high" because the operator was responsible for knowing what was in his training plan and Respondent should have known what was in his plan. (Tr. 340). Miners who were interviewed all reported that they performed their workplace examinations by using the lights off their machines and cap lights, a few saying that they would be under bolted roof looking out. (Tr. 341). None reported sounding the back. (Tr. 341).

The MSHA assessed violation history report (GX-16) revealed no citations for training plan violations in November 2014.

Van Dorn Cross Examination

A powder man, Ryan Bowden, was the only miner who had advised Van Dorn that the mine was "a little shaley." (Tr. 344, 348). Van Dorn conceded that Jeremy Kennedy and Stephen Brille's field notes regarding their interviews of Bowden did not contain any mention of shale. (Tr. 344-345; GX-15, pp. 10, 19). There was a reference, however, to "a little shale" mentioned in Van Dorn's notes of his Bowden interview. (Tr. 346-347; GX-15, p. 23). Van Dorn had not seen shale at the accident scene. (Tr. 351).

The other area where Van Dorn observed shale was approximately 100 yards from the cave-in. (Tr. 349). Another area that had caused concern was where the roof had fallen out around bolts or the roof had been scaled out around them. (Tr. 350). There were no citations issued because of such. (Tr. 350). These were the only two other areas that had caused concern. (Tr. 351).

Van Dorn conceded that he had never actually asked specifically in his discussion of workplace examinations whether soundings were being performed. (Tr. 352). Nobody interviewed reported that there were adverse ground conditions that required changes in the ground control policy. (Tr. 353). Nor did Van Dorn specifically ask such. (Tr. 353).

Van Dorn did ask hourly employees if they had any concerns about roof bolting in the area and none expressed concern. (Tr. 353).

Kennedy also had not observed anything abnormal during his "quick inspection." (Tr. 354).

Van Dorn believed split sets had been used at Fletcher Mine since 2000 and there had been no reported accidents regarding such. (Tr. 355).

With the exception of the two areas of concern that he previously testified regarding, Van Dorn observed no other areas that had ground conditions that disturbed him. (Tr. 356).

It was common in a drill and blast type of mine that domed-out areas would appear on a shot. (Tr. 358). This would not indicate systemically adverse conditions. (Tr. 358).

Van Dorn did not have any issues with the bolts still in the roof closest to the accident scene. (Tr. 359). He did not personally inspect the pillars and did not see anything of concern from a ground control perspective regarding the pillars. (Tr. 360).

No reportable ground falls at Fletcher were found. (Tr. 361). Nor were any unreportable ground falls located. (Tr. 361-362).

Approximately 90% of Fletcher Mine was brecciated ground. (Tr. 364). Van Dorn knew of no split set failures between 2000 and January 2015. (Tr. 365). Van Dorn was unaware if any other Doe Run mines had back falls similar to the instant accident. (Tr. 366). There had been no § 57.3360 citations issued in the last three years. (Tr. 366-367). Pull testing in 2014 did not reveal any split set bolts that failed to meet manufacturer's specifications as to holding capacity. (Tr. 367-368). The Casteel ground fall was not taken into consideration in issuing the § 57.3360 citation. (Tr. 368-369).

Van Dorn conceded that there was nothing in Fletcher Mine's history that supported the issuance of his citation. (Tr. 370). Van Dorn did rely upon the fact that roof bolts had been sticking straight up after the fall and that they had failed. (Tr. 371). Van Dorn opined that if roof bolts failed, they were not adequate to hold and therefore a citation was justified. (Tr. 371-372). The mine's past operating history would be considered in determining the level of negligence. (Tr. 372).

Van Dorn agreed that if roof bolts fail, an automatic citation is called for. (Tr. 373-374). Even if observable ground conditions may have been "okay" according to Inspector Kennedy's standards—the roof bolts had pulled out and "that's where I'm at on issuing it." (Tr. 373).

It was only after Vadnal pointed out the changes in the fall area did Van Dorn see them. (Tr. 375).

Disturbed bedding indicates that changes are happening and the area should be checked out. (Tr. 376). Van Dorn himself saw nothing at Fletcher that immediately struck his attention. (Tr. 377). He had no idea why the back fell. (Tr. 377). He estimated 175 to 250 tons of rock fell—of which 75% was in unbolted ground. (Tr. 377). He did not know the amount of force placed on the split sets during the fall or whether the force was static or dynamic. (Tr. 378-379).

Static force is the "total force pushing down." (Tr. 378). Dynamic force would be "movement of it or cantilever type," having a crowbar effect on the bolts. (Tr. 378).

Van Dorn did not know if resin bolts would have held but there would have been a greater chance of holding because of their greater holding capacity. (Tr. 378-379). He did not know whether static or dynamic force had been involved in the roof collapse. (Tr. 379). Van Dorn had no personal experience installing split sets but had observed them being installed. (Tr. 381-382).

Doe Run's ground control policy did not require the installation of resin bolts in shaley conditions. (Tr. 3482; GX-7). Split set bolts can support shaley ground. (Tr. 384). Doe Run's ground control policy did allow for bolt spacing to be changed if conditions warranted such. (Tr. 384-385).

A driller, Sam McCabe, advised Van Dorn that test drilling was not being performed but no roof bolters had indicated such. (Tr. 385-389).[35]

The sole basis for finding a violation of § 57.3201 was that Hoodenpyle "was in a position where he got injured from falling material." (Tr. 389). No more factual grounds were necessary for the issuance of the citation. (Tr. 390). Many mitigating circumstances surrounded the accident. (Tr. 390).

Van Dorn argued that it was not uncommon for 75-80% of a scaler to be under unbolted ground. (Tr. 390-391). He further agreed that the scaler cab was under the last row of bolts at the time of the accident. (Tr. 391). It was not necessarily a violation for a mechanical scaler to be under unbolted ground. (Tr. 391). Mitigating circumstances had been found as to this accident because Doe Run management was not in the fall area and had been unaware of the material falling on the scaler. (Tr. 394). These factors had reduced the level of negligence from high to moderate. (Tr. 395). Van Dorn agreed that another mitigating factor might be that the (mining) process employed by Respondent had been in use for a long time without prior incidents. (Tr. 395). That nobody in the fall area had voiced any concerns regarding bolts or ground conditions would not constitute a mitigating factor in that none of whom were management. (Tr. 396). For the same reason, the MSHA inspector's failure to note anything wrong with bolts or ground conditions would not constitute a mitigating factor. (Tr. 396). The fact that there had been no split sets failures in the past also would not constitute a mitigating factor as to the scaling citation. (Tr. 397). The fact that a scaler has FOPS had the potential for being a mitigating factor but not for the accident at issue. (Tr. 397-398).

During the investigation of the accident Van Dorn had garnered facts warranting the issuance of Citation No. 8680902. (Tr. 399; Gx-9). As of January 2015 Doe Run had not yet completed any training under its October 2014 approved training program. (Tr. 399). Van Dorn agreed that the time this original citation citing a violation of § 48.7(a) had been amended because the original allegations that no training had taken place were incorrect. (Tr. 400).

Van Dorn had learned that the citation had been amended on Friday prior to the within hearing.[36] (Tr. 402-403). He agreed that no workplace examination training had taken place between October 14, 2014, when the plan had been approved, and January 26, 2015. (Tr. 403-404). Van Dorn did not know if Hoodenpyle had received workplace examination training prior to his death. (Tr. 406). During his investigation Van Dorn asked various individuals in a conference room if they had been task trained on performing workplace examinations. (Tr. 407). All answered "yes," but none had MSHA form 5000-23 documentation. (Tr. 407). This was the evidence Van Dorn used to support the amended citation. (Tr. 407-408). Van Dorn had not considered Hoodenpyle in determining the amended citation but believed him to fall within the class of people without documentation. (Tr. 406, 410).

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[35] *See* same transcript pages for back and forth as to whether this question was limited to specific intersection of accident.

[36] At trial counsel for the Secretary stipulated that the actual filing date was on Monday before the commencement of hearing on Tuesday, May 23, 2017.

Van Dorn opined that Doe Run should have issued 5000-23s to document past training received prior to the new October 2014 part 48(a) training plan—even though no training had been afforded subsequent to October 2014. (Tr. 411).

Van Dorn, however, stated that he didn't agree with the way the amended citation came about. (Tr. 412). He further acknowledged that the new Part 48(a) training plan did not provide that Responded should go back and document that training had taken place under a prior approved plan. (Tr. 413; see also GX-10, p. 13).

If a mine has had a history of falls, whether reportable or not reportable, this could go to a knowledge of change in conditions in the mine.

The interview notes of Steve Strickland disclosed that Strickland had "glue bolted[37] before in bad ground." (Tr. 417; GX-15, p. 26). Big plates—base plates had also been used before in bad ground to help with the holding of the roof. (Tr. 417; GX-15, p. 26).

Clay McNail

Clay McNail, superintendent of Fletcher Mine, appeared and testified on behalf of the Respondent. (Tr. 419). He had been superintendent since 2010 and had worked for Doe Run for 12 years. (Tr. 419-420). His job duties included developing mine plans, working with survey and geological groups, and travelling on a regular basis throughout the mine.[38] (Tr. 420).

Fletcher was one of five active Doe Run mines. (Tr. 422). Doe Run mines were located in the Viburnum Trend, "a world class lead deposit," which also contained zinc and copper materials. (Tr. 424). Fletcher Mine first opened in 1965 and had ground conditions similar to other mines within the Viburnum Trend. (Tr. 424). Doe Run mines' host or country rock was dolomite, dolomitic limestone. (Tr. 425). This was "very competent" rock. (Tr. 425). The method of mining employed at Fletcher was "modified room and pillar" mining. (Tr. 425). Because of elevation changes, there is ramping up and down to different levels. (Tr. 425-426). The width of Doe Run mines depended on the width of the drifts. (Tr. 426).

There is a breccia trend that runs through the area which is followed in the mining process, which makes for a more snake-like appearance than that found in coal mine maps. (Tr. 426-427). Typical drifts and pillars at Fletcher range from 28 feet to 32 feet in width. (Tr. 427). The back is usually 16 feet to 18 feet high and no lower than 14 feet due to equipment size. (Tr. 427). Successive mining passes will result in areas as high as 100 feet to 120 feet in the trend. (Tr. 427). The mining cycle at Fletcher starts with drilling holes in the face and placing explosives in the holes. (Tr. 427). After the shot is set off, a loader is sent in; this pushes up the fly rock and mucks what can be mucked. (Tr. 428). When rock can no longer be loaded, a scaler

[37] Resin bolting (Tr. 418).

[38] McNail first started working in mining in 1994. (Tr. 420). In 1998 he earned a Bachelor of Science in Mine Engineering with emphasis in explosives engineering. (Tr. 421). In 2012 he earned a Master's in Mine Engineering with a Minor in Explosive Engineering. (Tr. 421).

comes in and, either by machine or hand, takes down the loose rock, making the area safe again. (Tr. 428). Loaders and trucks will come back in and complete the mucking or loading of the rock. (Tr. 428). If more scaling is required, scalers may come back in. (Tr. 428). Then the roof bolter comes in as final part of the cycle. (Tr. 428). Then the process starts over again. (Tr. 428).

At time of the accident bolting was performed at the intersections pursuant to ground control policy. (Tr. 429). Roof bolts were the main source of ground control at Fletcher Mine. (Tr. 429). Scaling involved the removal of rock that was not competent and separated by a crack or something that had the potential to possibly fall of its own accord. (Tr. 429). Blasting often creates the need for scaling. (Tr. 429).

Fletcher uses mechanical scalers with telescoping booms run by operators. (Tr. 429). It also uses, as an alternative, man baskets with two employees in the basket, using six foot aluminum bars with chisel ends to remove the rock by hand. (Tr. 436). Below 25 feet both methods are used interchangeably; above 25 feet hand scaling is used exclusively. (Tr. 430).

McNail had created a supervisor training presentation regarding ground support. (Tr. 430; RX-B). In describing the major job duties for mechanical and high boom scaling, McNail listed the following required actions: make areas safe by hand scaling from the ground up to 100 feet high with basket trucks; make areas safe by scaling with mechanical scaler; make accurate judgements on scaled areas that they are safe for the mining cycle to continue; install roof bolts by required means when necessary; complete other tasks as directed by mine supervisor. (Tr. 431; RX-B). Scaling is performed before rock bolting to ensure that rock is removed to a competent layer that will allow bolting to best support the ground above it. (Tr. 432). Mechanical scalers and high boom scalers are trained to sound the roof. (Tr. 432). Roof is sounded with basically anything that gives audio feedback. (Tr. 432). A mechanical scaler will ram the back with the tooth of his scaler and listen for sound. (Tr. 432). A hollow sound might indicate a separation of layers or vug.[39] (Tr. 433).

Fletcher Mine employed Getman S330 mechanical scalers such as used by the victim. (Tr. 433). At the end of the scaler were teeth that allowed the operator into cracks or features that he found. (Tr. 434). The Getman had a telescoping boom that could extend 25-30 feet, allowing the operator to stay in his station yet extend his reach. (Tr. 434). The Geman, used by the victim, had an articulation ROPS/FOPS canopy, giving the scaler a wider range of coverage without the need to physically move the machine. (Tr. 434). The operation station was located farthest away from the working end of the machine. (Tr. 434).

Prior to Hoodenpyle's arrival, the header had already been scaled several times over the course of a month. (Tr. 436). It had been scaled the day before the accident—both day and night shift. (Tr. 436).

Fletcher was a "very competent" section of the Bonneterre Formation and had already had millions of tons extracted from it. (Tr. 436). A good breccia trend ran through the middle of the mine. (Tr. 436). Adverse ground conditions at Fletcher were not common and very localized.

[39] A vug is a small or medium sized cavity in rock. (Tr. 433).

(Tr. 437). No matter the job title, all Fletcher Mine employees are trained to identify such conditions. (Tr. 437). All supervisors at Doe Run underwent annual underground roof and ground control training. (Tr. 438; RX-D). Employees also received workplace examination training—either during new miner training or annual refresher training. (Tr. 438).

Adverse ground conditions, such as vug holes or faulting, can be determined by visual examination. (Tr. 439).

The ground conditions where the fall occurred were similar to those throughout the trend generally. (Tr. 440; RX-A). A timeline had been developed describing the January 2015 mining cycle in the fall area prior to the accident. (Tr. 441; RX-Z). The area was shot on January 3. Scaling took place on January 4; crosshatching was installed on January 5; bolts were also installed on January 5. (Tr. 442-443). More scaling was performed on January 7. The area was shot again on January 8, with more scaling on January 10. (Tr. 442). The area was shot again on January 13 and scaled again on January 15. Another shot occurred on January 18. The area was scaled on both shifts on January 20. (Tr. 442). Scaling continued on January 21 when Hoodenpyle entered the area. (Tr. 442; RX-Z).

Vernon Roark was the bolter on January 5 who installed the split set bolts involved in the accident. (Tr. 443-444).

Split set bolts and resin bolts were used interchangeably in the mine. (Tr. 444). Due to ground water coming through the roof, resin bolts could not be physically installed in some areas of the mine because the resin packages containing the glue would be washed out. (Tr. 444-445).

McNail was not aware of any significant ground control issues at the Fletcher Mine as a whole or in RC over cut area. (Tr. 447). No employee had even complained to him of abnormal ground conditions. (Tr. 447). He had no knowledge regarding split set bolt failure at Fletcher. (Tr. 447). McNail had traveled throughout Fletcher Mine and had never personally observed any adverse ground conditions that had not been controlled. (Tr. 448). It was normal procedure to do blasting near bolted areas, the rock damage zone from a blast usually extending only a couple of feet. (Tr. 449).

The ground control policy in force at the time of the accident provided that scaling would begin a minimum of 60 feet back from the active face. (Tr. 449; RX-F). Generally the outline for roof bolting and scaling, rock bolting on a 5 by 5 pattern had been historically sufficient for intersections. (Tr. 449). The ground control policy had not required the use of resin bolts in areas of shale. (Tr. 449-450). Split sets had been used in areas of shale. (Tr. 450). The space between 7508, 7516, 7517, and 7561, as depicted on the map at RX-E, was not a completed intersection, and pursuant to the existent ground control policy would not have required a test hole at the time of accident.

Cross Examination of McNail

On cross examination McNail conceded that blasting created a certain amount of stress on rock.

Before an intersection is completed, there need to be test holes drilled pursuant to ground control policy. (Tr. 453). Bolting was budgeted for and McNail was not "worried about money." (Tr. 455). There were times when adverse ground conditions had required decreased spacing. (Tr. 455). Pattern tightening was not generally based upon reports of discoloration but upon reports of shale. (Tr. 456). McNail was not in the fall area the day that the accident had taken place. (Tr. 456).

Redirect Examination of McNail

The operating history of Doe Run suggested that the ground control policy regarding test holes was sufficient. (Tr. 457).

Though bolting incurred additional costs and slowed production, Respondent nonetheless chose to bolt throughout Fletcher Mine, including areas between pillars near the fall site that were not required to be bolted. (Tr. 457-458).

Questioning by the Court of McNail

McNail didn't have "any idea" as to the difference in costs between split set and resin bolts.[40] (Tr. 459).

Vernon Roark Direct Examination

At hearing Vernon Roark testified on behalf of Respondent. He had been working as a roof bolter for Respondent for the last 18 years, 14 of which were at Fletcher Mine. (Tr. 460-461). He had received training in sounding the back and bolting, split set and resin. (Tr. 461-462). In installing a split set bolt, he would first inspect the area, looking for "loose," and if none found, drilling a hole and then driving a bolt into the back. (Tr. 462). When drilling a hole he looks at shavings and observes the way the steel goes, whether it's jumping or solid. (Tr. 462). Shavings can indicate where shale or clay mud is being encountered. (Tr. 462-463). Shale was grayish in color and mud was red. (Tr. 463). The drill jumps if it hits soft ground or a void. (Tr. 463).

Roark sounded the back every time he drilled a hole. When the steel hits the back, he could tell if it was solid or "drummy." (Tr. 464). A drummy sound could indicate a layer was loose. (Tr. 464). If he encountered possible adverse conditions, he would notify the geologist, Bob Ridings. (Tr. 464).

In installing a resin bolt, glue is shot in after the hole is drilled. (Tr. 464). The bolt is spun in and held for a few seconds until the glue sets up. (Tr. 465). He was not aware of a situation where he would use one type of bolt versus another. (Tr. 465). He had been installing split sets for the past five years—"that's about all I put in." (Tr. 465). Prior to the accident on January 21,

[40] As discussed within, this Court found this answer to be less than fully credible given *inter alia* McNail's description of his job duties: "we look at financials and try to interpret those and control cost according to budget." (Tr. 420).

2015, he had bolted in the fall area on January 5. (Tr. 465). He was unaware of any split sets failing in the past. (Tr. 466). When he was in the fall area on January 5, 2015, the back and ribs looked "fine." (Tr. 466-467). There was no loose or voids. (Tr. 467). There was good color. (Tr. 467). There was nothing visually different from other areas. (Tr. 467). In drilling the bolt hole and in sounding the back, he noted no unusual shavings nor drumminess in sound nor jumping. (Tr. 467). The drifts and pillars were unremarkable.

He typically drilled two rows at a time, then returning to put the bolts in, with the whole process taking about 15 minutes. (Tr. 468). When he drilled in the fall area on January 5, he noticed nothing that required different spacing. (Tr. 468). He did not observe rounded boulders in the back. (Tr. 469). There was nothing about the previously installed bolts that concerned him. (Tr. 469). There were no abnormal noises. (Tr. 469).

Bolters at Fletcher Mine did receive a bonus, calculated by linear feet, for the number of bolts they installed. (Tr. 469). However, Roark did not care or "worry" about the bonus but worried about the people going under the bolts. (Tr. 470). He did not consider the area of the accident that he had bolted a completed intersection. (Tr. 470; RX-E).

Cross Examination of Roark

Split set and resin bolts both have the same size six inch bolt plates. (Tr. 470-471). There are also larger "butterfly" plates that are 12 inches. (Tr. 471). These larger plates are "not very often" used. (Tr. 471). The normal bolting pattern is 5 feet by 5 feet. (Tr. 471). On occasion, 4 feet by 4 feet or 3 feet by 3 feet patterns are employed to give more holding power. (Tr. 471-472). No supervisor was present before Roark began bolting on January 5. (Tr. 472). Split sets were quicker to install than resin bolts. (Tr. 472).

In the past Roark had hit clay mud, shale, voids, soft ground, and drummy ground at Fletcher Mine, all of which might have required tighter bolting patterns. (Tr. 473). He had not been task trained to use a "jumbo drill" which was a larger drill for drilling test holes. (Tr. 474).

He relied upon Mr. Ridings, the geologist, to pass on information about adverse ground conditions to a supervisor who would then decide to act or not act upon such. (Tr. 475).

If he encountered a void or vug, he would not file a written report but rather orally inform his foreman. (Tr. 476).

The bonus given for split set installation ranged from $200 to $800 monthly. (Tr. 476).

Roark agreed that conditions could change in 50 to 100 feet. (Tr. 479). After he stopped bolting on January 5, he walked into the heading about 25 feet from the face and noted nothing unusual. (Tr. 479).

Roy Folkerts Direct Examination

Roy Folkerts appeared and testified on behalf of Respondent at the hearing. He had held the job of roof man[41] at Fletcher Mine on January 15, 2015. He had operated a mechanical scaler for more than 30 years and for 10 years at Fletcher Mine. (Tr. 482). Getman "scratchers" or scalers were used at Fletcher Mine to scratch the face and back to get loose down. (Tr. 484). In scaling an area Folkerts would first get out of his cab and examine the area for cracks, loose, and anything abnormal. (Tr. 482-486). He would then return to his machine, stretch out the boom, hit and sound the back with the tooth[42] to see if the back sounded like clay or drummy. (Tr. 484). He would then do the side of ribs and keep working his way up. (Tr. 484). The teeth are rotated straight up and down and sideways to do the scaling. (Tr. 486).

Folkerts worked in 10 foot sections, stretching out the boom and moving up every 10 feet. (Tr. 487). As he scaled he would perform multiple soundings each shift. (Tr. 488). When encountering loose or faults or cracks, he would use different methods to get it down. (Tr. 488). He had never encountered a drummy or bad back that prevented him from completing the scaling process by the end of his shift. (Tr. 489). He had been in the RC3PO1 northeast area hundreds of times prior to the accident, both as a mechanical scaler and hand scaler. (Tr. 489-490). He had always found the ground conditions to be good. (Tr. 491). He had never observed loose split sets in the area. (Tr. 492). Sometimes the tooth of a scaler can tug on an installed bolt and bend it but not pull it out. (Tr. 492-493). On January 20, 2015, he had been working in the area between 7508 and 7516 (RX-E) for several days and had taken four to five soundings. (Tr. 494-495). He had observed roof bolts in the area between 7516 and 7517 on January 20, 2015, and they all looked normal and secure. (Tr. 495-496). He did not observe big rocks in the back (as testified to previously). (Tr. 497). Based upon his opinion and looking at the (fall) area, ground conditions appeared good from the first time he had been in the (fall) area until the time of accident. (Tr. 498).

Folkerts considered Hoodenpyle a good operator who set his scaler in a proper position. (Tr. 500). Roark had never experienced material falling on his cab while scaling.

Roy Folkerts Cross Examination

Folkerts had stopped scaling in the area at about 7508 to 7516. (Tr. 502; RX-E).

[41] A roof man operates a mechanical scaler, cleaning up headings to ensure safety. (Tr. 481).

[42] The tooth of a Getman is in front of the boom on a swivel head. (Tr. 485). The swivel head had two teeth and could be pulled back and forth. (Tr. 484; RX-C).

Thomas Welch Direct Examination

Thomas Welch testified at hearing for Respondent. An hourly employee, he had worked at Doe Run for 22 years, six years as a loader operator.[43] (Tr. 505). As a front-end loader operator, his job duties were to go in after a round has been shot, muck the heading out, clean it up, get it ready to be scaled and bolted and re-drilled and again start the mining cycle. (Tr. 507). Some scaling was done with the bucket on the loader. (Tr. 507). Any time scaling can't be performed with the bucket, the area is ribboned off and mechanical scalers or hand scalers are brought in. (Tr. 507).

Welch had been working in the roof fall area prior to Hoodenpyle's death and had been working on the same shift as the victim. (Tr. 508). He had seen Hoodenpyle "doing his walk around inspection, like I seen him doing a thousand times." (Tr. 508). Welch had been in the bolted area of the fall area. (Tr. 508). He had driven his loader in between pillar 7508 and 7516. (Tr. 509; RX-E). Everything looked normal: the back looked well; the pins were all in place; nothing looked like it had recently fallen. (Tr. 509). He had been sitting between 7495 and 7508 (*see* RX-E) waiting for trucks to be loaded again and had been at the scene approximately one to one and one half hours prior to Hoodenpyle's arrival. (Tr. 510).

Prior to the ground fall Welch did not hear anything indicating ground was moving. (Tr. 511). The ground conditions in the fall area appeared similar to the ground conditions in other areas of the mine. (Tr. 512). He was not aware of any unplanned ground falls of brecciated ground nor complaints about ground conditions. (Tr. 512). While he did not see the ground fall, he heard it and thought it sounded "like a lot of rock" for the area. (Tr. 514). When he arrived at the post-accident site, he noted no shale or other suspicious ground conditions. (Tr. 515-516).

Thomas Welch Cross Examination

When scaling with the bucket of the loader, Welch would only scale up to about 6 feet. (Tr. 516). He did no sounding in the areas between 7508 and 7516. (Tr. 516-517). Nor did he check and drill test holes. (Tr. 517). He did not go into the unbolted area between 7517 and 7561. (Tr. 517; RX-E). He did not examine the ribs or back in the area nor went past the bolted area. (Tr. 517).

Jason England Direct Examination

Jason England, the safety manager at Doe Run, testified at hearing. (Tr. 520). He had been Doe Run's safety manager for 13 ½ years. (Tr. 520). He had previously worked as a safety manager and specialist. (Tr. 520-521). As safety director, England reviewed citations to help sites determine which to conference, managed four safety specialists, helped implement and write training plans. (Tr. 521).

[43] Welch had approximately 25 years' experience in underground mining, working for two other mines in addition to Doe Run. His jobs included truck driver, loader operator, mechanical scaler, grade operator, shift extra and development miner. (Tr. 505-506).

Miners at Doe Run receive roof and ground control training, including the identification of adverse ground conditions and procedures such as scaling, in new miners' classes and annual refresher training. (Tr. 522-523). Safety specialists, experienced in ground control, demonstrate the proper use of scaling bars and show the different types of bolts. Safety meetings and supervisor training throughout the year also touch upon ground control issues. (Tr. 522). Hoodenpyle would have received training on Doe Run's ground control policy. (Tr. 523). Every employee is required to read and sign a copy of the policy. (Tr. 523). RX-N was a compilation of the training documents signed by Hoodenpyle throughout his career at Doe Run, including ground control policies.[44] (Tr. 523-523; RX-N).

Hoodenpyle had been task trained for the Getman scaler in February 2013. (Tr. 525-526).

As safety director, England would have received notice of any mine accidents but had not been notified of any accidents involving bolted ground falls prior to January 21, 2015. (Tr. 526). His review of records disclosed no reports of ground falls in ground supported by split set bolts. (Tr. 527). Nor had anyone ever expressed concerns to him regarding the use of friction stabilizer bolts at Fletcher Mine. (Tr. 527). Reviewing records back to 2010, he found no injuries as the result of ground falls on cabs with ROPS/FOPS. (Tr. 528). Internal investigations revealed nothing indicating ground support in the area had been inadequate. (Tr. 528).

There were no § 57.3360 violations found in Fletcher Mine's 10 year citation history. (Tr. 528-529). There was one citation for violation of § 57.3201 in 2009. (Tr. 529). There was no indication that the mechanical scaling process utilized by Doe Run (for at least the past 10 years) had exposed miners to the danger of falling material.[45] (Tr. 530). There was no record of mechanical scaler injuries. (Tr. 530). MSHA had never voiced concerns about the process. (Tr. 531).

England had become aware the day before the hearing of the amendment to Citation No. 8680902 from a training violation to a document citation. (Tr. 531).

During the closeout conference England objected to Doe Run being cited for failure to document workplace examination training. Hoodenpyle had received his workplace examination training during a time period when the October 2014 plan then in fact did not require such 5000-23 documentation. (Tr. 535). England did not deem it proper to write a citation on training that was conducted prior to the new plan's approval. (Tr. 532). No new miner class training or refresher training had been conducted or miner transfers had taken place under the new plan between its approval and the accident date. (Tr. 533). Between the new training plan's approval and the date of citation there was nobody at Doe Run who was required to receive task training on workplace examinations. (Tr. 533).

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[44] Hoodenpyle had been hired by Doe Run in 2011. His acknowledgements of having received ground control training were dated February 2011, February 2012, February 2013, and February 2014. (Tr. 524).

[45] The policy provided that all employees upon entering an area perform workplace examinations. They must start at least 60 feet from the face and scale their way into whatever heading they're working in. (Tr. 530).

Review of the new Part 48 training plan did not indicate that MSHA forms 5000-23 should have been submitted for workplace examinations under the old training plan. (Tr. 537-538; GX-10, p. 13). The first annual refresher training regarding workplace examinations after accident was in February 2015. (Tr. 539). 5000-23 documentation was issued for such. (Tr. 540). During the time period between October 2014 and January 2015 MSHA, during its inspections, issued no citations for 5000-23 documentation violations. (Tr. 540-541).

Jason England Cross Examination

Falls from unbolted ground would not generally be reported. (Tr. 542).

Randall Hanning Direct Examination

Randall Hanning held the position of mine operations manager at Doe Run since October 2014, having worked for the Respondent since September 1998.[46] (Tr. 546-547).

As a mine operations manager he manages the production of all the mines, helping mine superintendents in their daily activities. (Tr. 549). His position is cross functional with other departments, including maintenance, safety, and budgetary departments. (Tr. 549).

Hanning worked underground at four of Doe Run's mines. (Tr. 549). Generally, the ground conditions were similar at all of the mines with dolomite as the host rock and split stabilizers being utilized since 1998. (Tr. 550). He could not recall any split set failures. (Tr. 551). He was familiar with the installation of both split set and resin bolts. (Tr. 552). He opined that split sets and resins were "equal depending on how you use them and the situation and all that." (Tr. 553).

While holding capacity, by pull testing, disclosed six to eight tons for split sets and 20 tons for resin bolts, Hanning liked split set bolts because in "real wet" ground resin bolts did not work as well, it being difficult to keep the resin up in the holes. (Tr. 553). With split sets Hanning was more confident of "a quality installation," it not taking a "rocket science" to put in a split set bolt. (Tr. 553-554). With resin bolts, there is a concern that there is not enough resin in the hole or if there is sufficient spinning. (Tr. 554). Closing the split set pattern will help to increase the holding capacity to match resin bolts. (Tr. 554). The Doe Run ground control policy in effect on January 21, 2015, allowed for closer patterns if the bolter reached the determination such was necessary. (Tr. 555).

Hanning had travelled to the fall area after the accident but did not see any adverse ground conditions on his way to the site. (Tr. 556).

[46] Hanning graduated in 1988, receiving a Bachelor of Science in Engineering. (Tr. 548). He began working for Ascaro at the Sweet Mine in 1988. (Tr. 548). He had worked in mining as a surveyor, training level supervisor, mine supervisor, general mine supervisor, and mine superintendent. (Tr. 548-549).

Randall Hanning Cross Examination

Split set and resin bolts are the only two types of bolts used at Fletcher Mine. (Tr. 558). They are not necessarily selected based upon ground conditions. (Tr. 558). There are two types of machines used in installing bolts: a split set and resin bolter. (Tr. 558). If one is unavailable, then the other one is used. (Tr. 559). Bolters are paid a bonus depending upon the amount of bolting they do in a given time period. (Tr. 559). The incentive program can range from $200 to $800 a month. (Tr. 559).

Hanning had not visited the fall area prior to the accident and hadn't made any evaluation of ground conditions. (Tr. 559).

There was no requirement in Doe Run's ground control policy in effect in January 2015 that test drill holes be marked. (Tr. 560).

The fall area was not a wet area that would have prevented the use of resin bolts. (Tr. 562).

Hanning had observed split set bolts being installed in areas containing shale. (Tr. 563-564). Such a practice was not prohibited by Doe Run's ground control policy in effect in January 2015. (Tr. 564).

George Moellering Direct Examination

George Moellering, Respondent's Southeast Missouri exploration manager, appeared and testified at hearing. He had worked for Doe Run for 28 ½ years.[47] (Tr. 572). He had held his current position as Southeast Missouri exploration manager since 2012. (Tr. 576). His duties were basically the same as chief mine geologist with some additional duties, including setting policy for the mine geology group. (Tr. 576). Moellering had analyzed surface hole logs, graded faces, and mine planned to avoid "dilution."[48] (Tr. 577). As a geologist he would often go underground to visually determine different types of rock structures to help in the mining decision-making process. (Tr. 578).

Doe Run's mining areas run approximately 32.5 miles long. (Tr. 578; RX-A). The breccia trend at Doe Run is very intense in some places such as the Buick Mine and other places it is very subtle. (Tr. 580; RX-A). The entire Viburnum Trend had been dolomitized over the

[47] RX-8 contains Moellering's complete resume. He earned a B.S. in economic geology in 1988. From 1989 to 2004 he worked as a mine geologist for Doe Run, working initially as a grade control geologist and then as a mine geologist. (Tr. 574-575). He then worked for eight years with Doe Run as chief mine geologist, overseeing 10 mine geologists, a couple grade control geologists, and an underground drill foreman. (Tr. 575). His duties included grading faces with breccia in them, locating new ones, controlling the dilution, mine planning, budgeting—"everything…to do with mine geology, including surface drilling." (Tr. 575-576).

[48] Dilution is rock with no ore in it. The goal is keep as much of such out of the system as possible. (Tr. 577).

years, the dolomite sequence being narrow, generally less than two to three miles wide. (Tr. 581).[49]

In particular the Fletcher Mine had one of the higher grades in the Viburnum Trend with very strong and stable dolomite host rock. (Tr. 583-584). The geologic conditions in Fletcher Mine and in the accident area—RC3PO Northeast—were similar to other parts of the Doe Run complex. (Tr. 584-585; RX-A). Although the general breccia is the same, every run is going to look different. (Tr. 585). The rocks are turned different ways every round: taking a picture of it in one area and comparing a picture of it in another area would not show like images but the general structure would be the same. (Tr. 585). So changes (in appearance) would be quite common. (Tr. 585).

RX-I contained a photograph of a classic breccia taken at Casteel Mine which was a typical representation of breccia found in the Doe Run mines. (Tr. 586-587).[50] Describing different photographs of breccia with fracturing and different blocks of colored material, Moellering opined that none of the pictures depicted adverse ground conditions. (Tr. 587-589; RX-I). As breccia is re-cemented together over millions of years it can become even stronger in character. (Tr. 589-590). Brecciated ground conditions do not per se constitute hazardous conditions. (Tr. 590-591).

Moellering had walked with Vadnal to the fall area on January 21, 2015, and noted the changes that Vadnal had alluded to but found the changes to be "no surprise" in a breccia trend. (Tr. 591). As one comes from slightly brecciated ground into the main core of the breccia, change is expected. (Tr. 591-592). Moellering observed various changes in the face of the accident area: lighter color rock; different colors in some of the rocks; gray silt[51] showing in the back. (Tr. 593-594; area between 7561 and 7517 on RX-E). Nothing that Moellering observed did he find to be as a geologist unusual. (Tr. 595). He saw no shale on the ribs or back. (Tr. 595).

There was a surface hole approximately 140 feet in front of the mine workings that had not been cut with mining. (Tr. 596; RX-J). He had evaluated the lithology of the surface hole and found it to be typical of every other surface hole in the area. (Tr. 598). Nothing in the hole indicated the existence of adverse conditions. (Tr. 598). Nor did he see anything unusual about the elevation around 1086. (Tr. 599). He also did not detect any shale in the fall area and/or rocks in the fall area depicted in the photograph at GX-13, page 006. (Tr. 600-601).

In examining the photograph of rock laying between the pillars 7517 and 7561 (RX-E) Moellering opined that the rock looked like it had come out of the portion of the fall between 7517 and 7561. (Tr. 601). In looking at the photographs of the fallen rock, he did not note the change that he noticed on the face between 7561 and 7517. (Tr. 601). The face appeared to be

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[49] *See* Moellering's full testimony at Tr. 579-583 for more complete description of geological process leading to formation of Viburnum Trend and its mining history.

[50] *See* Tr. 585-587 for more detailed technical description of breccia formation.

[51] Gray silt is originally deposited as limestone, basically a lime mud stone; it's predominantly dolomite and generally very thick bedded. (Tr. 594).

highly brecciated and the material on the ground appeared to be pretty well flat bedded. (Tr. 602). He saw no evidence of shale in the rocks that had fallen on the scaler cab. (Tr. 603).

Moellering disagreed with Vadnal's assessment that heavily disrupted bedding could not hold a good back. (Tr. 604). Recementation was the key: if the rock was well-cemented together, there would be no problem. (Tr. 604). Based upon his past experience and education, he found no evidence of inadequate cementation in his review of photographs from the fall area. (Tr. 605). During his employment at Doe Run he had never seen nor heard of an unplanned ground fall—in bolted or unbolted ground—of the magnitude of the instant incident in similar ground conditions. (Tr. 605). As a geologist, he believed brecciated dolomite was safe ground to work under. (Tr. 605-606). Nothing in the photographs reviewed suggest to him as a geologist that ground conditions required more analysis or testing. (Tr. 606). High brecciated ground, if well cemented, was safe to work under. (Tr. 606). Mining production at Fletcher Mine, in brecciated condition, had been ongoing from 1965. (Tr. 607). Moellering had been unaware of any split set failure in any area of brecciated ground in RC3PO1. (Tr. 607).

Moellering Cross Examination

Surface holes cannot inform a miner whether the back or roof in a given area is stable. (Tr. 608). Grade sheets are a name for a report that a geologist produces when he's on any round that goes underground. A geologist would have the option of making comments on them about the mining area. (Tr. 608). Although copies are given to other management and employees, grade sheets are primarily for the purpose of determining an area contains ore that the geologist wants to have mined. (Tr. 609).

Moellering agreed that ground conditions could change from drift to drift and that was why evaluations were required. (Tr. 610). The difference in dolomite class (size) had no effect on its strength. (Tr. 611). Blasting can open seams and enlarge fractures. (Tr. 614). There could have been vugs, holes, or voids or some other condition that could have occurred in the space between the surface hole previously testified to and the fall site 140 feet away that could have affected the stability of the rock. (Tr. 615). Moellering did not participate in decisions on bolting. (Tr. 615).

It was Moellering's opinion that the percentage and class of the dolomite in a measured stone didn't have any effect on the strength. (Tr. 616).

Moellering Redirect

The cement or matrix in brecciated conditions was generally white sparry dolomite. (Tr. 616).

Moellering Recross

More elements or different types of rock could affect the strength of the matrix. (Tr. 619).

Thomas Yanske Direct Examination

Thomas Yanske, Doe Run's mine services manager, testified at hearing. (Tr. 621).[52] As mine services manager Yanske looked after the technical side of mining, assisting in production, supervising engineers, dealing with ground support. (Tr. 621). Yanske earned a Bachelor of Science in engineering in 1977 and later earned a professional engineer's license. (Tr. 622). In his early career he had been involved with the installation of roof bolts, actually installing split set bolts. (Tr. 622, 624). Later, he had been further involved with ground control issues and designing ground control systems. (Tr. 626). He had moved his offices to Fletcher Mine in 1992, working with pillar extraction and making evaluations as to what would be required to support roof and back. (Tr. 627). From 1995 to 2003, he had been involved as a mine engineer with the effect of pillar extraction on rock bolts, evaluating both resin bolts and split set conventional bolts. (Tr. 627-628). As a mine service manager since 2004, he managed three groups of employees: a surveying group which did all the surveying underground, ensuring all the maps were up to date and which also managed the bonus program for miners; a tech service group which consisted of five engineers who were extensively involved with pillar extraction; a mine planning group which looked at mining "from all operations from short-term, mid-term, to long-term planning." (Tr. 628). His tech service group coordinated with the vendor in setting up pull tests for the various types of bolts used at the mine. (Tr. 629).

Yanske was familiar with Doe Run's ground control policy that was in effect on January 21, 2015, and had participated in revising the policy in 2010 to require that the area above a person jack legging[53] needed to be bolted. (Tr. 631). The policy had also been revised after a fatality in 1998. (Tr. 632). It was provided that workplace examinations would start out 60 feet from the face. (Tr. 632). Test holes would be utilized and completed one per round. (Tr. 632). Surveyors would be required to have scaling bars and an area would be tested and scaled before work began. (Tr. 632).

Yanske was unaware of any unplanned ground falls during the time period between the institution of the new ground control policy following the 1998 fatality and the instant January 21, 2015 accident. (Tr. 634). The area between pillar 7515 and 7517 where the accident occurred was not a completed intersection. (Tr. 635). The ground control policy then in effect would not have required the entire area to be bolted. (Tr. 635).

Although MSHA had requested to see Doe Run's ground control policy prior to January 21, 2015, MSHA, to Yanske's knowledge, had not recommended any changes to the policy. (Tr. 636).

In installing split set bolts, a hole is drilled slightly smaller than the bolt itself. (Tr. 637). The bolt is hammered into place; the friction between the bolt and rock causes a radial force to the side which holds the layers of rock together. (Tr. 637). A roof bolter machine, rather than a jack leg, is now used to hammer the friction stabilizer in place. (Tr. 637-638).

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[52] *See* RX-K for full resume and Tr. 621-629.

[53] Jack legging is when a miner uses an air-operated drill by hand while drilling out the back. (Tr. 631).

The holding capacity of a split set bolt was shown by pull tests to be six to eight tons. (Tr. 638). This holding capacity was shown to be sufficient to support the ground at Doe Run. (Tr. 638). Yanske had actually met the creator of the split set—Dr. Scott—while Yanske had been attending college in 1977. (Tr. 640). He knew of no failures of split sets since his arrival at Doe Run in 1990. (Tr. 638).

When installing resin bolts, a hole is drilled and a cartridge of glue is inserted into the hole. The bolt is then inserted and spun into a two-part epoxy. (Tr. 640). They are separated in the plastic cartridges themselves. As the bolt is pushed up into the hole, it splits the cartridges and they rotate a prescribed amount of times. (Tr. 640). The bolt mixes the two parts together and epoxy glue sets up and holds the bolt into place. (Tr. 640). Resin bolts have a higher holding capacity than split set bolts but might not be used in ground that has a lot of water coming from it. (Tr. 641). Split sets cannot be used in soft ground because of the lack of friction. (Tr. 642). Split sets were appropriate ground support for brecciated conditions and, if properly installed, for shale.[54] (Tr. 642).

Yanske had travelled to the fall area after the accident and did not consider it shaley. (Tr. 643). He did not observe any shale in the area. (Tr. 643). A static load is a load that is in place. A dynamic load is a load where rock is moving. (Tr. 643). It was difficult to calculate dynamic loads and Yanske knew of no one who calculated dynamic loads on a regular basis. (Tr. 644). He also knew of no type of pull test that could measure a dynamic load. (Tr. 644).

Prior to the ground fall bolts had been in place in the fall area for two weeks, since January 1, 2015. (Tr. 645). Yanske opined one of two things happened after Hoodenpyle had begun scaling. As Hoodenpyle was reaching out onto unsupported ground with his boom to scale a piece of loose either he hit a keyblock and dislodged it which in turn allowed other rocks to fall or some force he generated in scaling caused it to go beyond—to go where it was no longer equilibrium—and that rock fell. (Tr. 645-646). In turn when it fell, it put dynamic load on those bolts in place, causing bolts to pull out. (Tr. 646). Yanske felt that the fall did not originate at the bolted ground because bolts had been in place prior to the ground fall for two weeks. (Tr. 646). When the ground fall took place, it did not go above the anchor point of the bolt. It actually separated below the anchor point which made Yanske feel the fall originated in the unsupported ground. (Tr. 646). The analogy would be similar to an underground miner taking his scaling bar, sticking it pointed end and trying to pry down a rock. As a miner slides his hands down a scaling bar it's very difficult to pry down a rock. But if the miner puts his hands at the far end of the scaling bar, six feet from the prying point, the fulcrum effect makes it a lot easier. (Tr. 646-647). The rock out in the unsupported ground acted in the same way as a scaling bar, actually pulling rock bolts out of the back. (Tr. 647).

Dynamic forces and dynamic loads cannot be anticipated. It would be "strictly speculation" to state that resin bolts would have prevented the fall. (Tr. 647). With dynamic loading and the longer the moment arm is, the more force is generated with the rock sitting out there, even though the weight in the unbolted rock would not be as much in weight as the rest.

[54] Proper installation in shale backs might require tightening the spacing to 4 feet by 4 feet, 3 feet by 3 feet, or even 2 feet by 2 feet patterns. (Tr. 642-643).

(Tr. 647). The multiplying force could cause the bolts to come out. (Tr. 648). Further, Yanske opined that a test hole in the middle of the intersection may not have revealed anything adverse. (Tr. 648). Based upon Doe Run's operating history and his knowledge of what the current ground conditions looked like in the area of the accident prior to the fall, he opined that there was no indication that the six-foot friction stabilizer bolts were inadequate. (Tr. 648).

All breccia is disrupted. Even highly brecciated ground can be supported by split set bolts as demonstrated by their use in Doe Run mines for decades. (Tr. 649-650).

In conducting a pull test, the load is continued until slippage of the bolt is detected. (Tr. 652). The slippage point indicates the bolt's maximum holding capacity. (Tr. 652).

Thomas Yanske Cross Examination

In addition to the bolters, other groups involved in production that receive bonuses at Doe Run are: drillers; roof bolters; backfill operators; mine support people; supervisors (annual bonuses). (Tr. 654). Geologists also received variable bonuses. (Tr. 654). The faster work is completed in a safe fashion[55], the more the bonus. (Tr. 654).

There is ground in the mine that cannot be safely mined due to geologic features. (Tr. 654). These areas will be bermed and flagged off. (Tr. 655). When too much water is encountered, more scaling is performed or additional bolts installed. (Tr. 655-656).

A deciding factor in determining whether to utilize split set or resin bolts may be the type of bolting machine that is available. (Tr. 656). In evaluating a roof, miners look for such features as fractures that might indicate an opening or movement, shale, color changes in the rock. (Tr. 656). Spacing patterns of bolts might be tightened to increase holding capacity in such situations as when larger beams like a brow are exposed or where a hole is encountered. (Tr. 658). Butterfly plates can also be used to prevent materials from falling. (Tr. 658).

Yanske repeated his opinion that the fall had been caused by a keyblock being dislodged during scaling or some other force that the victim induced causing it to go beyond equilibrium and fall. (Tr. 659).

Resin bolts in a tightened pattern would have more holding capacity than split set bolts. Because dynamic loads are so difficult to calculate the safety factor involved in increasing bolt patterns would be speculative in nature. (Tr. 660).

The area of ground involved in the 1998 Casteel Mine fatality was unbolted. (Tr. 662-663). If at the time of the fall Hoodenpyle's scaler had been back 15 to 20 more feet, he may have been in a protected area. (Tr. 663).[56]

[55] There are no bonuses for safety alone. (Tr. 654).

[56] *See* Tr. 663-664 for more detailed answer.

Thomas Yanske Redirect

Any part of the roof that was being scaled at the time of accident—not just a keyblock—could have been disturbed, causing a disruption in the equilibrium, setting the fall in motion. (Tr. 667-668).

Thomas Yanske Questioning by the Court

Split set bolts can be installed "a little quicker" than resin bolts. Split sets are also "a little cheaper" than resin bolts. (Tr. 670).[57]

Robert Ridings Direct Examination

Robert Ridings testified at hearing. He had been employed at Doe Run since October 2007 and was currently senior mine geologist. (Tr. 671). He had been working at Fletcher Mine as a geologist on January 21, 2015. (Tr. 672). As a geologist his primary duty was to come up with a hypothesis of the location of mine ore. (Tr. 672). Based upon data available he tested the hypothesis by managing underground drilling which took core samples. (Tr. 672). The underground percussion drill powders rock along the hole that can be assayed for data. He has a surface expiration program. (Tr. 672). He uses data from all sources to support or not support his opinion as to where ore is to be found in a certain area. (Tr. 673). He oversees the mining of the stopes of all the ore bodies that he has found. (Tr. 673). He looks for breccia, fractures, structures, anything that might serve as a conduit or have permeability for which the ore to deposit in. (Tr. 673). He goes underground for about four hours on the average of three days per week. (Tr. 673-674).

His activities include evaluating ground conditions. (Tr. 674). He looks for loose rock. (Tr. 674). Areas that have stylolite or a parting will be blasted so that loose rock could be scratched down. (Tr. 674). Any area that presents a concern is taped off and noted on his grade sheets. (Tr. 675). Nobody can enter it until it's scaled down and safe. (Tr. 675).

Breccia is the most common form of host rock at Fletcher Mine. (Tr. 675). A geologist uses grade sheets with mapping to convey to foremen and managers the exact grade of ore located underground at all the areas being mined. (Tr. 676; RX-R).[58] Any adverse condition would also be noted on the grade sheet. (Tr. 679).

During the month prior to the accident Ridings had in fact worked in the area of the fall (RC3PO northeast). (Tr. 680). He had created the Doe Run grade sheets in December 2014. (Tr. 680; RX-Q). He did not recall observing any adverse conditions, inadequate ground support, or any condition indicating a possible hazard on December 26, 2014. (Tr. 681). Nor did he observe any of such on January 5, 2015, or January 9, 2015. (Tr. 682-683). During an underground trip on January 12, 2015, he was surveying by eye and saw nothing that would cause alarm. (Tr. 684;

[57] *See* Tr. 669-670 for full answers.

[58] See Tr. 677-678 for detailed description for meaning of markings on RX-R.

RX-E). On January 16, 2015, the workings had advanced a little. He again saw nothing, including bolting or ground control, that looked dangerous. (Tr. 684).

On the day of the accident Ridings drove through the exact area where the fall took place and again saw nothing that would cause alarm. (Tr. 685). The time that he drove through was approximately 10:30 am to 1:00 pm. (Tr. 685). At the time Ridings was travelling with another geologist who was training for Fletcher and he was "kind of showing him around." (Tr. 685). There was nothing unusual about the brecciated back that he observed in the fall area. (Tr. 687). He did not notice any boulders in the back in what was to be the proposed intersection. (Tr. 685; *see also* RX-E). He actually saw the bolts that would later fall: They looked "good"; plates were flat up against the back. (Tr. 689).

He saw no evidence of a recent rock fall and heard no sounds, popping or cracking, indicating ground was moving. (Tr. 690). He saw no evidence of unusual cracks or fractures. (Tr. 690).

As a geologist he is often advised if somebody notes a possible adverse condition. (Tr. 690-691). Usually the first to notice such are roof bolters. (Tr. 691). The roof bolter Vern Roark had in the past brought possible adverse conditions to Ridings' attention but did not report anything about the fall area at issue. (Tr. 691). Nor had anyone else. (Tr. 692).

There was nothing in the month leading up to the accident date that indicated that the ground support was inadequately supporting the ground. (Tr. 692). The fall area ground was similar to the entire RC West Fork overcut and similar to areas supported by 5 foot by 5 foot patterns. (Tr. 692). He did not recall any similar situations where split sets installed in similar ground conditions had failed. (Tr. 692).

Robert Ridings Cross Examination

On cross examination Ridings agreed that he was not a bolter or driller nor had been involved in the development of any ground control or safety program at Fletcher. (Tr. 693). He further conceded that the best way to detect change in brecciated ground conditions is "continuous" testing and evaluation. (Tr. 694). Test hole results are not reported on the geologist's grading sheets. (Tr. 694). Blasting can loosen rock. Ore goes along the fractures in the rock. (Tr. 695). Fractures operate as a conduit: whatever path permeability for fluids to move through is where ore can be deposited. (Tr. 695).

Robert Ridings Redirect

As a geologist Ridings considered scaling a method of testing the stability of ground. (Tr. 698). Scalers can definitely spot loose. (Tr. 698).

Ridings carries a scaling bar with him and, if it appears safe to do so, will himself scale areas of loose. (Tr. 699). There was nothing uncommon about the fractures and cracks that he observed on January 21, 2015. (Tr. 699). He did not consider the typical cracks in brecciated ground at Fletcher mine to constitute adverse conditions. (Tr. 701).

CONTENTIONS OF THE PARTIES

The Secretary argues that the location of the Getman Mechanical Scaler identified in Citation No. 8680899 was a violation of 30 C.F.R. §57.3201 because the Mechanical Scaler was located in area that was only 25% bolted with split set bolts in a 5x5 pattern. The Secretary argues that the bolting in the area of the fall was inadequate for roof conditions and that the inadequate bolting was directly related to the failure to thoroughly evaluate and test the roof conditions. The Secretary argues that being further removed from the fall zone or under an area that was thoroughly tested, examined, and then properly bolted would have protected the scaler operator.

Doe Run argues that Citation 8680899 should be vacated because an objective analysis of all the surrounding circumstances, factors, and considerations establishes that a reasonably prudent person familiar with the mining industry and protective purposes of the standard would not have recognized the hazardous condition the standard seeks to prevent, in this case injury from falling material. Doe Run argues that mechanical scaling is the safest way to bring down loose material from roof and rib surfaces and that the mechanical scaler that Mr. Hoodenpyle operated contained many safety features, protecting the scaler operator from rock falls. Therefore, a reasonably prudent person would have believed the safety features protected the operator of the mechanical scaler. Doe Run argues that MSHA inspectors Kennedy and Van Dorn testified they have seen mechanical scalers operate in this position before and that doing so was not a violation and that such positioning was normal. Doe Run asserts there was nothing that should have put Doe Run on notice that either the ground support or ground conditions in the area were insufficient or hazardous.

The Secretary argues Doe Run failed to design, install, and maintain ground support adequate to the mine conditions. In support of Citation No. 8680900 the Secretary argues that Doe Run fails the reasonably prudent person test. The Secretary argues that the evidence shown at trial demonstrated that Doe Run failed to adequately design and install ground control measures at the Fletcher Mine and that that the measures installed were inadequate for the conditions existing in the RC3PONE heading. The Secretary argues the fatal roof fall occurred in an area where 25% of the roof was bolted as direct evidence of the inadequacy of the ground support for the mine conditions. In support of the argument, the Secretary states that previous roof falls put the mine on notice of the hazard. The Secretary argues that conditions dictated roof bolting in the area of the fall should have been done with either a tighter pattern or resin bolts. The Secretary argues a reasonably prudent person, familiar with the mining industry and the protective purpose of the standard, would have recognized the hazardous conditions that the standard seeks to prevent and would have adjusted the bolting accordingly.

Doe Run argues Citation 8680900 should be vacated as it also fails the reasonably prudent person test. Doe Run argues Citation No. 8680900 should be vacated because the evidence fails to establish that ground support in the RC3PONE stope was not properly designed, installed and maintained based on known ground conditions prior to the ground fall and Doe Run's mining experience in similar ground conditions as required by C30 C.F.R. §57.3360. Doe Run also argues that prior to the date of the accident the Fletcher Mine had never experienced any unplanned ground falls where split set roof bolts failed in similar ground conditions. Doe Run argues the geology in the area of the fall does not require the use of resin bolts or a tighter

bolt pattern. Doe Run relies on the testimony of several witnesses to assert that split set roof bolts adequately and safely support similar geologic conditions and had done so for decades at Doe Run mines to include the Fletcher Mine.

The Secretary argues that Citation Nos. 8680899 and 8680900 were properly designated "Significant and Substantial" per Section 104(d) (1) of the Mine Act. In support of the argument, the Secretary asserts that the violations associated with the Citations were of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard. The Secretary argues that both Citations satisfy the four step framework of the *Mathies* test: (1) the violation(s) were established as a violation of a mandatory safety standard; (2) the likelihood of the occurrence of the hazard against which a mandatory safety standard is directed; (3) the gravity of the violation; and (4) whether violation of the hazard would be reasonably likely to result in injury.

Doe Run further argues that Citation Nos. 8680899 and 8680900 were improperly designated as "Significant and Substantial." In support of this argument Doe Run argues that the Secretary failed to prove violations of either 30 C.F.R. §57.3360 or 30 C.F.R. §57.3201. Doe Run argues that if the Secretary is unable to prove a violation of a mandatory safety standard the Secretary fails the first step of the revised *Mathies* test rendering the other three steps unnecessary. Doe Run argues however, that, even if the Court determines the Secretary is able to meet its burden in regards to step one of the test, element two of the test is unmet because the likelihood of this occurrence was also unlikely for the same reasons.

ANALYSIS

Issue: Given that the Mine Act is a strict liability statute and given that a miner was killed due to the fall of roof material on his scaler due to ground support failure, were there *per se* violations of §§ 57.3201 and 57.3360?

Strict Liability

In their post-hearing briefs neither party devoted much of their briefs as to the applicability of strict liability to the present controversy.[59] The Undersigned nonetheless is convinced that this doctrine lies at the very heart of the matter, playing a decisive role in determining the fact of violation in cases of accidental roof falls causing death.

The Federal Mine Act has long been understood to be an act based upon strict liability. The Commission and Circuit Courts have long held that "an operator may be liable without fault." *Sewell Coal Co. v. FMSHRC*, 686F.2d 1066, 1071 (4th Cir. 1982). "Because the Mine Act is a strict liability statute, any violation of the Act or the mandatory safety and health standards adopted thereto…would be attributable to the mine operator regardless of whether the mine operator is at fault." 27 FMSHRC 721, 731 (2005). In *Spartan Mining Co.*, 30FMSHRC 699,

[59] This is so despite this Court's explicit request to do so. (*see, inter alia,* Hearing transcript at pp. 708-711, Secretary's original brief at p. 20, and Respondent's brief at pp. 35-37).

706 (Aug. 2008) the Commission rejected compliance with internal policy as a defense *because of the Mine Act's strict liability*.

Indeed, the legislative history of the Mine Act confirms the congressional intent that there should be "liability for violations of the standards against the operator without regard to fault." *Conf. Rep.* No. 761, 91st Cong., 1st Sess. 71, *reprinted* 1969 *U.S. Code Cong. & Ad. News* 2503, 2578, 2586.

The history of American mining horrifically documents why there was such a desperate need for the legislative imposition of strict liability. For generations mine operators had denied responsibility for miners' injuries and deaths, hiding behind such hoary legal defenses as assumption of the risk. All too often operators evaded responsibility by concealing or destroying evidence of accident causation, the explanation of which was their own avariciousness, recklessness, and gross indifference to miners' health and safety.[60]

The long history of American mining shows how with the aiding and abetting company lawyers, constabulary, and biased judicial donees, mine operators routinely evaded liability for even the most flagrant misconduct.[61] American mine workers' ability to obtain even minimal safety and health protection and minimal measures of justice were regularly blocked by an enabling political class, which, at Big Mining bidding, servilely refused to pass any meaningful regulatory reform.[62]

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[60] Donald Blankenship's malevolent shenanigans at Upper Big Branch is but a recent example of such.

[61] This observation should not be construed to imply that present Respondent has in any way acted reprehensibly.

[62] In 1968 President Nixon eloquently described the necessity for new Federal mine safety legislation:

> The workers in the coal mining industry and their families have too long endured the constant threat and often sudden reality of disaster, disease, and death. This great industry has strengthened our Nation with raw material of power. But it has also frequently saddened out Nation with news of crippled men, grieving widows, and fatherless children.
>
> Death in the mines can be as sudden as an explosion or a collapse of a roof and ribs, or it comes insidiously from pneumoconiosis or black lung disease. When a miner leaves his home for work, he and his family must live with the unspoken but always present fear that before the working day is over, he may be crushed or burned to death or suffocated. This acceptance of the possibility of death in the mines has become almost as much a part of the job as the tools and the tunnels.
>
> The time has come to replace this fatalism with hope by substituting action for words. Catastrophes in the coal mines are not inevitable. They can be prevented, and they must be prevented.

Special Message to the Cong. on Coal Mine Safety, Pub. Papers no. 96 at 177-78 (Mar. 3, 1969).

For score after score of years, mining state politicians would Pharisaically invoke the inscrutable nature of God's will to explain away avoidable accidents. A recent mining documentary, *Blood on the Mountain*, cites a particularly egregious example of such exculpatory theologic mumbo-jumbo. Acting to protect Pittston Coal Company, which operated the infamous Buffalo Creek Dam, West Virginia governor Arch Moore tried to suppress his own investigatory committee report regarding the dam's lethal design and construction. Lamenting the continual catastrophes that had plagued his state's mining industry, Moore pietistically blubbered: "why do all bad things have to happen to West Virginia? These are *Acts of God* (emphasis added) and where he picks to deliver his message I don't know."[63]

This history, and Congress' explicit intent, show that without the imposition of strict liability—the nation's miners are put at risk.[64]

In arguing that a reasonably prudent person test should be applied in determining the fact of violation, both parties appear to rely upon past Commission holdings in *Canon Coal Co.*, 9 FMSHRC 667 (Apr. 1987) and *Harlan Cumberland Coal*, 20 FMSHRC 1275 (Dec. 1988). (*Respondent's Post-Hearing Brief*, 42; *Secretary's Post-Hearing Brief*, 24). However, a more recent Commission decision, *Jim Walter*, 37 FMSHRC 493 (Mar. 2015) raises a substantial question as to the continuing viability of these precedents. This is particularly so where, as here, there is an actual accidental rock fall causing death.

In the underlying ALJ decision in *Jim Walter*, 34 FMSHRC 1386 (June 2012)(ALJ), the ALJ was confronted with a factual scenario similar to the instant controversy. The victim had been killed by a large piece of rock that had fallen upon him. All or a portion of the fall area had been bolted and supported. There were no eyewitnesses to the accident and the victim's body had only been discovered subsequently. Relying upon *Canon* and *Harlan*, Judge Weisberger found that the Secretary had failed to establish the existence of objective signs that existed prior to the roof fall that would have alerted a reasonably prudent person to install additional roof support beyond which had been actually provided at the time of accident. 34 FMSHRC at 1393. Accordingly; Judge Weisberger concluded that the Secretary had failed to establish by *the preponderance of the evidence* that § 77.202(a) had been violated. 34 FMSHRC at 1393-1394.

On appeal the Secretary argued that the ALJ had erred in applying a reasonably prudent person test. 34 FMSHRC at 494. The Secretary argued that operators are strictly liable for Mine Act violations and that, as a result, if a roof fails the roof was (as a matter of law) not supported or otherwise controlled to protect persons from hazards related to roof falls. (37 FMSHRC at

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[63] Moore was later convicted of widespread corruption and sentenced to jail in 1990.

[64] This is especially so when roof fall accidents are at issue. Such accidents have been and remain the leading cause of miner fatality. *See*, *inter alia*, July 6, 2017 Department of Labor news release documenting that roof falls since 2013 had led to the deaths of five continuous mining machine operators and the injury of 83 other operators; September 8, 2017 "Fatalgram" reporting death of 62 year old section foreman killed in West Virginia mine by a 3 foot by 2 foot rock fall between roof bolts.

494). Thus, the Secretary contended that, under the plain meaning of § 75.202(a)[65], a roof fall demonstrated a *per se* violation of the standard.[66] (37 FMSHRC at 495).

Given "the stark and tragic facts" presented, the Commission indicated that it was not necessary to decide whether to adopt one or the other test in *all* roof fall cases involving allegations of unsupported roof. 37 FMSHRC at 495. However, the majority opinion went on to state the following:

> This leaves the issue of whether the operator failed to support the roof "to protect persons from hazards related to falls." When Inspector Wilcox arrived on the scene, Jerry McKinney was lying fatally injured beneath a large roof fall. Accordingly, the only conclusion to be reached is that the roof was not supported to protect the miner from a roof fall. As previously mentioned, *the Mine Act is a strict liability statute, and this fatality resulting from a fall of roof material where persons work or travel unquestionably demonstrates a violation of section 75.202(a). The roof fall that pinned McKinney under a piece of rock, resulting in his death, amply demonstrates that the roof was not supported in a manner to protect him from hazards related to falls.*

37 FMSHRC at 496 (emphasis added).

Further, in his concurring decision, Commissioner Cohen specifically addressed the majority's refusal to follow the *Canon* precedent, concluding that "the disposition in this proceeding effectively overrules the Commission's decision in *Canon Coal*." Id. at 498 (Cohen Concurring).[67] Commissioner Cohen noted that the prudent person analysis in *Canon Coal* did not reflect an appropriate interpretation of the requirements of the safety standard to protect miners and the strict liability of the Mine Act. 37 FMSHRC at 498. "A roof that falls and kills a miner was obviously not supported 'to protect persons from hazards related to falls of the roof.'" *Id*.

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[65] § 75.202(a) provides, in pertinent part, that "the roof, face and ribs of areas where persons work or travel shall be supported or otherwise controlled to protect persons from hazards related to falls of the roof…"

[66] In the absence of a roof fall the Secretary would retain the reasonably prudent person test to determine the cited standard had been violated.

[67] The majority in footnote 7 of its opinion stated as follows:

> We recognize that the decision in *Canon Coal Co.*, 9 FMSHRC 667 (Apr. 1987), was reached in a factual context similar to that in the present case. However, in light of the determination set forth immediately above, we decline to follow the *Canon* decision.

37 FMSHRC at 497, note 7.

The "stark and tragic facts" of this miner's death are, if anything, more compelling than in *Jim Walter*. The roof fall that crushed John Hoodenpyle at Fletcher Mine was far more massive than the rock fall that pinned and killed Jerry McKinney at No. 7 Mine.[68] It was in fact so massive that it completely squashed the cab of Hoodenpyle's scaler, despite the cab's reinforced canopy. The sound of the roof fall was so thunderous that it could be heard in other parts of the mine. (*see* Tr. 514). The roof fall's force was so tremendous that even the bolted ground above the scaler cab collapsed.

The ALJ finds that the "stark and tragic" facts in this case require this Court to follow the Commission's rationale in *Jim Walter* rejecting *Canon Coal's* and *Harlan Cumberland's* prudent person test in the *limited circumstances where there is an accidental roof fall causing death.* In such limited circumstances, the fact of the fatal accident itself, by reason of strict liability, demonstrates a *per se* violation of the safety standard.

In reaching this conclusion the ALJ notes that the mandatory safety standards at issue are essentially identical to § 75.202(a) in that the plain meaning of both standards is there should be adequate ground control to protect miners from falling materials.

The operative language in § 53.3201 is that "scaling shall be performed from a location which will not expose persons to injury from falling material…" "The stark and tragic facts" of this case clearly establish that Mr. Hoodenpyle, while performing his scaling duties, was not in a "location that prevented his exposure to injury" and indeed death. Likewise, § 57.3360 provides in pertinent part that the ground "support system be designed, installed, and maintained to control ground in places where people work." The facts establishing a massive unplanned and uncontrolled roof fall in the area where Hoodenpyle worked and others travelled again demonstrate a clear *per se* violation of the mandatory safety standard.

In applying a strict liability test to the within controversy, this Court intentionally declines to address whether the fact of violation as to either standard could be established by utilizing a prudent miner test. The questions as to whether there were observable signs prior to the accident, whether there were similar unplanned ground falls, whether there were sufficient number, type and patterns of bolts used, and whether the accident was caused by geologic, static, and/or dynamic forces have been all zealously argued by the parties at hearing and in their respective briefs. Suffice it to say that, given the plethora of questions raised and unresolved, a prudent person test would have made the Secretary's case as to fact of violation much more problematic.

But of course this is exactly the point. When there is a death of a miner in a catastrophic roof fall, a mine operator cannot and should not escape liability on the fatalistic bases of "just bad luck" or "Act of God" or "accidents happen" or for that matter good faith conduct and

[68] As noted within, the roof fall at Fletcher Mine measured 55 feet by 20 feet by 6 feet. Tr. 73. The rock fall in *Jim Walter* was 83 inches by 43 inches by 7 inches. 34 FMSHRC at 1391.

unforseeability. A mine operator, in such circumstances, must be held liable under the Mine Act's strict liability.[69]

Accordingly, this Court finds that there were *per se* violations of §§ 57.3201 and 57.3360.

Issue: Based upon the particular facts surrounding the violations of §§ 57.3201 and 57.3360 did there exist a reasonable likelihood of the occurrence of the hazard against which the mandatory safety standards were directed?

The test for whether a violation was Significant and Substantial has been modified recently by *MSHA v. Newtown Energy, Inc.*, 38 FMSHRC 2033, 2036-2040 (Aug., 2016).

> Under the Commission's newly formulated *Newtown* test, the four steps of the S&S analysis require determinations of whether:
> (1) there has been a violation of a mandatory safety standard;
> (2) based upon the particular facts surrounding the violation, there exists a reasonable likelihood of the occurrence of the hazard against which the mandatory safety standard is directed;
> (3) based upon the particular facts surrounding the violation, the occurrence of that hazard would be reasonably likely to result in an injury; and
> (4) any resultant injury would be reasonably likely to be reasonably serious.

MSHA v. ICG Illinois, LLC, 38 FMSHRC 2473, 2483 (Oct. 2016) (Althen Dissenting).

It has already been found, *supra*, that there was a violation of a mandatory safety standard. The distinct safety hazards against which §§ 57.3201 and 57.3360 are directed are essentially similar: the dangers that materials might fall upon miners scaling, working, or travelling in areas with insufficient ground support.

However, after carefully reviewing the total record, the ALJ is not persuaded that there were compelling indicia surrounding the instant violations that would have suggested the reasonable likelihood of material falling upon Hoodenpyle while he performed scaling in the RC3PO northeast section.[70]

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[69] To paraphrase Sam Spade's lines to Brigid O'Shaughnessy in *The Maltese Falcon*: "When a miner is killed, it's bad business to let the operator get away with it…bad all around, bad for every miner everywhere"

[70] At hearing this Court requested that the parties address the issue of whether the two ground control violations met *Newton's* revised two-part *Mathies* Step 2 test. In his brief, Respondent's counsel primarily focused upon his contentions that step one of *Mathies* was not met in that there were no actual violations of either safety standard. However, Respondent did argue, in the alternative, that for all the reasons indicating there was no violation, step two was not met because the "likelihood of occurrence was unlikely." (*see also* Footnote 4 of Respondent's brief, p. 36).

Geologic Features of Viburnum Trend, Fletcher Mine and RC3PO Northeast Stope

This Court accepts the Secretary's general contention that when dramatic changes in rock are encountered there should be closer examination and testing. However, the Secretary failed to carry his burden of showing that Fletcher Mine in general, or the RC3PO northeast stope in particular, had or displayed geologic features that would have established the existence of a reasonable likelihood of a rock fall that would have injured Hoodenpyle in his scaler cab.

At hearing Vadnal testified that he had witnessed dramatic changes in the fall area which should have alerted miners to a potential roof fall hazard. (Tr. 165-168). However, the Secretary's own witness, MSHA Inspector Jeremy Kennedy contradicted such testimony, testifying that he had travelled through the area shortly *before* the accident and had seen nothing to alert him that a fall was imminent.[71]

This Court found Vadnal to be an honest and forthright individual. However, Vadnal had limited experience in dealing with brecciated ground and lead mining in general. He had no firsthand experience with Doe Run operations or Fletcher Mine ground conditions *prior* to the accident. His visual observations were limited to the time period *subsequent* to the accident. He lacked an actual degree in engineering. (Tr. 209-211). Further calling Vadnal's testimony into question were various Respondent witnesses who stated they had seen no outward signs of possible hazardous roof conditions either prior to or after the accident. (*See e.g* Tr. 447.) All of these factors diminished the probative weight that this Court accorded Vadnal's testimony.

This Court also observes that the photographic evidence offered by the Secretary to show external changes and disruptions of rock indicating the potential likelihood for a roof fall was problematic. The Respondent's witnesses all denied that the Secretary's pictures revealed obvious stigmata of dramatic change or signs indicating hazardous rock conditions. This Court could not discern any distinctly different geologic features in the scenes depicted.

Contrary to the Secretary's assertions otherwise, the mine geologist, George Moellering testified that the geological conditions in the RC3PO northeast stope were essentially similar to other parts of the Fletcher Mine as well as other parts of the Viburnum Trend as a whole. (Tr. 585). There was nothing unusual about mining in brecciated ground. Such mining had been going on since the late 1960s at Fletcher Mine. (Tr. 595, 607).

The ALJ recognizes that Respondent's witnesses may have offered some self-serving testimony in their assertions that there were no outward signs indicating the existence of hazardous roof conditions. Nonetheless, this Court was not persuaded by the Secretary that, at

[71] As trier of fact this Court has the duty to decide which evidence presented by either party is more credible or more persuasive. However, the Secretary does bear the burden of proof. When it presents testimony that is inherently contradictory, the Secretary places the Court in a position that might involve improper speculation. *See eg. Commonwealth v. Farquharson*, 467 Pa. 50, 354 A.2d 545 (1976), wherein the Pennsylvania Supreme Court held that where the Commonwealth presented evidence that was so contradictory in nature that any verdict based thereon would be pure conjecture, a jury would not be permitted to return such a verdict.

the time of accident, there were any geologic features of the Viburnum Trend, of Fletcher Mine as a whole, or rock changes in the RC3PO northeast fall area in particular, which would have indicated that there existed the reasonable likelihood of roof material falling upon Hoodenpyle's scaler cab.

Position of Hoodenpyle and the Getman S330 Mechanical Scaler at Time of Accident

At hearing and in his brief(s), Respondent essentially contends that the "prospective danger" (hazard) of falling materials from inadequately supported ground injuring a miner did not have an increased likelihood because of the position of Hoodenpyle inside his Getman scaler at the specific site of the accident.

None of the facts surrounding the violations associated with the position of Hoodenpyle and his scaler would have created the reasonable likelihood of falling material injuring the miner. Hoodenpyle had been positioned in his cab 60 feet from the face and his cab was under bolted ground—a place that historical practice had shown to be protected and safe. (Tr. 111.)

The Getman S330 mechanical scaler which Hoodenpyle operated had many safety features, including a stable chassis, telescopic boom, and ROPS/FOPS operator's compartment, all of which would have decreased the reasonable likelihood of an injury-causing rock fall. Both the locations of the scaler in general and scaler cab in particular would not in any significant way increase the likelihood of the occurrence of the hazards against which the mandatory safety standards were directed. No citations had ever been issued in the past to a miner for positioning his scaler in such a manner as Hoodenpyle nor had there been any instances of a roof fall crushing a scaler cab.

Thus, in considering *Newton's* "particular facts surrounding the violation" component of *Mathies* Step 2, this Court found nothing about the positioning of the scaler 60 feet from the face or the locating of the scaler cab beneath the last two rows of bolted ground or the reinforced features of the canopy/cab which would have contributed to the reasonable likelihood of an injurious roof fall onto Hoodenpyle. Furthermore, I find the negligence in both of these citations to be Low.[72]

Type of Bolts and Patterns of Bolt

The Secretary essentially contends that if resin bolts had been utilized in place of split set bolts and if a tighter bolt pattern had been utilized, the roof in RC3PO northeast may not have collapsed. (*see inter alia* Secretary's brief at 21). Given the total record, this Court finds said

[72] It should be noted that the Secretary's argument for increased negligence was lacking. Van Dorn's rationale for such is as follows—"the operator, the foreman of the mine at that time, wasn't in the area. He didn't know that this was going to happen. And I just put him at moderate because high says they knew or should have known." (Tr. 325).

hypothesis to be transcendentally speculative.[73] However, in arguing such the Secretary is also in essence contending that the type of bolts used and pattern of bolting utilized in the fall area were additional particular facts surrounding the violations that created a reasonable likelihood of occurrence of falling materials. This contention is also not supported by the total record.

This Court accepts the arguments of Respondent and credits Respondent's witness testimony that split set bolts in typical 5 foot by 5 foot patterns had been successfully and safely used throughout Doe Run and at Fletcher Mine and did not in any way constitute inadequate ground control support or techniques.

This of course is not to say that Respondent's witnesses were altogether forthcoming and completely believable in their assertions about the interchangeability of split sets and resin bolts at Doe Run. Beside the availability of appropriate bolting machines, this Court suspects that the usage of split sets was also motivated by cost and time factors and the lack of bolters possessing sufficient expertise to efficiently install resin bolts.

This Court also agrees with the Secretary's contentions that the use of bonuses to reward productivity may create the potential for unsafe work performance and resulting unsafe conditions. However, this Court found nothing in the evidence presented that established that Fletcher Mine personnel had performed their duties in an unduly speedy manner in the RC3PO northeast stope so as to endanger Mr. Hoodenpyle.

Prior Roof Falls

Although presenting some hearsay evidence about prior roof falls, the Secretary was unable to locate and examine any actual fall site so as to compare the area and circumstances of such with the accident site at issue. Inspector Kennedy testified that he was unaware of any falls prior to January 2015, which involved the failure of split sets in brecciated ground. (Tr. 91). Vadnal similarly found no reportable ground falls at Fletcher Mine in the five years prior to the instant fall. (Tr. 255). Van Dorn confirmed this lack of prior roof falls, and argued that such should be considered a mitigating factor. (Tr. 395).

There was testimony concerning a roof fall in the area in 1998 that led to a fatality. (Tr. 313-314, 632). The Secretary carries the burden of proof, and this Court believes that MSHA investigators were somewhat derelict in not pursuing a more robust investigation into this area. The operator revised its procedures after the 1998 fall, including providing that workplace examinations would start out 60 feet from the face, using test holes, and having surveyors scaling the area before work began. (Tr. 632). However, there is no indication that MSHA inspectors focused on investigating the area in any additional manner.

The parties' explanations for the actual force behind the ground fall that killed Mr. Hoodenpyle ranged from the simplistic—gravity—to the speculative—dynamic load fulcrum

[73] This Court does however adopt that as a general premise of ground support control, the greater the number of resin bolts used and the tighter the spacing, the lesser the likelihood of a roof fall.

effect. Exact causation need not be proved by the Secretary. However, the etiological mystery at the heart of this accident impinges upon the issue of whether the Secretary has shown sufficient particular facts surrounding the violations which indicated the existence of a reasonable likelihood of occurrence of a roof fall.

Other Evidence

It is also noted that private counsel for the estate of deceased was present at hearing. In considering the particular facts surrounding the violations the ALJ noted no evidence adduced that the specific bolts and scaler involved in the accident had a design or manufacturing defect which would have contributed to the likelihood of a hazardous ground fall. The ALJ does note however that if the scaler boom or arm in question had been 15-20 feet longer Hoodenpyle's death may have been avoided.

In view of the foregoing the Secretary has failed to carry its burden of proving the second prong of *Mathies* as set forth by the Commission in *Newton* and consequently neither of the within violations are found to be S&S in nature.

Issue: Did the Secretary's Amendment of Citation No. 8680902 Prejudice Respondent?

On the day before hearing, on May 22, 2017, the Secretary filed a Motion to Amend Citation No. 8680902 from a violation of 30 C.F.R. §48.7 to a violation of 30 C.F.R. §48.9. The original cited training standard requires:

> Miners assigned to new work tasks as mobile equipment operators, drilling machine operators, haulage and conveyor systems operators, roof and ground control machine operators, and those in blasting operations shall not perform new work tasks in these categories until training prescribed in this paragraph and paragraph (b) of this section has been completed. This training shall not be required for miners who have been trained and who have demonstrated safe operating procedures for such new work tasks within 12 months preceding assignment. This training shall also not be required for miners who have performed the new work tasks and who have demonstrated safe operating procedures for such new work tasks within 12 months preceding assignment.

30 C.F.R. §48.7.

The amended standard requires:

> Upon a miner's completion of each MSHA approved training program, the operator shall record and certify on MSHA Form 5000-23 that the miner has received the specified training. A copy of the training certificate shall be given to the miner at the completion of the training. The training certificates for each miner shall be available at the mine site for inspection by MSHA and for examination by the miners, the miner's representative, and State inspection

agencies. When a miner leaves the operator's employ, the miner shall be entitled to a copy of his training certificates.

30 C.F.R. §48.9.

The Secretary argues that its amendment to Citation No. 8680902 did not prejudice Doe Run because the facts and circumstances that support the violation are identical under either standard, and that no new defense or additional witnesses were required. It further argues that Doe Run was permitted to cross examine Inspector Van Dorn at the hearing on any issue related to the violation. The Secretary argues that its amendment to the Citation on the eve of trial was not filed in bad faith or for the purpose of delay.

The Respondent argues that there was no excuse for the Secretary's late modification of the Citation, and that it will suffer recognizable prejudice as a result of the proposed modification. Specifically, Respondent argues that its "preparation of witnesses and documents would have been considerably different if the undersigned would have been informed of the modification in advance of trial," and provides specific examples of such. *Resp. Post-Hearing Brief*, 64.

The Commission has held that a trial court judge "possesses considerable discretion in resolving motions seeking leave to amend pleadings." *Cyprus Empire*, 12 FMSHRC 911, 916 (May, 1990). Such amendments are to be "liberally granted," unless the moving party has acted in bad faith or for purposes of delay, or where the other party is prejudiced in preparing its defenses. *Wyoming Fuel Company.* 14 FMSHRC 1282, 1289-90 (August, 1992); *Brannon v. Panther Mining.* LLC, 31 FMSHRC 1277, 1279 (2009) (ALJ).

At hearing, the parties presented brief arguments for their respective positions regarding the amendment. This Court provisionally granted the motion to amend in order to accept evidence relating to the Citation. (Tr. 13). However, the Court made the provisional nature of the grant explicit, and invited further briefing into the issue, stating, "So that although I'm granting the motion to amend, I may ultimately find there is prejudice." *Id.* Upon review of both parties' briefs and arguments, this Court finds that the Secretary unduly delayed its amendment and that as a result the Respondent suffered prejudice.

In the instant matter, Inspector Van Dorn stated in depositions on October 12, 2016, that the Citation was issued under the wrong standard. *Resp. Post-Hearing Brief*, Ex-1. Furthermore, in preparation for the hearing, the parties discussed the Citation, and the Secretary "explicitly indicated to the [Respondent] that MSHA was electing to take the original allegations (i.e. that no training was conducted) to trial." *Resp. Post-Hearing Brief*, 64. Despite knowing that its inspector believed the Citation was issued under the wrong standard over 7 months prior to the hearing, the Secretary waited until the day before hearing to file its motion (and for the day of hearing to present it to the Court). The only excuse that the Secretary has provided for its decision to wait until hearing to amend the Citation is that the case had been passed along through several solicitors. (Tr. 11-12).

The Respondent has stated that its preparation for trial was based on the Secretary's repeated assurances that the Citation would not be amended. Furthermore, the Respondent states that as a result of the late modification,

> Doe Run was prevented from gathering and presenting evidence of MSHA Form 5000-23s documenting new miner training, annual refresher training and task training where workplace examinations had been trained on prior to the approval of the October 2014 training plan. Such evidence is highly probative to the issue of whether Doe Run was in violation of 30 C.F.R. §48.9 under the Secretary's interpretation that it be applied retroactively.

Resp. Post-Hearing Brief, 64. This Court is in substantial agreement with the Respondent that the Secretary's delay in amending the Citation was unreasonable, and that the request to amend on the afternoon before hearing prejudiced the Respondent. Therefore, Citation No. 8680902 is Vacated.

PENALTIES

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 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 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 has proposed penalties of $5,503.00 for Citation No. 8680899, $18,271.00 for Citation No. 8680900, and $745.00 for Citation No. 8680902. The Secretary has submitted evidence that the operator has a significant history of previous violations, and that it was a large operator. Furthermore, the assessed penalties would not affect the operator's ability to continue in business. Citation No. 8680899 was originally designated as "Moderate" negligence, and Citation No. 8680900 was originally designated as "High" negligence. Both citations were designated as "Low" negligence and Non-S&S, *supra*. The gravity of the citations was properly designated as "Fatal" and "Occurred," as a miner died as the result of the violations. The Citations were modified 13 and 14 times, respectively, over eight months, which illustrated a limited showing of good faith attempts at compliance. Accordingly, the penalty amount for

Citation No. 8680899 is modified to $3,100.00, the penalty amount for Citation No. 8680900 is modified to $10,300.00, and Citation No. 8680902 is Vacated.

ORDER

The Respondent, Doe Run Company, is **ORDERED** to pay the Secretary of Labor the sum of $13,400.00 within 30 days of this order. [74]

/s/ John Kent Lewis
John Kent Lewis
Administrative Law Judge

Distribution:

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[74] Payment should be sent to: MINE SAFETY AND HEALTH ADMINISTRATION, U.S. DEPARTMENT OF LABOR, PAYMENT OFFICE, P. O. BOX 790390, ST. LOUIS, MO 63179-0390

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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July 23, 2018

CUMBERLAND CONTURA, LLC, Contestant, v. SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent.	CONTEST PROCEEDING Docket No. PENN 2018-50-R Order No. 9078215; 09/28/2017 Mine ID: 36-05018 Mine: Cumberland Mine

DECISION AND ORDER

Appearances: R. Henry Moore, Esq., Jackson Kelly PLLC, Pittsburgh, Pennsylvania, for Contestant.

Jordana L. Greenwald, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for Respondent.

Before: Judge Lewis

I. STATEMENT OF THE CASE

This case arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et. seq. (2006) ("Mine Act" or "Act"). At issue is an imminent danger order issued under section 104(a) of the Act. On January 11, 2018, a hearing was held in Pittsburgh, PA. The parties presented testimony and documentary evidence and filed post-hearing briefs.

II. JOINT STIPULATIONS[1]

The parties have stipulated to the following facts:

1. Cumberland is an "operator" as defined in § 3(d) of the Federal Mine Safety and Health Act of 1977, as amended (hereinafter "the Mine Act"), 30 U.S.C. §803(d), at the mine at which the subject Order in this proceeding was issued.

[1] The Joint Stipulations were submitted at hearing as Joint 1, which will hereinafter be referred to as JX-1. The Secretary's exhibits will be referred to as GX followed by its alphabetical letter and Contestant's exhibits will be referred to as CX followed by its number.

2. Operations of Cumberland mine are subject to the jurisdiction of the Mine Act.

3. This proceeding is subject to the jurisdiction of the Federal Mine Safety and Health Review Commission and its designated Administrative Law Judge pursuant to Sections 105 and 113 of the Mine Act.

4. Andrew W. Gallagher, who is a Health Specialist for MSHA and whose signature appears in Block 22 of the Order at issue in this proceeding, was acting in an official capacity and as an authorized representative of the Secretary of Labor when the subject Order was issued.

5. A true copy of the Order at issue in this proceeding was served on Cumberland as required by the Act.

6. Cumberland Mine is owned and operated by Cumberland Contura, LLC.

III. SUMMARY OF TESTIMONY

Anthony Gallagher

Anthony Gallagher had been working for MSHA since 2013, first as an inspector trainee E0-1 inspector, and then for the last two years as a health specialist. Tr. 20-21[2]. His job duties included "running dust or running noise" on coal mine sections. Tr. 21. Prior to coming to MSHA, he had worked as a coal miner for 6 years, possessing a miner's certification.[3] Tr. 22.

On September 28, 2017, Gallagher issued a dust citation and imminent danger order to Cumberland Mine. Tr. 22. He had traveled to Cumberland on E0-1 inspections in the past. Tr. 23. While coming up 81 East Mains Track, going into the 68 headgate area, he observed an off-track motor and some cap lamps. Tr. 24-26. After going with Contestant's employees to find blocking and cribbing materials, Gallagher returned on a mantrip with Bob Dalnoky (the mine's senior safety representative). Tr. 26-27, 137. Contestant's employees started placing materials under the motor "to start jacking it up and slewing it over." Tr. 28. Gallagher then saw the cap lamp of Will Christopher coming through the "least clearing side of the motor" as the motor was being lifted off the ground with a jack walker.[4] Tr. 28-30. The jack walker was attached to the motor. Tr. 31.

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[2] Reference to the hearing transcript will be referred to as Tr., followed by the page number(s).

[3] Gallagher did not have any foreman's or miner's papers. Tr. 74. He had become an authorized representative in the spring of 2015. Tr. 74-75. When he had worked at Rosebud Mining, the transportation utilized was rubber-tired vehicles. Tr. 75. His past experience with jacking up dollies involved free-standing jacks that were positioned under the dollies so that they could be slewed over to be put back on the rail. Tr. 75.

[4] A jack walker is essentially a hydraulic jack attached to an I-beam that will push down on the mine floor and move the motor. Tr.30.

There was "a lot" of wind, making it difficult to hear conversation without the raising of voices. Tr. 31. Gallagher flagged both Christopher and an individual in the kitchen operator's compartment of the 20-ton motor to stop everything, and ordered that the diesel motor be shut down. Tr. 32. Gallagher did so because he "was scared" for Christopher's life. Tr. 32. In his experience, when blunt pieces of steel[5] were being put together, they sometimes "unexpectedly and very surprisingly" move in an unforeseen direction. Tr. 32.

Gallagher was approximately five or six feet from the diesel motor when Christopher walked over. Tr. 33. *See also* GX A. The derailed motor was in the crosscut area. Tr. 35. There was approximately 36" of space between the motor and rib when Christopher walked through. Tr. 36. On the other side of the motor there was approximately 6-7 feet of space to the closest rib. Tr. 37.

After stopping all progress, Gallagher pulled the two motor men, Christopher and Dalnoky, to the outby end of the motor. Tr.38. He informed them that it was extremely unsafe for somebody to walk through a pinch point while the motor was being lifted or re-railed. Tr. 38. Gallagher also opined that there were "too many bosses," that the re-railing was unorganized, and that there should have been a plan prior to attempting to re-rail a piece of equipment. Tr. 38.

Respondent's employees went back to work cribbing up the motor to slew it over, using the jack walker. Tr. 38-39. As company representatives, including (Jeff) Everett, were walking up to Gallagher's right hand side, Gallagher heard a "big bang" when the jack walker had "unexpectedly slipped or grabbed hold of something and slammed." Tr. 39.

Gallagher explained to Everett that it was unsafe to have so many people around, "barking orders," while a piece of equipment was being moved. Tr. 39. At this point Gallagher informed Dalnoky that he was issuing a 107(a) imminent danger order for Will Christopher having walked through the pinch point between the motor and the rib. Tr. 40.

Dalnoky disagreed with Gallagher's determination, asserting that re-railing equipment was within Contestant's expertise, and that it was not an unsafe act.[6] Tr. 40.

Gallagher estimated that the time between when he first observed Christopher walk by the motor and his issuance of a 107(a) imminent danger order was "under three minutes." Tr. 41. Christopher had reported that he did not know that the motor was going to be raised when he had walked through. Tr. 42. Further, the individual in the operator's compartment had not known that Christopher was going to walk past the motor. Tr. 42; *See also* Tr. 50.

[5] The "blunt pieces of steel" which Gallagher was referring to were the track, the jack walker, the frame of the 20-ton diesel motor, the undercarriage, everything that was involved in the situation. Tr.33.

[6] Gallagher noted that Dalnoky was "pretty verbal" in his disagreement. Tr. 40.

Gallagher had also spoken with the outby mechanic who reported that a pair of jack walkers had broken down the day before in the same intersection, approximately 20 feet from where the motor was sitting. Tr. 43.

Gallagher recorded his notes prior to going underground, while underground, and subsequently on the surface. Tr. 45; *See also* GX B. He had made a blunt drawing of the motor and track according to his observations on the day of the incident. Tr. 47; GX B, p.7. Gallagher had not specifically mentioned that there had been a bang in his notes. He did not think that the bang had anything to do with the imminent danger order. Tr. 53.

On the way to terminate the rock dust citation Gallagher had a "man to man conversation," with Bob Dalnoky, involving some, "pretty aggressive yelling," in the intersection of the occurrence, ending with apologies and a handshake. Tr. 53. Dalnoky further advised Gallagher that he would lose his job if an imminent danger order were to be issued. Tr. 53. However, this conversation was not mentioned in Gallagher's notes. Tr. 57.

On the elevator ride to the surface Gallagher has spoken with Christopher. Christopher had stated that he did not know that they were going to raise a piece of equipment when he passed the motor. Tr. 56.

Gallagher also spoke with Frank Foster, a member of Contestant's Safety Department, who questioned whether there was any other way to deal with the controversy rather than an imminent danger order. Tr. 58. Gallagher explained this was the tool he had in his toolbox for such situations. Tr. 58. Gallagher also advised that he would be issuing an S&S Citation if there was a safeguard existing for this situation. Otherwise, he would be writing a safeguard to stop such instances from happening in the future.[7] Tr. 59.

Gallagher was aware of other occasions when miners were injured in the process of re-railing diesel-powered equipment on similar rail systems.[8] Tr. 68. Shortly before the incident at issue, a miner had sustained a severe foot fracture while re-railing a piece of equipment. Tr. 68. The father of a coworker of Gallagher's had been killed in a re-railing accident. Tr. 69. Gallagher reported that he had feared for Christopher's life when Christopher had walked between the big piece of equipment and a coal rib. Tr. 69. He had declined to give a safety talk in lieu of issuing an imminent danger order because, in his experience, such an approach did not, "clear up the situation." Tr. 70.

Gallagher denied knowing of other inspectors who issued safeguards on the same day that they had witnessed a particular condition. Tr. 71. He conceded that for two months, from

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[7] Gallagher explained that he could not simply issue a safeguard immediately upon witnessing an unsafe act without following prescribed procedures. (T. 59-60). A safeguard was eventually issued on 12/1/17. Tr. 62; *See also* GX D wherein it states: "This is a notice to provide a safeguard preventing anyone from positioning themselves in a pinch point while re-railing track mounted equipment."

[8] *See* cross-examination regarding such incidents at Tr.76.

9/28/17 to 12/1/17, the alleged unsafe condition could have occurred again because no safeguard had been issued. Tr. 73.

Gallagher did not know the specific facts regarding the accident involving an injury at Enlow Fork Mine referred to in his earlier testimony. He did not know whether jack walkers were being used. Tr. 76. He also did not know the specifics regarding the fatality at Loverridge Mine that he referred to. Tr. 76. Nor had he looked into the specifics of the other derailment injuries that he had testified about. Tr. 76. He testified that he had never re-railed a track-mounted vehicle. Tr. 77.

When Gallagher made his drawing from the inby end of the motor, (GX B, p.7) the motor was still off the track. Tr. 77.

Gallagher acknowledged that Contestant's employees whom he had heard, "barking orders," would have had to yell to be heard. Tr. 77.

Given the location where motorman Stevens was sitting in the kitchen of the motor, which was on the inby end, Christopher would have had to walk right by the operator. Tr. 79. Christopher would be been wearing a cap light and reflective clothing. Tr. 79. The motorman would have "probably" observed Christopher walk by him. Tr. 80-81.

At the point Gallagher had issued his verbal imminent danger order, Christopher had already walked by the motor and was out of danger. Tr. 81-82.

Gallagher estimated the distance between the motor and the rib to be approximately 36". Tr. 83. He never actually measured the distance (despite the motor having been shut down)[9]. Tr. 83. Further, he had not noticed whether any of the motor's wheels were off track. Tr. 85-86. He did not know how many times Contestant's employees had to jack up the outby end, or back end of the motor to get it back on track. Tr. 86. Gallagher agreed that in order to re-rail the motor, it would be necessary to jack the motor up, place blocking underneath the jack, and then jack the motor up again so it could be raised high enough to get the wheels up to the rail. Tr. 87. He further agreed that Dalnoky had not perceived the events at issue to constitute a hazard. Tr. 88.

Gallagher himself had never driven any of the vehicles in the mine because he was an inspector. Tr. 89. Nor had he ever re-railed any vehicles in the mine(s) because he was an inspector. Tr. 89.

Gallagher observed the jack walker "abruptly" move but could not determine the direction of the "jerk", nor did he know the distance that the jack walker had moved. Tr. 90. The loud bang that Gallagher heard while watching the re-railing process had "scared" him. He relayed such to Dalnoky. Tr. 90-91.

[9] As discussed *infra* the ALJ notes the discrepancy between inspector Gallagher's testimony and that of Dalnoky on this point, as well as Gallagher's decision not to perform an actual measurement of the interspace at issue.

Christopher did not advise him, as they were exiting the elevator, that Christopher had announced to the motorman that he was going to pass the motor. Tr. 92.

Anthony Gallagher Redirect Examination

Gallagher was uncertain of the distance between the rib and motor on the outby end. Tr. 92. He did not recall hearing Dalnoky state that everything was static. Tr. 93.

Jeffrey Spooner

Spooner was a motorman at Cumberland Mine, working in this position for approximately 4 years. Tr. 96-97. He had begun working for Contestant in June 2011 and had no previous mining experience. Tr. 99. As a motorman, he essentially transported materials throughout the mine and moved goods. Tr. 97.

He recalled the incident at issue and testified that he had been working with Shawn Stevens on that day.[10] Tr. 97-98. A guide rail had loosened causing the motor to come off track. Tr. 98. All four of the locomotives wheels had come off track. Tr. 101. The left inby wheel was located inside the rail. Tr. 101; *See also* GX A. The wheel on the other side would have been in the apex between the three tracks, straight in the turn. Tr. 102. The outby wheels were basically in the same location(s) inside the track rail. Tr. 102. Two were contained between the two track rails over the actual rail system. The other two were "completely outside of it between the straight rail and the turn rail." Tr. 102.

Typically, when a motor goes off track, jack walkers are used to elevate the motor to slew it over. Tr. 103. However, in the instant matter, because the wheels had ended up "much lower"[11] below the top of the rail, blocking was also required. Tr. 103.

The motor would need to be elevated by the jack walker as high as possible with blocking being put under the motor and the process repeated until the wheels could clear the rail. Tr. 103.

Initially, Spooner was at the site alone with Stevens. Tr. 104. When Dalnoky and Gallagher arrived, he took their jeep to obtain blocking at a location approximately 600-800 feet away. Tr. 104. Stevens remained in the motor with the lights on. Tr. 104. When Spooner returned, he saw Gallagher walking towards the motor and heard the inspector yell, "stop." Tr. 105.

Spooner did not believe that the area through which Christopher walked was unsafe. Tr. 106. There was "no way" that the motor could have moved over toward the rib because the "wheels wouldn't allow it to jump the rail." Tr. 106. That was the reason blocking was needed. Tr. 106. Spooner already on the same day had to jack up the motor 4 to 5 times. Tr. 107.

[10] Spooner stated that Stevens had health issues (and was therefore not at the hearing).

[11] Spooner estimated that the wheels were 12" to 14" below the rail. Tr.103.

The area was loud and noisy due to the airflow and revving up of the engine in the motor for hydraulics to work. Tr. 108.

It was a typical event for a jack walker to come down and sometimes slew, going under the I-beam of the rail, causing the "whole thing" to jump and make a loud noise. Tr. 109. It was just the jack walker that moves; the motor does not move. Tr. 109. When Christopher walked beside the motor, it was not moving. Tr. 109. Rather, it was just sitting there, idle. Tr. 109. Typically, when Spooner or his fellow workers are around a motor, a foot is taken off the dead man so that the motor cannot move and is inoperable. Tr. 109.

Spooner had seen no potential for the motor to have moved over into the walkway where Christopher was walking. Tr. 110. Christopher would have had to be wearing a cap lamp, reflective clothing, and blinking lights. Tr. 110.

Spooner agreed that you would not want "a bunch of people milling about," during re-railing and would want only one-person giving orders. Tr. 111.

During the re-railing at issue, Stevens was communicating with Spooner and Dalnoky was helping Spooner move the blocking. Tr. 111.

Spooner did not witness personally any movement of the jacks when Christopher walked up alongside the motor. Tr. 112. Looking outby, Christopher would have been on the right side of the motor, and both the front and back wheels were on the inside of the rail. Tr. 112. The motor was sitting at an angle and could not have moved in such a way so as to move (sideways) to where Christopher was walking. Tr. 112. Jack walkers drop approximately 12"-14" and slew approximately 6"-8". Tr. 113.

Jeffrey Spooner Cross Examination

Spooner was not facing the motor when he had heard Gallagher hollering. Tr. 115. He was not certain whether Christopher had passed the motor entirely when Gallagher had yelled, "stop". Tr. 116. Further, he did not actually witness whether the motor was in motion in any direction when Christopher passed through. Tr. 116. Christopher was certain the motor was not in motion because if Christopher had walked up and alerted Stevens that he was walking by, Stevens would have taken his foot off the dead man and stopped all activity. Tr. 117.

Spooner agreed that a miner should not walk by machinery that was being jacked, even if it were safe to do so because one should not take a chance to go by moving equipment. Tr. 117. Common sense also dictated such. Tr. 119.

William Christopher

Christopher had worked at Cumberland Mine since 2010. Tr. 122. He had previously worked as a contractor at Bailey Mine since 2005. Tr. 122. His past mining jobs, including shuttle car operator, outby utility, general inside laborer, and presently rock dust motorman. Tr. 122.

As to the incident at issue, Christopher observed Spooner's motor off track at the corner of the 81 East Mains with its lights on. Tr. 123. Coming from an inby direction, Christopher walked down to the motor. Tr. 124. The motor could not be raised high enough with the blocking material at the scene so Christopher told Stevens he wanted to get more blocking materials from Spooner who had just returned to the site. Tr. 124. At that point Christopher walked past Stevens, down along the right side of the motor to get blocking materials. Tr. 124. Christopher remembered informing Stevens, "hold that, I want to get cribs from Spooner" before walking past the motor. Tr. 125. Coming outby, the right hand wheel was between the two rails. Tr. 126. The left hand wheel would have been in the middle of the other row because "you had to switch the apex or whatever." Tr. 126. Christopher thought it was safe to walk by the motor because the motor was off-track and he had alerted Stevens "to hold that." Tr. 127.

Christopher did not notice Gallagher flagging him as he walked by. While not remembering Gallagher's exact words, Christopher did however recollect that Gallagher had said something concerning the fact that the motor could have slid over. Tr. 127. Christopher did not mention if the jack walker had slipped off or had made a sudden movement. Tr. 129. Subsequently, during a ride in the elevator, Christopher told Gallagher that he had not noticed whether the motor was being lifted when he walked by. Tr. 130.

William Christopher Cross Examination

Christopher had told Stevens to stop because it was common practice in the mine that before passing any piece of machinery to make sure the operator knows you are going through. Tr. 131. It could be unsafe to move the motor while someone was walking by. Tr. 132.

Christopher reported that he could not be sure whether the motor was being raised as he passed through. Tr. 133. Nor was he sure, whether there were any sudden movements as the jacking process proceeded. Tr. 135.

Robert Dalnoky

At the time of hearing, Robert Dalnoky had been the senior safety representative at Cumberland Mine for two years. Tr. 137. His duties included escorting inspectors, performing training, and ensuring employees worked in a safe fashion. Tr. 137. He had previously worked as a shift foreman at the Emerald Mine. Tr. 138. Identical rail haulage systems were utilized at both mines. Tr. 138. Some of Emerald Mine's motors had in fact been transferred to Cumberland Mine after Emerald's closing.[12]

Dalnoky had Pennsylvania certification papers for mine foreman and assistant mine foreman. Tr. 141. He also had a two-year mining technical degree from Penn State University. Tr. 141.

[12] Prior to working at Emerald Mine, Dalnoky had worked for Consol and Gateway Mine as a section foreman and part-time shift foreman. At Consol's Westland Mine a rail coal haulage system was used with cars being pulled by 50-ton motors. Tr.139-141.

As to the 9/28/2017 incident in question, Dalnoky remembered traveling with Gallagher to the 68 Head Gate Section. Tr. 142. As they rounded a curve, they came upon a derailed motor off track. Tr. 142. Spooner flagged them to come forward as he needed some wood. Returning from 69 Section, Dalnoky saw Christopher talking to the operator of the motor as he was approaching, Tr. 143. As Christopher passed the motor, Dalnoky saw nothing-unsafe happening. Tr. 143. The motor was off all four wheels. The outby jack walker was up but the motor was not moving. Tr. 143.

Dalnoky did not see the jack walker raise the motor any further as Christopher walked by. Tr. 144. Even if the motor were being raised, there would have been no danger because the wheels were in between the track(s) and the motor could not have slewed over. Tr. 145-146. Because of the blowing air, Dalnoky could not hear the words exchanged between Stevens and Christopher. Tr. 146.

After Christopher had walked past the motor, it began to be jacked up. The tip of the jack walker was sitting on the flange of the rail and slipped, creating a bang. Tr. 147. At that point, Gallagher raised his hands, yelling, "stop." Tr. 146.When Dalnoky asked him "what is the matter," Gallagher replied, "you scared me." Tr. 147.

There followed an exchange between Gallagher and Dalnoky in which Gallagher asserted that Christopher could have been injured in passing by the motor and Dalnoky asserted that it was not possible for such. Tr. 148.

After other of Contestant's supervisory personnel arrived at the scene, Gallagher announced that he was issuing an imminent danger 107(a) order because "that guy walked along the rib there," and "there is just too many people around here." Tr. 149.

Dalnoky disagreed and became, "a little excited," at which point Jeffrey Everett grabbed him by the shoulder. Dalnoky then walked away. Tr. 150.

Dalnoky then helped to get the motor on the track, repairing the guide rail whose bolt had broken with a new bolt. Tr. 150.

Gallagher advised Dalnoky that an imminent danger order was "the only tool in his tool box" and could not be convinced from issuing such. Tr. 151.

A map of the site was created to reflect where the motor was at the time the imminent danger order was issued and where Christopher had walked past the motor. Tr. 152-154; CX 1A. Dalnoky observed Gallagher taking measurements of the distance between the rib and motor where Christopher walked which he announced to be three feet. Tr. 154-155.

Subsequently, while in a jeep with Gallagher, Dalnoky apologized for "going off." Tr. 155. Dalnoky understood how Gallagher, due to his inexperience in rail haulage mines, may have been frightened by the re-railing scene that he witnessed. Tr. 156. However, he still disagreed that Christopher's actions posed an imminent danger. Tr. 156. Dalnoky denied ever telling Gallagher that he might be fired if an imminent danger order were issued. Tr. 156.

When the jack walker skipped off the flange, the motor did not move. Tr. 157. Dalnoky had written notes immediately after the incident to keep matters fresh in his mind. Tr. 158; CX 2. He corrected one of the observations contained in the notes to reflect that Christopher had actually walked down the "wide" side of the motor rather than the tight side. Tr. 158; *See also* CX 1A.

Normally, it takes about approximately four times to jack a motor back up onto the rail. In his career, Dalnoky had re-railed a countless number of motors, lowboys, and equipment. Tr. 159.

Jack walkers (attached to motors) are the "safest thing" to have: there was no chance of the bar hitting you or the jack flying out. Tr. 160.

Dalnoky characterized the re-railing at issue as a "textbook" operation, stating that Spooner was the only individual giving directions, and that it was a routine procedure. Tr. 161.

Robert Dalnoky Cross Examination

Dalnoky could not hear the actual exchange between Christopher and the motorman during Christopher's walk-by. Tr. 163, 165. He would not have heard if Christopher were giving directions to Mr. Stevens. Tr. 166.

Dalnoky disagreed that Christopher was in a "pinch zone" at the time of the incident. Tr. 171. The motor was still off on all four wheels when the jack walker was up. Tr. 173. He further asserted that it was only *after* Christopher had walked through that the jack walker slipped off the rail and that Gallagher "went nuts." Tr. 175. Dalnoky disagreed with the wording of the Respondent's written order because the jack walker was not being used when Christopher walked through. Tr. 185.

Jeffrey Everett

The mine superintendent, Jeffrey Everett, testified at the hearing. He had worked 6 years as such, previously working for two years as superintendent of Emerald Prep Plant.[13] Tr. 192.

On the date in question, Everett travelled to the scene with various corporate personnel and heard yelling. Tr. 194. He noticed Gallagher yelling and observed Spooner and Dalnoky with cribbing material in their hands. Tr. 155. He asked Gallagher what was going on and Gallagher replied that he feared somebody was going to get hurt because more than one person was giving directions. Tr. 195. At some point Everett learned that a 107(a) order was being issued. Tr. 196. Everett assumed the order was being issued due to him and other corporate personnel passing along the tight side of the motor. Tr. 196. He may have put his hand on Dalnoky's shoulder. Tr. 198.

[13] Everett's former jobs included: maintenance superintendent since 1999 and union maintenance man for 22 years. Tr.192.

Everett explained the benefits of using jack walkers, which allowed controlled movement with no risk of falling over. Tr. 200-202. The maximum horizontal movement or side-by-side movement was 9 inches. Tr. 201-202.

Jeffrey Everett Cross Examination

Everett was not present at the time that Christopher actually walked past the motor and would not know whether there was any movement of the motor during such time. Tr. 203.

IV. ISSUE PRESENTED

Did the Secretary carry his burden of proving by the preponderance of the evidence that the Section 107(a) imminent danger order in question was properly issued?

V. LAW AND REGULATIONS

Section 107(a), 30 U.S.C. § 817(a) in pertinent part, provides:

> If, upon any inspection or investigation of a coal or other mine which is subject to this [Act], an authorized representative of the Secretary finds that an imminent danger exists, such representative shall determine the extent of the area of such mine throughout which the danger exists, and issue an Order requiring the operator of such mine to cause all persons, except those referred to in section [104(c)], to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such imminent danger and the conditions or practices which cause such imminent danger no longer exist. (Emphasis supplied)

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

VI. CONTENTIONS OF THE PARTIES

The Secretary contends that, in the within matter, MSHA's representative properly exercised his discretion in issuing a 107(a) order. Inspector Gallagher came upon a scene in which a 20-ton locomotive was derailed. He heard "too many bosses" yelling orders. (TR. 38, 78, 107, 111). He observed a miner, Christopher, walking through a narrow interspace between the derailed locomotive and coal rib, and concurrently heard a loud bang and perceived machinery movement. (TR. 28-30, 38-40). Fearful for the miner's safety, Gallagher, within minutes, concluded that an imminent danger order was warranted.

Inter alia, Contestant maintains that, during the time period when Christopher had passed the derailed motor, it was not possible for the motor to have moved any distance horizontally so as to have endangered the miner. Any reasonable investigation would have revealed such.

VII. FINDINGS OF FACT AND CONCLUSIONS OF LAW

It is the duty of the Secretary to establish by a preponderance of the evidence that an imminent danger order is properly issued. This question turns on whether the conditions or practice observed by the inspector could reasonably be expected to cause death or serious bodily injury before the practice could be eliminated. *Wyoming Fuel Co.*, 14 FMSHRC 128, 129 (Aug 1992).

An inspector's issuance of a Section 107(a) order is reviewed under an "abuse of discretion" standard. *Island Creek Coal Co.*, 15 FMSHRC 339, 345-346 (Mar. 1993). An imminent danger order will be upheld if the Secretary proves by a preponderance of the evidence that the inspector concluded, based upon information that was known or *reasonably available* to him at the time the order was issued, that an imminent danger existed. *Id.* at 346.

However, in both *Island Creek*, 15 FMSHRC at 346, and *Knife River Construction*, 38 FMSHRC, 289 at 1291 (June 2016), the Commission emphasized that the 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 an inspector to conclude that an imminent danger existed.

This Court finds that Gallagher had an honest belief that possible movement of the derailed motor during the time Christopher passed such would have posed an imminent danger. Gallagher's descriptions of coming upon the derailment scene and hearing men shouting and hearing loud noise(s), of observing Christopher entering a narrow space between the motor and rib, of perceiving possible movement of equipment all support the bona fide and good nature of Gallagher's subjective belief.

However considering *the specific factual circumstances* of the within controversy, this Court is not persuaded that the inspector's belief was a reasonable one. As set forth *supra* in the *summary of testimony*, Contestant's witnesses consistently maintained that *it was not physically possible* for the locomotive to have slewed over so as to have struck Christopher at the moment that Christopher had passed through the rib/locomotive inter-space. (*See inter alia* Spooner testimony at Tr. 106, 112 that the locomotive wheels were located inside the tracks and that there was, "No way… No matter what happened," that the wheels could jump the rail; Christopher testimony at Tr. 127; Dalnoky testimony at Tr. 147-148; Everett testimony that jack walkers were spaced at all four corners of the machine and at that time there was no risk of the machine, "automatically just falling over" at Tr. 202).

In his investigation, which lasted less than three minutes (TR. 40-41), Gallagher had failed to take such steps as measuring the actual interspace distance[14] and of noting where the derailed motor's wheels were actually located vis-à-vis the tracks. Tr. 85-86. As noted *intra,*

[14] This Court specifically accepts Gallagher's testimony that he had not actually measured the distance but estimated such, and rejects Dalnoky's testimony on this point. This Court also rejects Gallagher's contention that taking measurements after the ordered work stoppage would have presented a hazard.

brief interviews with available witnesses would have revealed the physical impossibility of untoward motor movement.

In *Knife River Construction,* objective observable facts supported the inspector's conclusion that an imminent danger order should have been issued. In *Knife River,* the inspector stopped what he believed to be an unsafe scraper and asked for a demonstration that the vehicle was capable of stopping and holding on a grade while it was carrying a load before issuing an imminent danger order. 38 FMSHRC at 1290. The scraper failed to do so, the inspector observed it failing to come to a stop on a grade and at the bottom of such. *Id.* The inspector was aware that an embankment was under construction and feared that the scraper would continue to travel toward the waste dump, an area of the mine with multiple grades and depart the embankment. *Id.*

In *Knife River* there was clear *objective* evidence that the scraper could *not* hold its land on a grade and/or come to a safe stop. In the instant matter there was no such clear objective evidence presented by the Secretary that the motor in question, given its location off-track, could have moved horizontally during the jacking up process so as to have endangered Christopher.

Of course, as discussed within, an inspector's reasonable belief in the existence of an imminent danger may be validated -- despite the lack of actual objective evidence supporting his determination. Hazardous situations often arise when an inspector must necessarily rely solely upon his own experience, personal perceptions, and instincts in determining the need for an imminent danger order. However, to avoid a finding of arbitrariness, an inspector must timely and prudently investigate all available evidence regarding a perceived danger before issuing his order. This Court finds that Inspector Gallagher failed to fulfill this duty of sensible investigation and thus abused his discretion.

At hearing and in their briefs all parties essentially concurred that it was unwise and unsafe for a miner to pass through a squeeze point while machinery is in motion. Indeed, Contestant has not challenged the notice of Safeguard issued in this matter that prohibits anyone from positioning themselves in a pinch point while re-railing track-mounted equipment.

This Court suspects that the combination of Dalnoky's "know it all attitude" and verbal aggression toward the less experienced Gallagher had played a role in Gallagher's failure to have properly investigated whether the derailed motor in question could have in fact moved in such a manner so as to have injured Christopher.[15]

This Court finds that, given this case's particular circumstances, a prudent inspector, possessing a qualified inspector's education and experience, would not have concluded *after a reasonable investigation* that an imminent danger had actually existed. In reaching this determination, this Court has made various credibility determinations, including giving credit to

[15] Dalnoky displayed the same off-putting hubris at hearing but did offer persuasive testimony that the derailed motor at the moment Christopher passed had not posed an actual danger to the miner.

Contestant's witnesses' consistent assertions that it had not been physically possible for the derailed motor to have moved horizontally or sideways during the time period in question.[16]

This Court found Gallagher to be an honest individual. However, this Court concludes that Gallagher's inexperience with the re-railing process and machinery at issue, coupled with his initial misapprehension at viewing what he believed a chaotic and dangerous re-railing scene, led him to an unreasonable determination based upon inadequate investigation.

Considering also that any imminent danger as to Christopher had already passed once Christopher had walked by the locomotive, this Court finds that Gallagher had abused his discretion in issuing the within 107(a) order.

In essence this case scenario raises the following issue. Considering the totality of the circumstances, including any facts peculiar to the mining industry and including any information known or readily available, would a prudent inspector reasonably conclude that an imminent danger in fact existed? This Court is not persuaded that, in investigating the site of the derailment and in interviewing parties at the scene, a reasonably prudent inspector would have concluded that an imminent danger was posed.

This Court emphasizes that an inspector is not required—in garnering all available information—to conduct an unduly prolonged investigation or engage in a lengthy complex analysis of risk. But he must reasonably inspect the imminent danger scene at issue, question available witnesses, and make straightforward assessments of whether the condition or practice at issue in fact can reasonably be expected to cause death or serious physical harm. Given the total circumstances, Gallagher's investigation was not sufficient. An example of his investigatory insufficiency was Gallagher's failure to note where the motor's wheels rested— inside or outside the tracks—after the derailment.

The Court also emphasizes that the within holding is based upon specific credibility assessments and case specific factual findings. This is a narrow case-specific holding and it in no way intended to abrogate the general rule that inspectors may reasonably believe an imminent danger exists even if no mandatory safety standard was actually being violated. *See Utah Power and Light Co.*, 13 FMSHRC 1617, at 1622 (Oct. 1991).

In finding that Gallagher's belief that an imminent danger existed was objectively unreasonable, this Court is not holding that inspectors may only issue 107(a) orders when there is

[16] This Court is unable to find that all of the Contestant's witnesses perjured themselves on this point. This Court does, however, accept that Dalnoky was incorrect, possibly because of faulty recollection, in his assertions that Gallagher had actually measured the interspace at issue. This Court declines to apply a "*falsus in uno falsus in omnibus"* assessment as to Dalnoky's remaining testimony, which was found to be credible in light of such factors as Dalnoky's lengthy past experience in the re-railing process at issue.

"objective, ascertainable, evidence"[17] of looming danger. Nor does this Court suggest that the Secretary may only prove the existence of an imminent danger by introducing physical evidence, disinterested corroborative testimony and supporting expert testimony. Such evidence may not be readily obtainable in imminent danger situations where the unsafe condition can arise suddenly and in a remote section of the mine, where the inspector is alone, and where physical evidence is elusive. Rather, this Court merely holds that, consistent with the Mine Act's purpose and legislative history and consistent with Commission case law, an issuing inspector's honest perceptions must be reasonable ones *under the circumstances*; and that Gallagher's determination, albeit in good faith, was not a reasonable one due to his failure to garner and consider all available evidence.[18]

A preponderance of the evidence establishes that it would not have been possible for the derailed motor to have struck Christopher as he passed through the interspace at issue. This could have been readily ascertained upon a reasonable survey of the site and upon reasonable inquiry of available witnesses. Neither of which would have required a prolonged safari in time and space.

This Court finds that the inspector abused his discretion and acted arbitrarily and capriciously in issuing the subject order. The 107(a) Order is hereby Vacated.

ORDER

It is hereby **ORDERED** that 107(a) Order No. 9078215 is **VACATED**. Having found that the order is invalid, this case is **DISMISSED**.

/s/ John Kent Lewis
John Kent Lewis
Administrative Law Judge

[17] *See* Commission's discussion of and rejection of stringent "objective, ascertainable evidence" test in validating reasonable belief in *Secretary of Labor on behalf of Robinette v. United Castle Coal Co*, 3 FMSHRC 809-812 (April 1981).

[18] The proper test for assessing the subjective/objective components of a miner's work refusal in discrimination cases is essentially similar to the test applied herein to an inspector's 107(a) subjective/objective determination. *See* again *Robinette* at 808-812 (April 1981) for an excellent in depth analysis of such.

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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July 30, 2018

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	CIVIL PENALTY PROCEEDINGS Docket No. WEVA 2015-0509 A.C. No. 46-01968-374332
v.	Docket No. WEVA 2015-0632 A.C. No. 46-01968-377533
THE MONONGALIA COUNTY COAL COMPANY, successor to CONSOLIDATION COAL COMPANY, Respondent	Mine: Monongalia County Mine (formerly Blacksville No. 2)

DECISION

Appearances: John Nocito, Esq., Helga Spencer, Esq., U.S. Department of Labor, Office of the Solicitor, Philadelphia, Pennsylvania for Petitioner;
Jason Hardin, Esq., Artemis Vamianakis, Esq., Fabian VanCott, Salt Lake City, Utah for Respondent.

Before: Judge Feldman

The captioned civil penalty proceedings are before me based upon Petitions for Assessment of Civil Penalty filed by the Secretary of Labor ("the Secretary") pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, as amended by the Mine Improvement and New Emergency Response Act of 2006 ("Act," "Mine Act," or "New Miner Act"), 30 U.S.C. § 815(d), against the Respondent, Monongalia County Coal Company ("Monongalia").[1] The hearing in these matters was held on March 7, 2017, through March 9, 2017, in Morgantown, West Virginia.[2] The parties' post-hearing briefs have been considered in the disposition of these matters.

[1] Monongalia County Coal Company does not dispute that it is a proper party based on its role as successor in interest in Consolidation Coal Company. Resp't Post-Hr'g Br. at 1-2. For purposes of this decision, the Respondent shall be referred to as Monongalia, and the mine site shall be referred to as the Monongalia County Mine. *Id* at n.1.

[2] The issuance of this decision has been delayed due to a medical leave of absence.

At issue in WEVA 2015-0632 is 104(d)(2) Order No. 8059209, which alleges a violation of the mandatory safety standard in section 75.400 as a result of impermissible combustible coal accumulations along the 5 West No. 1 belt.[3] Resp't Ex. 1. The Secretary seeks to impose an enhanced civil penalty of $121,300.00 under the "repeated" flagrant provisions of section 110(b)(2) of the New Miner Act. This statutory provision provides:

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

30 U.S.C. § 820(b)(2).

In *American Coal Company*, the Commission crafted two interpretations of the "repeated" language in section 110(b)(2), one "narrow" and one "broad." *American Coal Co.*, 38 FMSHRC 2062 (Aug. 2016). Under the "narrow" interpretation, a violation can be designated as flagrant if the duration of the violation, without regard to a history of violations, is sufficient to warrant a "repeated" designation. *Id*. at 2065. Thus, the Commission's "narrow" interpretation of the flagrant provisions of the Act concerns a discrete ongoing violation. *Id*. In contrast, the Commission articulated that its "broad" approach involves a recurrent-type violation analysis, i.e., analysis of several discrete yet similar violations. *Id*. This approach allows for a "repeated" flagrant violation based on a relevant history of similar violations.

Monongalia has stipulated to the fact of the violation of section 75.400 and to the significant and substantial ("S&S") nature of the violation.[4] Resp't Post-Hr'g Br. at 2 n.3. However, Monongalia challenges that the subject violation was attributable to an unwarrantable failure, and that the violation constitutes a "repeated" flagrant violation. Resp't Post-Hr'g Br. at 3, 39. The Secretary asserts that the accumulations violation cited in Order No. 8059209 can be designated as "repeated" based on either the Commission's "broad" or "narrow" interpretation. Sec'y Post-Hr'g Br. at 39, 49.

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[3] Section 75.400 provides:

> Coal dust, including float coal dust deposited on rock-dusted surfaces, and other combustible materials, shall be cleaned up and not be permitted to accumulate in active workings, or on diesel-powered and electrical equipment therein.

30 C.F.R. § 75.400.

[4] As a general matter, a violation is properly designated as S&S if there is a reasonable likelihood that the hazard against which the mandatory safety standard is directed will result in an occurrence that is reasonably likely to cause injury of a reasonably serious nature. *Newtown Energy, Inc.,* 38 FMSHRC 2033, 2037-38 (Aug. 2016).

Also before me is 104(d)(2) Order No. 8059212 in Docket No. WEVA 2015-0509 that alleges a violation of section 75.360(a)(1) of the Secretary's regulations for a failure to conduct an adequate preshift examination of the 5 West No. 1 belt during the preceding midnight shift for the day shift of July 30, 2014.[5] The Secretary proposes a civil penalty of $40,300.00 for Order No. 8059212. Resp't Ex. at 6. Monongalia has not challenged the fact of the violation or the S&S designation. Resp't Post-Hr'g Br. at 58-62. However, Monongalia disputes, in essence, that the cited inadequate preshift examination is attributable to an unwarrantable failure. *Id*.

I. Procedural History

The Secretary has identified three non-flagrant predicate 104(d) orders, contained in Docket Nos. WEVA 2015-74, WEVA 2015-425, and WEVA 2015-473, in support of his flagrant designation in Order No. 8059209 under the "broad" approach. Given the Secretary's asserted relevance of the alleged predicates, these predicate dockets were consolidated with the captioned dockets and stayed on May 12, 2016, pending final disposition of *Oak Grove Res., LLC*, 38 FMSHRC 957 (May 2016) (ALJ). *Oak Grove* addressed the evidentiary requirements for a "repeated" flagrant designation with respect to an alleged violation of section 75.400. After the 30-day appeal period for the May 3, 2016, *Oak Grove* decision had expired, the predicate dockets in WEVA 2015-74, WEVA 2015-425, and WEVA 2015-473 were severed on June 14, 2016. *Consolidation Coal Co.*, 38 FMSHRC 1573 (June 2016) (ALJ).[6]

Oak Grove recognized that the Commission had held "that past [relevant] violative conduct may be considered in determining whether a condition can be cited as a 'repeated' flagrant violation." *Oak Grove*, 38 FMSHRC at 964, n.6 (citing *Wolf Run Mining Co*., 35 FMSHRC 536, 541 (Mar. 2013)). However, *Oak Grove* held that a violative condition that does not otherwise meet the statutory definition of flagrant cannot be elevated to flagrant status simply based on a history of violations. *Id*. 38 FMSHRC at 960-61. Consequently, in an interlocutory

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[5] Section 75.360(a)(1) states, in pertinent part:

> [A] certified person designated by the operator must make a preshift examination within 3 hours preceding the beginning of any 8–hour interval during which any person is scheduled to work or travel underground. No person other than certified examiners may enter or remain in any underground area unless a preshift examination has been completed for the established 8–hour interval. The operator must establish 8–hour intervals of time subject to the required preshift examinations.

30 C.F.R. § 75.360(a)(1).

[6] The transcript for the three-day hearing consists of three volumes, each volume beginning at page one. Transcript references shall be cited by volume followed by page number. At trial, Monongalia moved to replace Consolidation Coal Company as its successor in interest. Tr. I 31-33. The Secretary did not oppose Monongalia's motion. *Id*. at 33. Citations to *Consolidation Coal Co*. are for pre- trial orders issued prior to Monongalia's substitution as the successor in interest.

order, the flagrant designation in *Oak Grove* was deleted based on the Secretary's failure to demonstrate the subject accumulations could reasonably have been expected to proximately cause death or serious bodily injury. *Oak Grove Res*., 37 FMSHRC 1311, 1321 (June 2015) (ALJ). The Secretary did not appeal the interlocutory order.

Simply put, *Oak Grove* held that, while a history of violations may be a relevant consideration in assessing a civil penalty, predicate violations are not dispositive of whether an alleged flagrant violation is properly designated as "repeated." *Oak Grove Res*., 38 FMSHRC at 960-61. The ALJ holding in *Oak Grove* was rejected in the *American Coal* remand, in which the Commission concluded that a history of similar recurring violations can satisfy the "repeated" element for a flagrant violation. 38 FMSHRC at 2065. However, the Commission did not specify the exact role played by a violation history in a "broad" "repeated" flagrant analysis. Consequently, on remand the Commission directed the ALJ to fashion his own interpretation of section 110(b)(2), which permits the Secretary to establish a "repeated" flagrant violation "by taking the operator's history of previous accumulations violations into account." *Id*. at 2082.

As the significance of a relevant violation history remained unclear following *American Coal*, the parties were advised that the March 7, 2017, hearing in these matters would be limited to the Commission's "narrow" analysis. *Consolidation Coal Co.*, 39 FMSHRC 423, 425 (Feb. 22, 2017) (ALJ). The parties were invited to address, in their post-hearing briefs, whether Monongalia's two-year history of 147 section 75.400 violations is sufficient to support a "repeated" flagrant designation under the "broad" approach. *Id*. The parties have addressed this issue. Sec'y Post-Hr'g Br. at 46; Resp't Post-Hr'g Br. at 37.

II. Stipulations

At trial the parties agreed on the following stipulations:[7]

1. Monongalia is an "operator," as defined by § 3(d) of the Federal Mine Safety and Health Act of 1977, as amended, 30 U.S.C. § 803(d), of the coal mine at which the Orders at issue in this proceeding were issued.

2. This proceeding is subject to the jurisdiction of the Federal Mine Safety and Health Review Commission and its designated Administrative Law Judge pursuant to sections 105 and 113 of the Mine Act.

3. True copies of the Orders at issue in this proceeding were served on Monongalia as required by the Mine Act.

4. The Orders contained in Exhibit "A" attached to the Secretary's Petition in the subject dockets are authentic copies of the Orders at issue in this proceeding.

5. The imposition of the proposed penalties will not affect Monongalia's ability to continue in business.

[7] Stipulations 1-7 are set forth at Tr. I 30-31. Stipulations 8-10 are set forth at Tr. II 120-21, 228-29, 233.

6. The Mine Operator engaged in mining operations in the United States and its mining affects interstate commerce.

7. The Blacksville No. 2 Mine now operates as The Monongalia County Mine.

8. The conditions described in Order No. 8059209 constitute a violation of 30 C.F.R. § 75.400, and the violation was S&S and reasonably likely to result in an injury or illness affecting one miner.

9. The conditions described in Order No. 8059212 constitute a violation of 30 C.F.R. § 75.360(a)(1).

10. The conditions described in Order No. 8059212 were S&S and reasonably likely to result in an injury or illness affecting one miner.

III. Order No. 8059209

Findings of Fact

The Monongalia County Mine is a large underground coal mine located in the Pittsburgh coal seam. Tr. I 67. MSHA records reflect that, as of July 30, 2014, the date of the subject mine inspection, more than 3 million tons of coal had been extracted from the Monongalia Mine. Sec'y Pet. for Assessment of Civil Penalties, Docket Nos. WEVA 2015-0509 and WEVA 2015-0632, Ex. A.

At all times relevant to these proceedings, Monongalia was operating four mechanized mining units ("MMU"): two for the main section, one in the development section, and one for the longwall section. Tr. I 67, 151-52; Resp't Ex. 19. Mine operations were performed during three daily production shifts. Tr. I 68. The day shift was conducted from 8:00 a.m. through 4:00 p.m.; the afternoon shift was conducted from 4:00 p.m. through 12:00 a.m.; and the midnight shift was conducted from 12:00 a.m. to 8:00 a.m. *Id*. at 69.

There are approximately 12-and-a-half miles of belt lines in the Monongalia County Mine. *Id*. at 158. Coal production from the 20W Headgate and 13W Longwall MMUs was carried outby from the 5 North and 5 South belts toward the 5 North/5 South belt transfer point, where the coal was transferred onto the 5 West No. 2 belt. *Id*. at 163. The 5 West No. 2 conveyor belt travels outby from the 5 North/5 South belt transfer point to the 5 West No. 2 belt transfer point located at the 59 block, where it dumps onto the 5 West No. 1 belt, the site of the subject accumulations. *Id*. at 163-4. The 5 West No. 1 belt is approximately 75,000 feet long. *Id*. at 174. The 5 West No. 1 belt transfers coal onto the 6 North belt at the 5 West No. 1 transfer located at the 1 block. *Id*. at 91, 164; Resp't Exs. 19, 20; Sec'y Ex. 45 (denoted in blue).

The Monongalia County Mine is classified as a gassy mine in that it liberates between six and seven million cubic feet of methane in a 24 hour period. Tr. I 69-70. As such, the mine is subject to a five-day spot inspection in accordance with section 103(i) of the Act. *Id*. at 70; 30 U.S.C § 103(i). On July 30, 2014, MSHA Inspector Tyler Peddicord ("Peddicord") arrived at the Monongalia Mine at approximately 7:30 a.m. to conduct an E02 methane spot inspection and a regular E01 inspection at the 13W Longwall section. Tr. I 70-71. Prior to traveling underground, Peddicord reviewed the preshift, on-shift, and electrical examination records for the 13W Headgate, the area of the mine he planned to inspect as part of his E01 inspection. *Id*. at 71. After reviewing the examination book, Peddicord met with miners' representative Chad Newbraugh and mine representative Doug Moyer to discuss his planned inspection for the day. *Id*. at 72.

Peddicord entered the mine accompanied by Newbraugh and Moyer to perform an E02 section 103(i) methane spot inspection in the 13 W Headgate section. *Id*. at 71, 74, 147; Tr. II 27-28. They traveled by mantrip. Tr. I 73. However, due to obstructions present at the entry of the 5 West track, the inspection party was not immediately able to advance to the 13W Headgate via mantrip. *Id*. at 73. As a result, the inspection party exited the mantrip, whereupon Peddicord decided to conduct an E01 inspection of the 5 West No. 1 conveyor belt, which had not yet been subject to an MSHA quarterly inspection. *Id*. at 74. The Secretary has proffered a map denoting the area inspected by Peddicord in the 5 West No. 1 belt entry. Sec'y Ex. 45 (denoted in orange).

Peddicord began his inspection at the 1 block, where 5 West No. l/6 North transfer was located, and proceeded to travel inby by up to the 40 block. *Id*. at 93; Sec'y Ex. 45; Resp't Exs. 19, 20. In the course of his travels, he observed extensive accumulations of coal dust covering the mine floor, roof, ribs, belt structures, waterlines, and power cables, starting at the 6 block and extending inby. *Id*. at 95-96, 107; Sec'y Ex.1; Resp't Ex. l. The coal dust accumulations he observed were black in color and measured approximately 1/8 inch for a distance of approximately 3400 feet, measured from the 6 block to 34 the block. Tr. I 95, 106-07, 133-35. In addition to the 1/8 inch depth of accumulations, there were ten discrete locations, several of which were located in the vicinity of the 27 block where the misaligned belt was located, that measured 16 to 24 inches in depth. *Id*. at 104-06; Sec'y Exs. 4, 6. At these locations there were a total of 19 rollers turning in coal. Tr. I 107. Each location measured approximately two to three feet in length and three feet in width. *Id*. at 104-6. Thus, these locations totaled approximately 25 to 33 feet in length. *Id*. at 79, 109, 200; *see* Sec'y Exs. 1, 8, 45.

Of the nineteen rollers turning in coal, there was one broken roller at the 7 block and one frozen roller at the 29 1/2 block. Tr. I at 93, 105, 109-10, 112-13; Tr. II 65, 91; Sec'y Exs. 3,11. The broken roller at the 7 block made substantial noise as a result of metal-to-metal contact and had heated to the point that it steamed when water was applied. Tr. I at 78, 114; Sec'y Ex. 3. In addition, a belt misalignment approximately fifty feet in length, starting at the 27 block, caused

the belt conveyor to rub against six bottom roller cradles,[8] all of which were covered in coal dust. Tr. II 69; Sec'y Ex. 4. The continued rubbing between the belt conveyor and cradles created friction sufficient to completely remove the top paint coating from all six cradles revealing the "shiny metal" underneath. Tr. I 117. Inspector Peddicord was concerned that continued rubbing between the belt and roller cradles would cut into the belt and result in a tear. *Id*. Based on his observations, Peddicord initially informed Moyer that he was issuing a 104(a) citation alleging a violation of section 75.400. Tr. I 96, 107.

As the inspection party continued inby, additional accumulations were observed, extending to the 34 block that were in proximity to the two damaged rollers noted above. Sec'y Ex. 1; Resp't Ex 1. Peddicord also observed a portion of misaligned belt measuring approximately 50 feet in length. Tr. I 96-107; Sec'y Exs. 8, 45. Peddicord believed there were numerous points of contact that could create friction that would generated heat, causing an ignition hazard which could ignite a fire. Tr. I 78, 108-11, 128; Tr. II 146, 147-49. There were no active workings in proximity to the cited accumulations along the 5 West No. 1 belt. Tr. I 170. In fact, the 5 West No. 1 belt entry, which was ventilated with fresh air, was located approximately three and a half miles from the working long wall face. *Id*. at 167; Tr. II 30. Consequently, Peddicord testified that his major concern was ignition (combustion) of the coal accumulations rather than propagation. Tr. I 78. In this regard, the Secretary's counsel conceded that he was asserting that Peddicord's concern was "a mine fire hazard and not an explosion hazard." Tr. II 29.

Peddicord concluded that the totality of the circumstances necessitated the removal of the 5 West No. 1 conveyor belt from service in order to repair and replace the damaged rollers, realign the belt, shovel underneath the nineteen bottom rollers turning in coal and apply rock dust in the belt entry. Tr. II at 62, 66, 140, 143. Consequently, Peddicord ultimately informed Moyer that he was issuing a 104(d) order instead of a 104(a) citation. Tr. I 143. It took fifteen to twenty miners approximately 10 hours to abate the cited conditions. *Id*. at 141; Sec'y Ex. 8 at 29.

[8] In Order No. 8059212, issued for the alleged preshift violation, Peddicord noted the misaligned belt contributed to the bottom belt contacting seven consecutive bottom roller cradles at the 27 block. Sec'y Ex. 6. However, Citation No. 8059211, issued by Peddicord for the misaligned belt referenced in the subject accumulation citation in Order No. 8059209, notes that the belt misalignment contributed to belt contact with six bottom roller cradles. Sec'y Ex. 4. Citation No. 8059211, not a subject of this proceeding, is discussed *infra*. At trial, Peddicord also testified that the misaligned belt caused belt contact with six bottom roller cradles. Tr. I 116. Consequently, all references to this issue will be to six bottom roller cradles.

Based on his observations, Peddicord issued Order No. 8059209 alleging a violation of section 75.400. The order states:

> Accumulations of combustible material is allowed to accumulate over previously rock dusted surfaces on the 5-West company #1 belt conveyor in the following locations: 1) Accumulations of loose coal, and coal fines is allowed to exist from 6 block to 34 block. The accumulations measured 16 feet wide, 1/8 inch thick, and approximately 3400 feet long. These accumulations are located on the mine floor, roof, ribs, and belt structure. The accumulations are dark brown in color. 2) Accumulations are present 10 1/2 block and in contact with both bottom rollers. These accumulations of coal fines/belt fines measured 3 feet wide, 2 foot long, and 16 inches deep. 3) Also, accumulations of dry coal fines/belt fines are present at the 12 1/4 block and in contact with both bottom rollers. These accumulations measure 3 feet long, 3 feet wide, and 24 inches deep. 4) Accumulations of loose coal, and coal fines is present at 12 1/2 block, and are in contact with on bottom roller that is turning in accumulations. These accumulations measured 3 feet long, 3 1/2 feet wide, and 20 inches high. 5) Also, accumulations of coal fines, and loose coal is in contact with bottom roller at 17 1/2 block. These accumulations measured 1 foot wide, 2 feet long, and 20 inches deep. 6) Also, accumulations of coal fines/belt fines is present at 21 3/4 block and contacting both bottom rollers. These accumulations measured 2 feet wide, 2 feet long, and 22 inches high. 7) Also, accumulations just inby 23 block are in contact with inside part of both bottom rollers, allowing rollers to turn in accumulations. These accumulations are coal fines, and belt fines. These accumulations measured 3 feet long, 1 foot wide, and 10 inches deep. 8) Also, accumulations of coal fines/belt fines is in contact with both bottom rollers at 23 1/2 block. The accumulations measured 2 feet wide, 2 foot long, and 12 inches deep. 9) Also, accumulations of coal fines/belt fines is present at 24 block and in contact with both bottom rollers. These accumulations measured 3 feet long, 1 foot wide, and 10 inches wide. These accumulations were dry and black in color. 10) Also, accumulations of dry coal fines/belt fines are in contact with 2 consecutive bottom rollers at 25 1/2 block. The accumulations measured 3 feet wide, 1 1/2 wide, and 10 inches deep in both locations. 11) Also, accumulations of coal fines/belt fines is allowed to exist on mine floor, and in contact with bottom roller. Accumulations measured 1 1/2 feet wide, 1 foot long, and 18 inches deep at 19 3/4 block. This mine is on a 5-day 103(I) spot inspection for liberating over 1 million cubic feet of methane in a 24 hour period. Citation #8059210, and Citation #8059211 are issued in conjunction with this order for damaged rollers, and belt rubbing metal components in same areas as cited accumulations. This creates a confluence of factors. Miners work and travel in these areas each shift in performance of their duties. There is evidence that these accumulations have existed for an extended period of time, due to the amount of the accumulations present, and foot prints in the walkway through the accumulations. A certified mine examiner travels this belt conveyor 3 times a day, and should have been aware that these conditions were present. Accumulations/roller spillage was visible to the most casual observer. Examinations are the first line of defense for the health and safety of the miners.

> These conditions were obvious and extensive and should have been reported and corrected. History has shown that frictional heat sources such as belt rubbing structure causes mine fires. If normal mining operations were to continue and these conditions were left unabated it is reasonably likely that friction sources present will ignite accumulations, and/or contribute to a fire and/or explosion occurring nearby. The operator removed the belt from service to correct ignition sources. Numerous 75.400 citations have been issued at this mine in the past. This is the third 75.400 order issued on belt conveyors at this mine in the past 6 months. The operator has engaged in aggravated conduct constituting more than ordinary negligence. The belt was in operation at time of issuance. A mine fire occurred at this mine on 3-12-12. This violation is an unwarrantable failure to comply with a mandatory health and safety standard.

Sec'y Ex. 1; Resp't Ex. 1.

In addition to Peddicord noting the broken roller at the 7 block and the frozen roller at the 29 1/2 block in Order No. 8059209, Peddicord issued Citation No. 8059210, which is not a subject of this proceeding, citing the two malfunctioning rollers as an S&S violation of section 75.1731(a). Sec'y Ex. 3; Resp't Ex. 2. The mandatory standard in section 75.1731(a) requires damaged rollers that pose a fire hazard to be immediately repaired or replaced. 30 C.F.R. § 75.1731(a). Peddicord designated this damaged roller violation as reasonably likely to cause an injury leading to lost workdays or restricted duty. Sec'y Ex. 3; Resp't Ex. 2. He attributed the violation to a moderate degree of negligence. *Id*. The Secretary proposed a civil penalty of $1203.00 for Citation No. 8059210. Sec'y Post-Hr'g Br. at 8.

Peddicord also issued Citation No. 8059211, also not a subject of this proceeding, citing an S&S violation of section 75.1731(b) as a result of the approximately fifty feet of misaligned belt that he had observed. Sec'y Ex. 4; Resp't Ex. 3. The mandatory standard in section 75.1731(b) prohibits improperly aligned conveyor belts. 30 C.F.R. § 75.1731(b). Peddicord designated the cited violation as reasonably likely to result in lost workdays or restricted duty. Sec'y Ex. 4. Peddicord attributed the violation to a low degree of negligence. *Id*. The Secretary proposed a civil penalty of $585.00 for Citation No. 8059211. Sec'y Post-Hr'g Br. at 8.

Citation Nos. 8059210 and 8059211 were the subjects of a Joint Motion to Approve Settlement in Docket No. WEVA 2015-0033. Sec'y Ex. 5. The settlement terms were that Monongalia accepted Citation Nos. 8059210 and 8059211 as unmodified and agreed to pay the initially proposed civil penalties of $1203.00 and $585.00, respectively. *Id*. These settlement terms were approved in a Decision Approving Settlement issued on April 21, 2016. Sec'y Ex. 5; Tr. I 116.

Monongalia does not dispute that the cited accumulations in Order No. 8059209 constitute a section 75.400 violation. Resp't Post-Hr'g Br. at 49. However, Monongalia alleges several mitigating factors with respect Order No. 8059209. *Id*. at 40-44. With respect to the presence of potential ignition sources, Monongalia argues that Peddicord only found two out of 4000 rollers to be defective and fifty feet out of 5000 feet of belt to be misaligned. *Id*. at 40; Tr. I 197-200. With regard to the length of time the violative conditions existed, Monongalia argues that the ten discrete areas of deeper accumulations were the result of broken chains on the belt and that these accumulations existed for less than a day. Resp't Post-Hr'g Br. at 40. Furthermore, Monongalia alleges that it was engaging in an ongoing process of repairing chains and cleaning the associated accumulations. *Id*.

With respect to the risk of danger the violative conditions posed, Monongalia argues that there was no methane in the belt entry and that the cited accumulations were not in contact with the cited ignition sources. *Id*. at 41-2; Tr. I 180-1; Tr. II 168-9. Additionally, Monongalia argues that the distance of the accumulations from the mining face, and the Secretary's characterization of no more than lost workdays resulting from the risk posed by the defective rollers and misaligned belt undermine the Secretary's assertion in Order No. 8059209 that the accumulations will result in a fatality. Resp't Post-Hr'g Br. at 42; Tr. I 166-7.

With respect to knowledge and obviousness, Monongalia does not dispute that it was aware of the cited accumulations. Resp't Post-Hr'g Br. at 43. In this regard, Monongalia was on notice that greater efforts were required to comply with section 75.400 by virtue of the reported capital expenditures it incurred to improve the conditions in 5 West No. 1 belt entry. Tr. II 161-62. In addition, Monongalia asserts that it had made efforts to eliminate the violative conditions by rock dusting and repairing broken belt chains. Tr. II 313, 321.

Disposition

a. S&S

Monongalia does not contest the cited accumulation violation, Citation No. 8059209, or that the violation was properly designated as S&S. Sec'y Post-Hr'g Br. at 3-4. However, an understanding of the S&S legal framework is helpful in providing context to the parties' stipulations.

The Mine Act describes an S&S violation as one "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." 30 U.S.C. § 814(d)(1). A violation is properly designated as S&S in nature if, based on the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard

contributed to by the violation will result in an injury or an illness of a reasonably serious nature. *Cement Div., Nat'l Gypsum*, 3 FMSHRC 822, 825 (Apr. 1981). In *Mathies Coal Co*., 6 FMSHRC 1, (Jan. 1984), the Commission explained:

> In order to establish that a violation of a mandatory safety standard is S&S 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 [by the violation] will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

Id. 6 FMSHRC at 3-4; *see also Austin Powder Inc. v. Sec'y of Labor*, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff'g* 9 FMSHRC 2015, 2021 (Dec. 1987) (approving the *Mathies* criteria).

Once the fact of a violation has been established under step one of *Mathies*, the second *Mathies* step addresses the extent to which the violation contributes to a particular hazard. In a change to the Commission's long-standing interpretation of the *Mathies* criteria, the Commission now has opined that the second step analysis is "primarily concerned with likelihood of the occurrence of the hazard against which a mandatory safety standard is directed." *Newtown Energy*, 38 FMSHRC at 2037 (citing *Knox Creek Coal Corp. v. Sec'y of Labor*, 811 F.3d 148, 163 (4th Cir. 2016)). Thus, step two of the *Mathies* test now involves a two-part analysis: first, identification of the hazard created by the subject violation of the safety standard; and second, "a determination of whether, based on the particular facts surrounding the violation, there exists a reasonable likelihood of occurrence of the hazard against which the mandatory safety standard is directed." *Newtown Energy*, 38 FMSHRC at 2038. Consideration must be given to both the time frame that a violative condition existed prior to the issuance of a citation, and the time that it would have existed if normal mining operations had continued. *Bellefonte Lime Co.*, 20 FMSHRC 1250, 1255 (Nov. 1998) (citing *Rushton Mining Co.*, 11 FMSHRC 1432, 1435 (Aug. 1989)); *Halfway, Inc.*, 8 FMSHRC 8, 12 (Jan. 1986).

Under the Commission's analysis in *Newtown Energy*, when evaluating the third *Mathies* criterion, the analysis assumes that the hazard identified in step two has been realized, and then considers whether the hazard would be reasonably likely to result in injury, again, in the context of "continued normal mining operations." *Newtown Energy*, 38 FMSHRC at 2038 (citing *Knox Creek Coal Corp.*, 811 F.3d at 161-62); *Peabody Midwest Mining, LLC*, 762 F.3d 611, 616 (7th Cir. 2014); *Buck Creek Coal*, 52 F.3d 133 at 135; *U.S. Steel Mining Co.*, 6 FMSHRC 1573, 1574 (July 1984)). In sum, while the methodology for analyzing S&S under the long-standing *Mathies* criteria has been modified by *Newtown Energy*, the Commission acknowledged that "the ultimate inquiry has not changed." 38 FMSHRC at 2038, n.8.

Given the fact that section 75.400 violations are the most commonly cited, the Commission has identified the elements necessary to create a fire or explosion hazard. Resp't Ex. 15; *Most Frequently Cited Standards for 2014, Underground Coal, Jan. 1, 2014 – Dec. 31, 2014*, MSHA, https://arlweb.msha.gov/stats/top20viols/top20home.asp ("Most Commonly Cited Standards"). When analyzing the degree of hazard posed by section 75.400 violations, the

Commission looks to whether the particular facts surrounding the violation can create a "confluence of factors" that can result in an ignition. *Texasgulf, Inc.*, 10 FMSHRC 498, 501 (Apr. 1988). These factors include "a sufficient concentration of methane in the atmosphere . . . and ignition sources." *Id*. The confluence of factors can create a fire and/or explosion. *Id*. In this case, the Secretary asserts that there was a confluence of factors that created a fire hazard. Tr. II 29-30. As previously noted, Monongalia does not dispute that the subject accumulation violation was properly designated as S&S. However, the Secretary does not assert that the cited accumulations created a propagation hazard given their distance from the face. *Id*. at 30-31; Sec'y Post-Hr'g Br. at 18.

b. Unwarrantable Failure

The Commission summarized the characteristics of an unwarrantable failure in *IO Coal Co.*, 31 FMSHRC 1346 (Dec. 2009). The Commission stated:

> 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); *see also Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 136 (7th Cir. 1995) (approving Commission's unwarrantable failure test).

Id. at 1350.

Thus, whether conduct is "aggravated" in the context of unwarrantable failure is determined by considering the facts and circumstances of each case to determine if aggravating or mitigating factors exist. *Id*. at 1351. These factors 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 id*. at 1350-51; *Cyprus Emerald Res. Corp*., 20 FMSHRC 790, 813 (Aug. 1998), *rev'd on other grounds*, 195 F.3d 42 (D.C. Cir. 1999). These factors must be viewed in the context of the factual circumstances of a particular case. *Consolidation Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2000). Accordingly, Commission judges are not required to give equal weight to the above factors. *Emery Mining Corp*., 9 FMSHRC 1997, 2001(Dec. 1987). Thus, the unwarrantable failure question is resolved based on whether there are mitigating factors that outweigh any aggravating factors. As discussed below, although the aggravating factors outnumber the mitigating factors, the weight given to the mitigating factors precludes a finding of an unwarrantable failure.

i. Obviousness and Extent of the Violative Condition

Turning to the relevant factors identified by the Commission, with respect to obviousness and extent, the accumulations were readily observable given the 1/8 inch in depth of coal dust that was deposited on "the mine roof, ribs, belt structure, [and in] multiple crosscuts" in the 5 West No.1 belt entry for a length of approximately 3400 feet. Tr. I 107. In addition to the 1/8-inch depth of accumulations, there were 10 discrete locations, each measuring approximately three feet long by three feet wide, where the accumulations measured 16 to 24 inches in depth. *Id*. at 104-06. At these locations there were a total of 19 rollers turning in coal. *Id*. at 107. Thus, these locations totaled approximately 33 feet in length. *Id*. at 79, 109, 200; *see also* Sec'y Exs. 1, 8, 45. The discrete areas of greater accumulations apparently were significantly affected by the misaligned belt at the 27 block. Sec'y Ex. 6; Resp't Ex. 4.

However, there were only two malfunctioning rollers out of the approximately 4000 properly functioning rollers that were operating within the 3400-foot expanse inspected by Peddicord in the belt entry. *Id*. at 199-200. Similarly, there was only approximately 50 feet of misaligned belt in the vicinity of the 27 block out of 3400 feet of beltline inspected by Peddicord. Tr. I 199-201. The misaligned rollers and malfunctioning belt were located a distance of approximately three-and-a-half miles from the working face. *Id*. at 167. Although the potential ignitions sources relied on by the Secretary were less obvious, on balance, the obvious nature and extent of the accumulations are aggravating factors. *See E. Assoc. Coal Corp.*, 32 FMSHRC 1189, 1195 (Oct. 2010) (citing *Peabody Coal Co.*, 14 FMSHRC 1258, 1261 (Aug. 1992)); *Quinland Coals, Inc.*, 10 FMSHRC 705, 708 (June 1988).

ii. Duration of the Violative Condition

Monongalia's self-serving assertion that a significant portion of the cited accumulations occurred as a result of broken conveyor chains that purportedly occurred only hours before Peddicord's inspection is unavailing. Resp't Post-Hr'g Br. at 40. Rather, I credit Peddicord's testimony that a substantial portion of the accumulations existed for at least three shifts. Tr. I 135. I reach this conclusion based on the extensive nature of the accumulations as well as Peddicord's observation of footprints tracking through the accumulations, which is further evidence of their duration. *Id*. at 136. Moreover, the preshift examination records further support Peddicord's opinion that the accumulations existed for at least several shifts. Resp't. Ex. 25. Namely, the examination book reflects relevant accumulations located in the 5 West No. 1 belt entry, from the 25 block to the 34 block, that were noted during the preshift examination conducted from 1:00 p.m. to 3:00 p.m. on July 29, 2014. *Id*. This preshift examination was conducted three shifts prior to the issuance of Order No. 8059209 at 9:30 a.m. on July 30, 2014. Resp't. Ex. 25.

In addition, the misaligned belt observed by Peddicord caused the belt conveyor to rub against six bottom roller cradles, all of which were covered by coal dust. Tr. II 69. The continued rubbing between the belt conveyor and cradles created friction sufficient to remove the top coating of paint from all six cradles revealing a "shiny metal" surface. *Id*. at 117. The friction-related damage reflects that the accumulations in the cradles developed over a significant period of time. *Id*. Peddicord's observation of friction-related damage in the areas of these accumulations also undermines Monongalia's assertion that these accumulations had recently

occurred. Resp't Post-Hr'g Br. at 43. Consequently, the record supports the Secretary's contention that the cited accumulations existed for at least several shifts, and, as such, is an aggravating factor.

iii. Operator's Knowledge of the Violative Condition

The Commission has held that knowledge is established by showing the failure of an operator to abate a violation that it knew or reasonably *should have known* existed. *See Emery Mining*, 9 FMSHRC at 2002-03; *IO Coal*, 31 FMSHRC at 1356-57 (holding that an operator "reasonably should have known of a violative condition"); *Drummond Co.*, 13 FMSHRC 1362, 1367-68 (Sept. 1991) (quoting *Eastern Assoc. Coal Corp.*, 13 FMSHRC 178, 187 (Feb. 1991)).

As noted, Monongalia had knowledge of the cited accumulations as reflected by the preshift examination records that recorded relevant accumulations from the 25 to the 34 block in the preshift examination conducted during the afternoon shift on July 29, 2014. Resp't. Ex. 25. Moreover, it is reasonable to conclude that belt examiners had previously observed the subject accumulations as evidenced by Peddicord's testimony of footprints in the accumulations located in the inspected area. Tr. I 136. Thus, Monongalia's actual or constructive knowledge of the cited accumulations is an aggravating factor that weighs in favor of finding an unwarrantable failure.

iv. Operator's Notice that Greater Compliance Efforts Are Required

The Commission has noted that repeated similar violations can constitute an aggravating factor that is relevant to an unwarrantable failure determination in that they serve to put an operator on notice that greater efforts are necessary for compliance with the cited standard. *See IO Coal*, 31 FMSHRC at 1353-55; *Amax Coal Co.*, 19 FMSHRC 846, 851 (May 1997); *see also Consolidation Coal Co.*, 23 FMSHRC 588, 595 (June 2001). Thus, a relevant excessive history of similar violations is a significant element of an unwarrantable failure designation. In this case, Monongalia had been cited for 147 violations of section 75.400 in the two years preceding the issuance of the subject accumulation violation. Sec'y Ex. 39. Based on this fact alone, it is clear that Monongalia was aware that greater compliance efforts were required for its adherence to the mandatory safety standard in section 75.400.

The Commission has also recognized that "past discussions with MSHA" about a problem "serve to put an operator on heightened scrutiny that it must increase its efforts to comply with the standard." *San Juan Coal*, 29 FMSHRC 125, 131 (Mar. 2007) (citing *Consolidation Coal*, 23 FMSHRC at 595). Peddicord testified that in addition to the subject accumulation violation citation issued on July 30, 2014, there were two additional similar accumulation violation citations issued in April and May of 2014. Tr. I 140-41. Peddicord further testified without contradiction that during closeout conferences, mine inspectors counsel mine operators on how to best avoid the future occurrence of similar violations. *Id*. at 141. As previously noted, in recognition of its belt problems, Monongalia reportedly made significant upgrades and capital improvements to the 5 West No. 1 belt "to enhance the tracking . . . [in an effort] to reduce spillage in and along the beltlines and drive areas." Tr. III 54-56; Resp't Ex. 36. Thus, Monongalia's significant history of relevant violations, its relevant capital expenditures, and its prior closeout conferences with MSHA clearly demonstrate that it was on notice that greater efforts were required to avoid accumulation violations of section 75.400.

v. Operator's Efforts in Abating the Violative Condition

When considering a mine operator's efforts to eliminate the subject violative condition, the Commission focuses on compliance efforts made prior to the issuance of a citation or order. *Enlow Fork Mining*, 19 FMSHRC 5, 17 (Jan. 1997). The 5 West No. 1 belt extends in an outby direction from the headpiece at the 59 block to the tailpiece at the 1 block. Sec'y Ex. 45. This matter concerns accumulations cited by Peddicord from the 6 block to the 34 block in the 5 West No. 1 belt entry. Sec'y Ex. 1. The preshift and on-shift reports for the 5 West No. 1 belt preceding the preshift examination conducted from 5:00 a.m. to 7:16 a.m., immediately prior to Peddicord's inspection at 9:00 a.m. on July 30, 2014, are instructive. The notations in these reports reflect corrective actions for numerous accumulation-related conditions concerning bad top and bottom rollers and broken chains. Resp't Ex. 25. The examination records also reflect notations for spillage and accumulations in need of cleaning or rock dusting. *Id*. Many of the accumulation-related conditions were beyond the area inspected by Peddicord, located from the 41 block to the 59 block. *Id*. As a general proposition, these notations and corrective actions reflect that the operating conditions in the 5 West No. 1 belt entry were not being ignored. *Id*.

More specifically, the examination reports reflect notations and corrections taken immediately prior to the subject inspection in the area observed by Peddicord. *Id*. For example, during the preshift examination conducted from 9:00 p.m. to 11:00 p.m. on July 29, 2014, a bad top roller located at the 22 block was noted in addition to dark gray accumulation present from the 25 block to the 34 block. *Id*. The midnight on-shift report of July 30, 2014, reflects corrective action for broken chains located at the 36, 37, and 39 blocks. *Id*. Although Peddicord observed a hot roller at the 7 block and a frozen roller at the 29 1/2 block, his observations did not include a bad top roller located at the 22 block or broken chains at the 36, 37, or 39 blocks. Sec'y Ex. 3. Consequently, Peddicord's failure to cite these conditions leads to the reasonable conclusion that corrective actions may have been taken immediately prior to Peddicord's inspection.

Although Monongalia's efforts to prevent the subject accumulation violation were unsuccessful, it is apparent remedial actions were being taken during the shifts immediately preceding the subject inspection. Resp't Ex. 25. Thus, I view Monongalia's attempt to improve the accumulation conditions in the 5 West No. 1 belt entry prior to Peddicord's inspection as a mitigating factor.

vi. Degree of Danger Posed by the Violative Condition

The degree of hazard posed by accumulation violations must be viewed in the context of the fact that fire, smoke, and the danger of an explosion are the natural consequences of combustion. The D.C. Circuit held that the existence of an emergency should be assumed in evaluating the degree of hazard for determining whether a violation is properly designated as S&S. *Cumberland Coal Res., LP*, 717 F.3d 1020, 1024 (D.C. Cir. 2013) (holding that an emergency necessitating an evacuation should be assumed in evaluating whether an improperly hung lifeline constitutes an S&S violation). However, to assume the occurrence of a fire-related emergency to determine whether a violation constitutes an unwarrantable failure would conflate S&S designations with unwarrantable failures, thus rendering the majority of section 75.400 violations as unwarrantable. Such a result is problematic as section 75.400 is the most commonly cited mandatory safety standard. For example, in the year 2014, section 75.400 violations

comprised 10.73% of all cited mandatory safety standards. Resp't Ex. 15; *Most Commonly Cited Standards*, MSHA, *supra* page 11. Rather, a reasoned analysis should be employed to distinguish those accumulation violations that are unwarrantable from those that are not.

As previously noted, in *Texasgulf* the Commission noted the degree of hazard associated with a section 75.400 violation is based on an inquiry as to whether the circumstances surrounding the cited combustible accumulations create a confluence of factors, such as explosive levels of methane in proximity to ignition sources that can cause a fire or explosion. *See* 10 FMSHRC at 501. With respect to a confluence of factors, it is important to distinguish accumulations remotely located in belt entries from those that pose a propagation risk by virtue of their proximity to working places where mining crews are present and dangerous levels of methane and ignition sources are more prevalent.[9]

The Commission's decision in *Twentymile* is instructive in illustrating the significance of the location of accumulations. *Twentymile Coal Co.*, 36 FMSHRC 1533 (June 2014). In *Twentymile*, the Commission considered the gravity of two separate violations of section 75.400. *Id*. The first violation concerned black coal dust accumulations and dark float coal dust located in the tailgate extending 1700 feet outby into a return entry. *Id*. at 1534. The Commission concluded that the subject accumulations were S&S in nature because "there was ample reason to fear a methane ignition at the face" that would propagate an explosion fed by the dangerous accumulations of float coal dust. *Id*. at 1536.

The second violation in *Twentymile* concerned accumulations near the portal in the belt entry extending 3400 feet inby. *Id*. at 1540. The accumulations of coal dust were "very fine" in nature. *Id*. These accumulations were located approximately seven miles from the longwall face. *Id*. at 1543. The judge concluded that the accumulations were S&S because "a methane explosion at the [longwall] face can travel 'long distance[s]' down mine entries, 'for a considerable distance beyond the presence of the methane.'" *Id*. at 1543 (quoting *Twentymile Coal Co*., 32 FMSRC 1431 (Oct. 18, 2010) (ALJ)). The Commission vacated the S&S designation based on its finding that "[t]here [was] no record evidence that the explosive forces would travel so far in the mine in question," and remanded the S&S issue for further consideration. *Id*. at 1543, 1544.

Here, risk posed by the potential ignition sources relied on by the Secretary cannot be disassociated from degree of danger posed by the cited accumulations. The Secretary has attributed the degree of negligence for the defective rollers and misaligned belt in Citation Nos. 8059210 and 8059211 to moderate and low negligence, respectively. Sec'y Exs. 3, 4. The

[9] A working place is defined as "Any place in a coal mine where *miners are normally required to work* or travel." 30 C.F.R. § 75.2 (emphasis added).

Secretary proposed civil penalties of $1203.00 for the malfunctioning rollers and $585.00 for the misaligned belt. Sec'y Ex. 5. These citations were the subjects of a Joint Motion to Approve Settlement that was approved in a December, 22, 2015, Decision Approving Settlement in Docket No. WEVA 2015-0033, which required Monongalia to pay the proposed penalties. Sec'y Ex. 4; Tr. I 116. The Secretary's attribution for the unaddressed potential ignition sources to only low or moderate negligence undermines the unwarrantable failure designation. It is true that the Commission in *Twentymile* affirmed the unwarrantable failure for the remotely located accumulations near the portal. 36 FMSHRC at 1546. However, *Twentymile* is distinguishable in that it did not involve the presence of violative ignition sources that have been attributed to low and moderate negligence, and for which the Secretary has proposed relatively low civil penalties.

In this case, although Monongalia has stipulated to the fact of the accumulation violation, the Secretary has admitted that the cited accumulations located approximately three-and-a-half miles from the face did not constitute a propagation hazard. Sec'y Post-Hr'g Br. at 4-5; Tr. I 78. Thus, the Secretary has, in effect, conceded that the danger posed by the cited accumulations was less than it would have been had the accumulations posed a propagation risk.

While I may have favorably entertained a timely motion to amend Citation Nos. 8059210 and 8059211 with respect the degree of negligence alleged, the Secretary failed to do so. In the absence of a showing of prejudice, had the Secretary filed a timely motion, I may have been inclined to find an unwarrantable failure.

Despite the rather de minimis penalty for the defective roller and misaligned belt, the Secretary now seeks to impose a civil penalty of $121,300.00 for the subject accumulations cited in Order No. 8059209. Resp't Ex. 6. Notwithstanding the absence of a propagation hazard, the Secretary's attribution of a relatively low degree of negligence attributable to Monongalia's failure to address the potential ignition sources relied on by the Secretary undermines his assertion that the accumulations are attributable to aggravated conduct. Resp't Exs. 2, 3; Sec'y Ex. 6.

Despite the distance of the accumulations from the face, Monongalia cannot escape the fact that the accumulation conditions in the 5 West No. 1 belt entry were obvious, known, and extensive. Moreover, Monongalia was on notice that greater efforts were necessary for compliance given the capital expenditures it incurred to address accumulation problems in its Monongalia County Mine. Consequently, the Secretary has demonstrated that the cited accumulations are attributable to Monongalia's high degree of negligence.

However, it is not uncommon for the Secretary to issue 104(a) citations, rather than 104(d) citations, for violations that are attributable to a mine operator's high degree of negligence. *See Original Sixteen to One Mine, Inc*., 36 FMSHRC 2224, 2229 (Aug. 2014) (ALJ) (upholding the inspector's issuance of a 104(a) citation due to the operator's high degree of negligence); *Taft Production Co*., 35 FMSHRC 965, 971 (Apr. 2013) (ALJ) (upholding the inspector's issuance of a 104(a) citation due to the operator's high degree of negligence); *Black Beauty Coal Co*., 34 FMSHRC 1733, 1574-5 (Aug. 2012) (remanding an ALJ's affirmation of an unwarrantable failure designation); *Black Beauty Coal Co*., 35 FMSHRC 401, 410 (Feb. 2012) (ALJ) (finding the violation was due to an operator's high negligence but did not constitute an

unwarrantable failure); *Bachman Sand and Gravel*, 34 FMSHRC 226, 233 (Jan. 2012) (ALJ) (modifying a 104(d)(1) citation issued due to the operator's high degree of negligence to a 104(a) citation at hearing); *Cloverlick Coal Co*, 31 FMSHRC 1377, 1381 n.2 (Nov. 2009) (ALJ) (modifying a 104(d)(1) order issued due to the operator's high degree of negligence to a 104(a) citation).

Although the subject accumulations are attributable to a high degree of negligence, the issue is whether Monongalia's conduct can be properly characterized as aggravated or indifferent. The relevant preshift examination records for the shifts preceding Peddicord's inspection on the morning of July 30, 2014, fail to reveal a level of indifference. Rather, they reflect that Monongalia took actions, albeit unsuccessfully, to address the accumulation conditions in the 5 West No. 1 belt entry. Resp't Ex. 25. Consequently, consistent with Commission case law, although Monongalia's negligence was high, the Secretary has failed to demonstrate that it rose to the level of aggravated or unjustified conduct indicative of an unwarrantable failure. **Accordingly, Order No. 8059209 shall be modified to a 104(a) citation to reflect that the cited accumulation violation is not unwarrantable.**

c. Flagrant

Congress provided a not so subtle clue for the proximate cause requirement for imposition of enhanced civil penalties by specifying what a flagrant violation means. Section 110(b)(2) provides:

> [T]he term "flagrant" with respect to a violation *means* a reckless or repeated failure to make reasonable efforts to eliminate a known violation of a mandatory safety standard that *substantially and proximately caused, or reasonably could have been expected to cause, death or serious bodily injury.*

30 U.S.C. § 820(b)(2) (emphasis added).

Prior to the passage of section 110(b)(2), the most severe sanction under the Act was a withdrawal order issued pursuant to section 104(d) that subjects an operator to a maximum penalty of $70,000.00.[10] *Greenwich Colleries*, 12 FMSHRC 940, 945 (Nov. 2011) (citing *UMWA v. FMSHRC*, 768 F.2d 1477, 1479 (D.C. Cir. 1985)); 30 U.S.C § 814(d). Withdrawal orders are issued solely as a consequence of an operator's unwarrantable conduct evidencing more than ordinary negligence, without regard to the degree of hazard posed by the subject violation. Thus, 104(d) withdrawal orders can be issued for non-S&S violations.

[10] The issuance of 104(d) withdrawal orders can also result in an interruption of production. In this case, production was halted from 12:30 p.m. to 8:00 p.m. on July 30, 2014, to abate the accumulations violation cited in Order No. 8059209. During that period, approximately 10,000 tons of raw materials resulting in 7000 tons of clean coal would have been extracted. At a market value of $60.00 per ton, the approximate eight-hour interruption in mining activities resulted in an approximate loss of revenue of $420,000.00. Tr. II 178-80.

Similar to the provisions of section 104(d), the flagrant provisions amended the Mine Act to allow for the imposition of enhanced civil penalties for dangerous violations that are attributable to reckless or repeated conduct, also demonstrating more than ordinary negligence. 30 U.S.C. § 820(b)(2). However, unlike section 104(d) withdrawal orders, which may be issued for non-S&S violations that do not pose a high degree of danger, Congress added the "proximate cause" and "death or serious bodily injury" provisions as prerequisites for a flagrant designation. *Id*. Consistent with the Mine Act's graduated enforcement scheme, section 110(b)(2) provides for enhanced civil penalties for flagrant violations of up to $220,000.00, adjusted for inflation. *Id*; *Nat'l Gypsum Co.*, 3 FMSHRC at 828 (holding that the Mine Act provides for increasingly severe sanctions for increasingly severe violations).

In *American Coal*, the Commission remanded a Judge's flagrant analysis of an accumulation violation for further consideration of the application of the Commission's "narrow" and "broad" interpretations of section 110(b)(2) of the Act. 38 FMSHRC at 2085. As noted, if appropriate, the Commission directed the Judge "to fashion an interpretation of the flagrant violation provision . . . which permits the Secretary to establish a violation as flagrant by taking the operator's history of previous accumulation violations into account." *Id*. at 2082. On remand, the judge found the subject accumulation violation satisfied the flagrant provision under a "narrow" analysis. *American Coal Co*., 39 FMSHRC 1247, 1265 (June 15, 2017) (ALJ). Thus, the Commission's "broad" interpretation with respect to "repeated" flagrant designations for accumulation violations remains unresolved. While I am adjudicating the propriety of the "repeated" flagrant designation under the "narrow" approach, I will endeavor to address the differing relevant considerations associated with a "narrow" and "broad" analysis that uniquely apply to accumulation violations.

In *American Coal*, the Commission chose to rely on the degree of negligence demonstrated by an operator's failure to address a known violation rather than "the degree of danger posed by a violation," to distinguish a flagrant violation. 38 FMSHRC at 2070. However, the Commission could not have intended to disregard two inviolate principles of law. The first is that it is axiomatic that the degree of danger posed by a hazard and the degree of care required to avoid that hazard are inextricably intertwined. In other words, the duty to remedy increasingly dangerous conditions requires an increasingly higher standard of care. *See Peklun v. Tierra Del Mar Condominium Assc*., 119 F.Supp.3d 1361(S.D. Fla. 2015); *Manchenton v. Auto Leasing Corp*., 605 A.2d 208 (N.H. 1992); *Richardson v. Gregory*, 281 F.2d 626 (D.C. Cir 1960); *Palsgraf v. Long Island R.R. Co.*, 162 N.E. 99 (1928).

The second inviolate principle is that "proximate cause," as contemplated by section 110(b)(2) of the Act, is "[a] cause that directly produces an [injury] and without which the [injury] would not have occurred." BLACK'S LAW DICTIONARY 213 (7th ed. 1999). In keeping with these principles, the flagrant provisions of the Act are intended to address the most dangerous of violations – those that are known yet remain unabated despite the fact that they can be reasonably expected to proximately cause death or serious bodily injury.

The Commission tracked the provisions of section 110(b)(2) in identifying the elements for establishing a flagrant violation. These elements are:

> (1) there was a condition that constituted a violation of a mandatory health or safety standard, (2) the violation was "known" by the operator; (3) the violation either (a) substantially [and proximately] caused death or serious bodily injury, or (b) reasonably could have been expected to [substantially and proximately][11] cause death or serious bodily injury; (4) there was a failure on the part of the operator to make reasonable efforts to eliminate the violation; and (5) that failure was either reckless or repeated.

American Coal, 38 FMSHRC at 2066-67.

With the exception of the "repeated" criterion in element number five, the Commission did not differentiate between the remaining elements necessary for demonstrating a "repeated" flagrant violation under a "narrow" analysis from those required under a "broad" analysis. *Id*. Thus, with the exception of "repeated," the remaining statutory provisions of section 110(b)(2) apply to both a "broad" and "narrow" approach. A "narrow" analysis is a traditional application of statutory provisions to the facts surrounding a discrete alleged violation. It is only when the alleged flagrant violation is neither "reckless" nor "repeated" under a traditional analysis that a history of violations may become material in designating a violation as "repeated flagrant."[12]

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[11] It is fundamental that:

> A statute is passed as a whole and not in parts or sections and is animated by one general purpose and intent. Consequently, each part or section should be construed in connection with every other part or section to produce a harmonious whole. Thus, it is not proper to confine interpretation to the one section to be construed.

2A Sutherland Statutory Construction § 46:5 at 189-201 (7th ed.).

The Commission did not explicitly include the substantial and proximate cause requirement for instances where death or serious bodily injury has not yet occurred in the elements required to establish a flagrant violation. Absent a Commission directive to the contrary, the proximate cause terminology must be inferred with respect to accidents that have not yet occurred.

[12] The untraditional nature of a "broad analysis" is reflected by the Commission's *American Coal* remand instructing the judge "to fashion an interpretation of the flagrant violation provision . . . *which permits the Secretary* to establish a violation as flagrant by taking the operator's history of previous accumulation violations into account." 38 FMSHRC at 2082 (emphasis added).

i. Narrow Interpretation

Turning to the Commission's elements with respect to a "narrow" interpretation, element one is satisfied as the accumulations constituted a violation as reflected by their nature and extent as well as Monongalia's stipulation. As previously discussed, the evidence reflects element two with respect to knowledge is satisfied by virtue of the footprints in the accumulations and notations in the preshift examination records. Resp't Ex. 25; Tr. I 136. That Monongalia failed to make reasonable efforts to eliminate the violative accumulations despite being aware of them satisfies element number four. Resp't Ex. 25.

Thus, the remaining elements for a "narrow" flagrant violation require an analysis of the term "repeated" in element five and the term "proximate cause" in element three, as contemplated by the statue. In addressing a "narrow" interpretation of the term "repeated" based on a repeated failure to address violative accumulations, it is helpful to distinguish between section 75.400 violations that concern accumulations that by nature occur over a period of time from spillage that occurs spontaneously.

Section 75.400 provides:

> Coal dust, including float coal dust deposited on rock-dusted surfaces, and other combustible materials, *shall be cleaned up and not be permitted to accumulate* in active workings, or on diesel-powered and electrical equipment therein.

30 C.F.R. § 75.400 (emphasis added).

As a general proposition, while the Mine Act is a strict liability statute, strict liability cannot create liability for conduct that does not otherwise violate a mandatory safety standard. Pragmatically speaking, accumulations of coal dust and coal fines that occur over a period of less than one shift may not constitute a violation of section 75.400. I reach this conclusion for two reasons. Such accumulations of coal particles that have occurred over a brief period of time may not be of sufficient depth to require rock dusting or removal. Obviously, there must be a minimum depth requirement to constitute a violation of section 75.400. Assuming the bare minimum depth of such short-term accumulations is sufficient to require removal, the Secretary would have difficulty demonstrating that the operator "permitted" the accumulations to occur in that the operator may not have had a reasonable period of time to address them.

However, Monongalia's stipulation to the fact of the violation constitutes its admission that it permitted the combustible accumulations to occur without addressing them within a reasonable period of time. Notwithstanding the stipulation, the evidence reflects that the subject accumulations existed for at least three shifts based on the nature and extent of the accumulations, the notations in the preshift examination reports, as well as Peddicord's observation of footprints left in the accumulations. Resp't Ex. 25; Tr. I 136. Having existed for at least three shifts, the accumulations satisfy the "narrow" interpretation of "repeated" based on the duration of the subject accumulations, without regard to a history of relevant similar violations that are necessary under the "broad" approach.

Having determined that the duration of the accumulations satisfies the "repeated" fifth element under the "narrow" approach, we turn to the issue of proximate cause under the third element. The proximate cause element is essential in demonstrating a flagrant accumulation violation. Thus, the focus shifts to whether the violative accumulations could be reasonably expected to cause a fire that will "proximately cause death or serious bodily injury." As previously noted, the D.C. Circuit has concluded that an underground mine fire caused by violative accumulations should be assumed in evaluating whether the violation is properly designated as S&S. *Cumberland Coal*, 717 F.3d at 1027. However, the question is whether this presumed fire gives rise to an assumption that the fire is reasonably expected to substantially and proximately cause death or serious bodily injury, as required by statute.

In *American Coal*, the Commission concluded that a potential injury from smoke inhalation as a result of a mine fire constitutes "a serious bodily injury" as contemplated by the flagrant provisions. 38 FMSHRC at 2070. However, the flagrant provisions require a showing that serious smoke inhalation injury or death is "reasonably expected" to occur. 30 U.S.C. § 820(b)(2). The distinction between the likelihood of the occurrence of a "lost workday" injury and a "permanently disabling" or "fatal" injury with respect to smoke inhalation requires consideration of the location of the victim. For while fires produce smoke, not all fires pose a significant risk of grave smoke inhalation injuries. To assume otherwise would render the majority of frequently cited violations of section 75.400 as flagrant.

The history of fatal or serious injuries associated with belt fires reflects that victims were located in working places where mine crews were assigned as distinguished from injuries to belt examiners traveling in entries located in remote areas of the mine. There were 65 reportable fires from 1980 to 2007, nearly all of which involved mine conveyor belts. Flame-Resistant Conveyor Belt, Fire Prevention and Detection, and Use of Air from the Belt Entry, 73 Fed. Reg. 80,580, 80,606 (Dec. 31, 2008) [*herein after* Conveyor Belt Rulemaking]. During this 27-year period, these fires resulted in three deaths and approximately two dozen injuries. *Id*.

Of the three deaths, two occurred at the Aracoma Alma No. 1 Mine on January 19, 2006. MINE SAFETY AND HEALTH ADMIN., U.S. DEP'T OF LABOR REPORT OF INVESTIGATION FATAL UNDERGROUND COAL MINE FIRE ARACOMA ALMA MINE #1 (2007).[13] The deaths occurred when a twelve-member crew performing roof-bolting and assorted tasks in a return entry attempted to escape smoke emanating from a longwall belt takeup storage unit in the headgate by entering the primary escapeway. *Id*. 7, 9-10. However, missing stoppings caused the primary escapeway to be inundated with thick black smoke. *Id*. at 36-37. Ten of the crewmembers escaped the mine by entering into a personnel door that allowed them to access the secondary escapeway. *Id*. at 12. However, the two fatalities occurred when the victims became disoriented and

[13] Public documents published by MSHA are subject to judicial notice. *Brody Mining, LLC,* 36 FMSHRC 2027, 2030 n.4 (Aug. 2014) (citing *Jim Walter Res., Inc.*, 7 FMSHRC 1348, 1355 n.7 (Sept. 1985)); *Black Diamond Constr., Inc.*, 21 FMSHRC 1188, 1189 n.3 (Nov. 1999) (citing *Jim Walter Res., Inc.*, 7 FMSHRC at 1355 n.7).

continued to travel in the primary escapeway toward the origin of the smoke. *Id*. at 12-13. The remaining fatality occurred at the Florence No. 1 Mine on November 27, 1986, when a mine foreman suffered a fatal heart attack while fighting a belt fire. Conveyor Belt Rulemaking, 73 Fed. Reg. at 80,606.

The remaining relevant accumulation-related fatalities occurred at the Upper Big Branch Mine on April 5, 2010. MINE SAFETY AND HEALTH ADMIN., U.S. DEP'T OF LABOR, REPORT OF INVESTIGATION FATAL UNDERGROUND MINE EXPLOSION UPPER BIG BRANCH MINE-SOUTH 1 (2010). The fatalities occurred as a result of a methane ignition located near a longwall tailgate. *Id*. at 2. The ignition was caused by worn shearer bits that likely created an ignition source when the shearer came into contact with sandstone. *Id*. at 7. The initial methane ignition at the tailgate ignited a larger accumulation of methane that caused a massive explosion engulfing an extremely large area of the mine. *Id*. As a consequence, 29 miners lost their lives. *Id*.

As a result of its investigation, MSHA concluded the Upper Big Branch Mine disaster was attributable to violations of a variety of safety standards. *Id*. at 4-10. These violations included, inter alia, performing perfunctory mine examinations; failing to maintain the longwall shearer in satisfactory condition creating an ignition source for accumulated methane; and failing to remove or rock dust extensive areas of coal dust accumulated throughout the mine, which provided the fuel source for a massive explosion. *Id*. at 9. The investigation also determined that the mine operator's failure to abide by its roof control and ventilation plans, contributed to the fall of the tailgate roof, which in turn restricted airflow to the longwall face. *Id*. at 6. The reduced airflow permitted dangerous levels of methane to accumulate in the tailgate without being diluted. *Id*.

The fatal belt fire at Aracoma and the fatalities caused by the massive explosion at Upper Big Branch are distinguishable from the risk posed to a belt examiner who is inspecting conveyors in remote areas of a mine. Rather, the smoke inhalation risk posed to belt examiners is a matter of degree. Belt entries are ventilated with fresh air. Tr. I 129; Conveyor Belt Rulemaking 73 Fed. Reg. at 80591. A belt examiner traveling in an outby direction, approaching the cited accumulations, would become aware of any smoky conditions prior reaching the origin of the fire, thus avoiding significant exposure to smoke emanating from the cited accumulations. Similarly, a belt examiner traveling in an inby direction would not be exposed to a significant risk of serious smoke inhalation as any smoke would be carried away from him in an inby direction. The greatest risk of a significant smoke inhalation injury to a belt examiner is if the examiner happened to be at the location of the cited accumulations at the moment of ignition, a circumstance that is not "reasonably expected" to occur. Finally, any belt maintenance performed by mine crews in the belt entry would require de-energizing the conveyor, thus eliminating the risk of fire. 30 C.F.R. § 75.511.

The Commission has noted the Secretary's citation characterizations of "lost workdays or restricted duty," "permanently disabling," and "fatal" cannot be relied upon by operators "to circumscribe the definition of 'serious bodily injury' . . . in interpreting the flagrant penalty provisions." *American Coal*, 38 FMSHRC at 2069 (citing *Brody Mining, LLC*, 37 FMSHRC 1687, 1701 (Aug. 2015)). So too, the Commission is not bound by the degree of negligence attributed to mine operators by the Secretary. *Id*. at 2083. Rather, the Commission's negligence

determinations should be based upon "the totality of the circumstances holistically." *Id*. at 2083, (quoting *Brody Mining*, 37 FMSHRC at 1702). Thus, Commission judges retain the de novo discretion, based on the particular circumstances of a case, to credit or reject the gravity and/or negligence characterizations in contested citations.

In this case, that potentially deadly smoke inhalation should not be presumed regardless of the location of the combustible accumulations, is illustrated by the Secretary's citations for the non-functioning rollers and misaligned belt. These citations reflect that the potential ignition sources exposed the belt examiner to no more than injuries that would result in lost workdays or restricted duty. Sec'y Exs. 3, 4. Thus, the Secretary, in essence, acknowledges that accumulations located in belt entries several miles from working sections may not pose a significant smoke inhalation risk.

Here, the subject accumulations are approximately three-and-a-half miles from the working section where mining crews are assigned. Tr. II 167-68. I do not construe the Commission's express concern over the serious consequences of smoke inhalation to apply to situations where the combustible accumulations are remotely located in belt entries many miles from the working face, where serious or fatal injuries are not reasonably expected to occur. Consequently, the evidence, when viewed in its entirety, reflects that the Secretary has failed to satisfy his burden of demonstrating that a fire caused by the cited accumulations could be reasonably expected to proximately cause death or serious bodily injury to a belt examiner. **Therefore, the flagrant designation shall be deleted.**

Make no mistake. I am not trivializing the inhalation risk to miners in general and to belt examiners specifically. However, despite MSHA's well-meaning intentions, confidence in the implementation of the Act is undermined by attempts to broaden the reach of the statutory flagrant provisions provided by Congress. *See Drummond Co.*, 14 FMSHRC 661, 674-75 (May 1992) (holding that the Commission's adjudicative powers are a means to enhance public confidence in the implementation of the Mine Act). I am only suggesting that Congress could not have contemplated that the majority of frequently cited section 75.400 violations should be designated as flagrant simply by assuming grave smoke inhalation injuries occurring as a consequence of an assumed fire without due regard to the specifics of a particular case.

ii. Broad Interpretation

Spillage, by nature, occurs suddenly. Consequently, a spillage violation may not satisfy the Commission's "narrow" duration criteria for a "repeated" flagrant violation. Under the Commission's broad approach, an accumulation violation may be designated as a "repeated" flagrant violation based on a relevant history of similar violations. While a history of violations is one of many considerations in an unwarrantable failure analysis, consistent with *Wolf Run*, as elaborated in *American Coal*, a relevant recurrent history of violations may provide the sole basis for a "repeated" designation of a spillage violation under a "broad" analysis. Under such circumstances, Monongalia's 147 violations of section 75.400 in the two years preceding the issuance of a citation for an alleged spillage violation may constitute the requisite recurrent history under a broad analysis.

On the other hand, virtually all coal dust accumulation violations that are not caused by spillage satisfy the "narrow" "repeated" element because they must have developed and gone unaddressed for at least more than one shift. Consequently, the question of whether violative accumulations not caused by spillage can be a "repeated" flagrant violation under the "broad" approach is moot.

Notwithstanding the moot nature of the "broad" analysis, in *American Coal* the Commission sought the Judge's input with respect to fashioning the criteria for a "broad" analysis of the "repeated" provision as it applies to accumulation violations. 38 FMSHRC at 2082. In this case, rather than relying on a general history of violations, the Secretary asserts that "predicate" violations that satisfy the requirements for a flagrant violation, but have not been designated as flagrant,[14] may serve as the basis for demonstrating a "repeated" flagrant violation under a "broad" analysis.[15] Sec'y Post-Hr'g Br. at 46-47.

The Commission has the unquestioned adjudicative authority to resolve disputes concerning the validity of enforcement actions. *Freeman United Coal Co*., 6 FMSHRC 1577, 1580-81 (July 1984). In addressing its adjudicative function, the Commission has stated:

> The Mine Act expressly empowers the Commission to grant review of "question[s] of law, policy or discretion," and to direct review *sua sponte* of matters that are "contrary to … Commission policy" or that present a "novel question of policy…." Since Congress authorized the Commission to direct such matters for review, we infer that Congress intended the Commission to possess the necessary adjudicative power to resolve them. The reason the Commission was created by Congress and equipped with broad remedial powers and policy jurisdiction was to assure due process protection under the statute and, hence, to enhance public confidence in the mine safety and health program. *Addressing claims of arbitrary enforcement by the Secretary is at the heart of* [the Commission's] *adjudicative role.*

Drummond Co., 14 FMSHRC at 674-75 (emphasis added) (footnote omitted) (citations omitted). Consistent with *Drummond*, section 706(2)(A) of the Administrative Procedure Act ("APA") requires setting aside agency action that is arbitrary, capricious, or an abuse of discretion. 5 U.S.C. § 706(2)(A).

Although the Commission has concluded that a "broad" analysis is a viable option, the Secretary's reliance on predicates in a "broad" analysis must be rejected for several reasons. As

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[14] The Secretary alleges that the relied upon predicate violations "were the result of Respondent's failures to make reasonable efforts to eliminate known violations of a mandatory health or safety standard that reasonably could have been expected to cause death or serious bodily injury." Sec'y Post-Hr'g Br. at 46-47.

[15] As previously noted, application of the Secretary's "repeated" predicate theory in instances where the discrete violation is not of significant duration, would still require satisfaction of all other elements identified by the Commission for a flagrant designation.

an initial matter, the Secretary's failure to designate the purported predicate violations as flagrant, even though they allegedly satisfy the flagrant provisions, is the epitome of arbitrary and capricious enforcement action that must be rejected. For it is odd that the Secretary would propose that alleged predicates that meet the criteria for a flagrant violation, but are not designated as such, would serve as a basis for designating a subsequent violation as flagrant even though the violation does not otherwise meet the "reckless" or "repeated" statutory criteria.

Moreover, the Secretary seeks to impose his "predicate" framework on mine operators without having engaged in a relevant notice and comment rulemaking. The Commission noted in *Drummond*, that while the APA does not require adherence to the notice and comment process for interpretive rules or general statement of policy, a formal notice and comment rulemaking is required for agency actions that affect substantive rights.[16] 5 U.S.C. § 553; *Drummond Co*., 14 FMSHRC at 690, (holding a Program Policy Letter that that affects substantive rights requires a notice and comment rulemaking under the APA). Clearly, the "predicate" framework that exposes operators to liability for enhanced penalties under the flagrant provisions affects substantive rights. *See id*.

Finally, and perhaps most significantly, the Secretary has failed to successfully demonstrate a "repeated" flagrant designation based on predicate violations despite having repeatedly attempted to do so. In this regard, in accumulations cases before the Commission, the Secretary has consistently sought to settle his "broad" flagrant enforcement positions by withdrawing his "repeated" flagrant designations. *See, e.g.*, American Coal Co., 40 FMSHRC 330, 332 (Mar. 2018); *Oak Grove Res*., 38 FMSHRC at 964; *Conshor Mining, LLC*, 37 FMSHRC 1845, 1846 (Aug. 2015) (ALJ); *Wolf Run Mining Co*., 31 FMSHRC 479, 479 (Apr. 2009) (ALJ).

Most recently, in *American Coal*, the Secretary agreed to amended settlement terms for consideration by the Commission that withdraw the "repeated" flagrant designation for an accumulations violation. Amended Jt. Mot. to Approve Settlement, Docket No. LAKE 2009-0035 (May 18, 2018). In so doing, the Secretary agreed to a reduction in the degree of gravity to reflect that the violation initially designated as "flagrant" will result in no more than a "lost workday or restricted duty" injury. *Id*. Having moved for the deletion of the flagrant designation, the Secretary agreed to reduce the initial proposed penalty of $164,700.00 to $11,307.00. *Id*. In an order issued June 15, 2018, the amended settlement terms deleting the flagrant designation, reducing the level of gravity, and substantially reducing the assessed penalty were approved by

[16] It is not uncommon for Congress, through enabling statutes, to delegate to administrative agencies the authority to establish policy through either rulemaking or adjudication. *See*, *e.g.*, *City of Arlington, Tex. v. F.C.C.*, 668 F.3d 229, 240 (Jan 2012) (holding that the Federal Communications Commission has the discretion to announce rules through either adjudication or rulemaking). However Congress, in the Mine Act, delegated to the Commission the exclusive authority to resolve questions of law and policy through adjudication. 30 U.S.C. § 823(a); *see Thunder Basin Coal Co*. 510 U.S. 200, n.9 (Jan. 1994); *see also* S. REP. NO. 95-181, at 47-48 (1977), *as reprinted in* 1978 U.S.C.C.A.N. 3401, 3446-47. Consequently, the Mine Act precludes the Secretary from circumventing the rulemaking requirements in section 553 of the APA as he lacks the authority to unilaterally set policy though adjudication.

the Commission. Order, 40 FMSHRC ___ (Mar. 2018). Suffice it to say, the Secretary's persistent removal of flagrant designations reflects a lack of confidence in his reliance on the suitability of predicates as a basis for demonstrating a "repeated" flagrant designation in accumulations cases.

d. Civil Penalty

The Commission outlined the parameters of its responsibility for assessing civil penalties in *Douglas R. Rushford Trucking*, 22 FMSHRC 598 (May 2000). The Commission stated:

> The principles governing the Commission's authority 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 "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) and 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 and 2700.44. The Act requires that, "[i]n assessing civil monetary penalties, the Commission [ALJ] shall consider" 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 of the operator's ability to continue in business, [5] the gravity of the violations, and [6] the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

22 FMSHRC at 600 (citing 30 U.S.C. § 820(i)). The Commission has noted that de novo consideration of the appropriate civil penalties does not require "that equal weight must be assigned to each of the penalty assessment criteria." *Thunder Basin Coal Co.*, 19 FMSHRC 1495, 1503 (Sept. 1997).

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). 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 for the statutory criteria and the deterrent purposes of the Mine Act. *Id*. at 294; *Cantera Green*, 22 FMSHRC 616, 620 (May 2000).

The maximum penalty for a violation attributable to an unwarrantable failure is $70,000.00. 30 U.S.C. § 820(a)(1). The maximum penalty for a violation properly designated as flagrant is $220,000.00, adjusted for inflation. 30 U.S.C. § 820(b)(2). The Secretary seeks to impose a civil penalty of $121,300.00 for the subject accumulations violation based on the assertion that the violation is attributable to an unwarrantable failure, and that it is properly designated as a flagrant violation.

Turning to the civil penalty criteria in section 110(i) of the Act, the evidence reflects that Monongalia is a large mine operator. Monongalia has stipulated, in essence, that the Secretary's proposed penalty in this matter is not disproportionate to the size of its business and would not impede its ability to remain in business. *See* stipulation number 5, *supra* page 4. Monongalia made good faith efforts to address the cited accumulations after notification of the violation. While Monongalia's history of 147 section 75.400 violations issued in the two years preceding the issuance of the subject citation is not exemplary, the violation history must be viewed in the context of the large size of the Monongalia County Mine that contains approximately 12 miles of beltline.

The deletion of the unwarrantable failure and flagrant designations with respect to the subject accumulations reflects a meaningful reduction in the gravity of the violation as well as Monongalia's degree of negligence. Nevertheless, although the flagrant and unwarrantable designations shall be deleted, the degree of Monongalia's negligence remains high given the duration and extent of the subject accumulations. **Consequently, a civil penalty of $60,000.00 shall be imposed for modification of 104(d)(2) Order No. 8059209 to a 104(a) citation.**

IV. Order No. 8059212

Findings of Fact

After observing the accumulation conditions in the 5 West No. 1 belt entry from the 6 to the 34 block, Peddicord continued to travel inby to the 40 block. Tr. II 52. At the 41 block Peddicord traveled through a personnel door where he determined that there was no longer an obstruction that precluded him from traveling by mantrip to the 13 West headgate section, the area he initially intended to inspect. *Id*. Peddicord's inspection of the 13 West headgate section did not disclose any violations of mandatory safety regulations. *Id*. 52-53.

Upon completion of his inspection, Peddicord exited the mine and traveled to the mine office where he issued citations for the violative accumulation conditions he observed in the 5 West No. 1 belt entry. *Id*. at 53-54. Although Peddicord reviewed the preshift examination book for the 13 West headgate section prior to entering the mine, upon returning to the surface, Peddicord reviewed the preshift examination book for the 5 West No. 1 belt entry. Peddicord determined that the preshift examination of the belt entry conducted during the midnight shift between 5:00 a.m. to 7:16 a.m. for the oncoming day shift on July 30, 2014, was inadequate. Resp't Ex. 4.

Consequently, Peddicord issued Order No. 8059212 for an alleged inadequate preshift examination in violation of the mandatory safety standard in 30 C.F.R. § 75.360(a)(l) that he attributed to an unwarrantable failure. Order No. 8059212 states:

> The operator failed to conduct an adequate preshift examination for the 5-West Company #1 belt conveyor on the examination conducted on midnight shift for dayshift of 7-30-2014. A D-2 order #8059209 was issued for accumulations of combustible material being in numerous locations from 6 block to 34 block on this belt. Citation #8059210 was issued for damaged rollers being present along

this belt conveyor in the same location as cited accumulations. One of these rollers emitted visible steam when water was applied. Belt was in operation at time of inspection. Also, Citation #8059211 was issued for bottom belt contacting 7 consecutive bottom roller cradles at 27 block, which is also in the same area as the cited accumulations. Accumulations were obvious and extensive and in contact with many bottom rollers. Accumulations were dark brown in color and easily visible. The accumulations were over 3400 feet long. The person conducting this examination failed to report and/or record any of the conditions discovered during inspection. These conditions were obvious and extensive and should have been reported and corrected. These areas are required to be preshifted each shift by a certified mine examiner, because this is an active belt conveyor, and miners are scheduled to work and travel in these areas. A prudent examination of these areas would have resulted in the condition being found and reported. Proper examinations are the first line of defense for the health and safety of the miners. Foot prints were also observed through the cited accumulations along the cited accumulation areas. This mine is on a 5- day 103 (I) spot inspection for liberating over 1 million cubic feet of methane in a 24 hour period. Discovering and reporting hazardous conditions to mine management is one of the lines of defense for the health and safety of the miners. If normal mining operations were to continue and inadequate examinations were to continue it is reasonably likely that miners will suffer injuries from being exposed to unknown hazardous conditions. This condition is an unwarrantable failure to comply with a mandatory health and safety standard. This violation is an unwarrantable failure to comply with a mandatory standard.

Sec'y Ex. 6; Resp't Ex. 4

Disposition

a. Unwarrantable Failure

The cited mandatory safety standard in section 75.360(a)(1), provides, in pertinent part:

> (a)(1) [A] certified person designated by the operator must make a preshift examination within 3 hours preceding the beginning of any 8-hour interval during which any person is scheduled to work or travel underground. No person other than certified examiners may enter or remain in any underground area unless a preshift examination has been competed for the established 8-hour interval.

30 C.F.R. § 75.360(a)(1).

In determining whether a violation of section 75.360(a)(1) has occurred, the Commission looks to whether the preshift examination was "adequate" in identifying hazardous conditions. *See, e.g.*, *RAG Cumberland Resources LP*, 26 FMSHRC 639, 648 (Aug. 2004), *aff'd*, 171 Fed. Appx. 852 (D.C. Cir. 2005). Here, it is undisputed that the preshift examination was inadequate as evidenced by Monongalia's stipulation to the fact of the violation as well as the S&S

designation. Tr. II 233. However the extent of inadequacy with respect to an unwarrantable failure is a matter of degree. Although the general factors of an unwarrantable failure have previously been discussed, the dispositive issue is whether the cited preshift examination was so perfunctory or otherwise ineffective that it evidences a degree of negligence that rises to the level of "aggravated conduct" or "indifference." *Emery Mining Corp.*, 9 FMSHRC at 2003.

As a preliminary matter, an element of the preshift violation cited in Order No. 8059212 is the failure of the belt examiner to note the conditions cited in Citation No. 8059211 "for bottom belt contacting [six] consecutive bottom rollers at the 27 block, which is also in the same area as the cited accumulations." Sec'y Ex. 6. Specifically, misaligned belt Citation No. 8059211 states, "The 5-West Company # 1 belt conveyor is not properly aligned to prevent the moving belt conveyor from contacting belt components in the 27 block[.]" Sec'y Ex. 4. Permitting the misaligned belt condition at the 27 block to remain uncorrected was attributed to a low degree of negligence. *Id*. Yet, the Secretary seeks to rely on Monongalia's failure to note this condition in the preshift examination to support his assertion that the violation is attributable to aggravated conduct. Sec'y Ex. 6; Resp't Ex. 4.

Viewing Order No. 8059212 in its entirety, the violation is predicated on the alleged inadequacy of the preshift examination conducted from 5:00 a.m. to 7:16 a.m. on July 30, 2014, rather than on an alleged series of inadequate preshift examinations. Resp't Ex. 4. Thus, evaluating the degree of inadequacy of the subject examination requires consideration of the preshift examiner's notations holistically to determine the extent to which relevant hazardous conditions, located between the 6 and 34 blocks, were noted or overlooked. In this regard, the preshift examiner made several significant relevant notations concerning the belt entry conditions in the area inspected by Peddicord. Resp't Ex. 25. These relevant notations are: a bad top roller at the 23 block; dark gray accumulations at the 25 block through the 34 block; and spillage at the 16 block through the 25 block. *Id*. Thus, while the subject preshift examination was inadequate, the relevant accumulation-related conditions noted by the examiner, including accumulations from the 15 block to the 34 block, reflect that the examination was neither perfunctory nor so ineffective as to render it meaningless.

In addition, the cited preshift examination conducted from 5:00 a.m. to 7:16 a.m. reflects notations for numerous conditions with regard to the belt entry conditions in areas that were not inspected by Peddicord. *Id*. Specifically, the preshift examiner noted: broken chains at blocks 96, and 97; bad top rollers at blocks 40, 55, and 63; bad bottom rollers at blocks 41, 47, 63, and 91; and water and spillage at the No. 1 tailpiece and No. 2 tailpiece. *Id*.

In addition to examining the adequacy of the subject preshift examination, the adequacy of the preshift examinations preceding the subject examination is relevant. The numerous notations contained in the preceding preshift examinations demonstrate that Monongalia was aware of its obligation to conduct meaningful preshift examinations pursuant to section 75.360(a)(1). *Id*. For example, the following notations were recorded: July 27, 2014, preshift

records contain notations for broken chains at blocks 26, 38, 39, and 40; July 28, 2014, preshift examination records contain notations for broken chains at blocks 36 through 40 and spillage at blocks 25 through 35; and July 29, 2014, preshift records contain notations for broken chains at blocks 36 through 40, bad top rollers at blocks 22 and 32, accumulations at blocks 25 through 34, and spillage at blocks 16 through 25. *Id*.

Consequently, the multiple relevant notations in the preshift examinations immediately preceding the subject examination support the inference that Monongalia was aware of, and was not indifferent to, its responsibility to conduct effective preshift examinations. *Garden Creek Pocahontas Co*., 11 FMSHRC 2148, 2153 (Nov. 1989) (holding that reasonable inferences may be drawn if there is a "rational connection between the evidentiary facts and the ultimate fact to be inferred").

Significantly, the Secretary has failed to present any evidence of a relevant history of section 75.360(a)(1) violations that would have placed Monongalia on notice that greater efforts to perform thorough examinations were required. Sec'y Ex. 40. On balance, although inadequate, the relevant notations with regard to accumulation conditions between the 6 block and 34 block, made during the subject preshift examination, reflect that the inadequacy is attributable to no more than a moderately high degree of negligence. Accordingly, the Secretary has failed to demonstrate that the subject preshift examination rises to the level of aggravated conduct evidencing "reckless disregard," "intentional misconduct," "indifference," or a "serious lack of reasonable care." *Emery Mining Corp.*, 9 FMSHRC at 2001. **Therefore, 104(d)(2) Order No. 8059212 shall be modified to a 104(a) citation to reflect that the cited preshift examination violation is not attributable to an unwarrantable failure.**

b. Civil Penalty

The Secretary seeks to impose a civil penalty of $40,300.00 for the subject preshift examination violation. Sec'y Ex. 7. Applying the penalty criteria in section 110(i) of the Act, the evidence reflects Monongalia is a large mine operator. Monongalia has stipulated, in essence, that the Secretary's proposed penalty in this matter is not disproportionate to the size of its business and would not impede its ability to remain in business. *See* stipulation number 5, *supra* page 4. While the preshift examination was inadequate with respect to accumulation conditions between the 6 and 34 blocks, there were numerous notations in the examination book along the entire length of the 5 West No. 1 belt entry. Resp't Ex. 25. It is an additional mitigating factor that the ignition sources that concerned Peddicord, that were overlooked by the preshift examiner, were attributed to low or moderate negligence. Resp't Exs. 2, 3; Sec'y Exs. 3, 4. Significantly, the relevant history of violations proffered by the Secretary reflects that it is a neutral factor in that there were no citations issued for inadequate preshift examinations in the two years preceding the issuance of Order No. 8059212. Sec'y Ex. 40; JWR, Inc., 28 FMSHRC 983, 995 (Dec. 2006) (holding that a general history of violations is sufficient to defeat an operator's claim that an absence of a history of similar violations is a mitigating circumstance with respect to the appropriate civil penalty). Finally, the deletion of the unwarrantable failure designation reflects a meaningful reduction in Monongalia's degree of negligence.

Despite the numerous notations concerning accumulations and conveyor conditions along the entire length of the 5 West No. 1 belt entry, the belt examiner's failure to adequately note the accumulations-related conditions between the 6 and 34 blocks during the preshift examination from 5:00 a.m. to 7:16 a.m. on July 30, 2014, evidences a moderately high degree of negligence. **Given the nature and extent of the unrecorded accumulations, a civil penalty of $22,200.00 shall be imposed for modified 104(a) Citation No. 8059212.**

ORDER

IT IS ORDERED that Order No. 8059209 **IS MODIFIED** to a 104(a) citation to reflect that the unwarrantable failure and flagrant designations **ARE DELETED**.

IT IS FURTHER ORDERED that Order No. 8059212 **IS MODIFIED** to a 104(a) citation to reflect that the unwarrantable failure designation **IS DELETED**.

IT IS FURTHER ORDERED that the significant and substantial designations in 104(a) Citation Nos. 8059209 and 8059212 **ARE AFFIRMED**.

IT IS FURTHER ORDERED that The Monongalia County Coal Company shall pay a civil penalty of $60,000.00 in satisfaction of 104(a) Citation No. 8059209, and a civil penalty of $22,200.00 for 104(a) Citation No. 8059212.

IT IS FURTHER ORDERED that The Monongalia Coal Company pay, within 40 days of the date of this decision, a total civil penalty of $82,200.00 in satisfaction of the two citations at issue.[17]

/s/ Jerold Feldman
Jerold Feldman
Administrative Law Judge

[17] 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 Nos. and A.C. Nos. noted in the above caption on the check.

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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August 22, 2018

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION, (MSHA), Petitioner, v. RAIN FOR RENT, Respondent.	CIVIL PENALTY PROCEEDING Docket No. WEST 2017-0377 A.C. No. 04-00156-434274 VVG Mine: Natividad Plant

DECISION

Appearances: Isabella M. Finneman, Esq., Joshua Love, Esq., U.S. Department of Labor, Office of the Solicitor, San Francisco, California, for Petitioner;

Byron Walker, Esq., Jack Easterly, Esq., Tim Boe, Esq., Rose Law Firm, Little Rock, Arkansas, for Respondent.

Before: Judge Simonton

I. INTRODUCTION

This simplified proceeding is before me upon the Secretary of Labor's petition for assessment of a civil penalty pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d) ("the Act").[1] The docket involves a single citation issued pursuant to Section 104(a) of the Act with a proposed penalty of $116.00. The parties presented testimony and evidence regarding the citation at a hearing held in San Francisco, California, on May 15, 2018. Based upon the parties' stipulations, my review of the entire record, my observation of the demeanor of the witnesses, and consideration of the parties' legal arguments, I make the following findings and order.

II. STIPULATIONS OF FACT

The parties jointly filed the following stipulations of fact:

1. Respondent Rain for Rent is a contractor that provides temporary liquid handling solutions, including pumps, tanks, filtration and spill containment to different industries, including mine operators in the United States, Canada, and United Kingdom.

[1] In this decision, the joint stipulations, transcript, the Secretary's exhibits, and Respondent's exhibits are abbreviated as "Jt. Stip.," "Tr.," "Ex. S–#," and "Ex. R–#," respectively.

2. Respondent provided services to Lhoist North America of Arizona, Inc., which operates the Natividad Plant, MSHA I.D. No. 04-00156, in Monterey County, California.

3. This matter is subject to the jurisdiction of the Commission and the assigned judge.

4. The subject citation was properly served by a duly authorized representative on the date and place stated therein, and may be admitted into evidence for the purpose of establishing its issuance but not for the truthfulness or relevance of any statements asserted therein.

5. Respondent demonstrated good faith in abating the conditions noted in the subject citation.

6. The Rain for Rent company truck referenced in Citation No. 8785566 was parked on flat, level ground in the parking area of the mine office.

7. The MSHA inspector observed the alleged violation referenced in Citation No. 8785566 upon opening the truck door.

8. The MSHA inspector did not communicate with Rain for Rent or its representative before opening the door referenced in Citation No. 8785566.

9. The truck referenced in Citation No. 8785566 is marked with the Rain for Rent logo and related information on its exterior.

10. Respondent and its representatives cooperated with the Secretary during the inspection that resulted in the issuance of the subject citation.

11. Respondent demonstrated good faith in addressing the conditions noted in the subject citation.

12. The alleged violation in Citation No. 8785566 was terminated immediately after its issuance.

III. FINDINGS OF FACT

The Natividad Plant is a limestone quarry and mill located in Monterey County, California, and operated by Lhoist North America of Arizona, Inc. ("Lhoist"). Prior to the inspection at issue, Lhoist contracted with Rain for Rent ("Respondent") to pump an accumulation of rainwater out of the quarry pit. Jt. Stip. #2; Ex. S–6; Tr. 42. Rain for Rent employee Jaime Tejeda ("Tejeda") visited the mine site several times to install the pump, perform maintenance and repairs, and replace the original pump with a larger model. Ex. S–7; Tr. 42-43. Tejeda signed in at the mine office on behalf of Rain for Rent upon each visit. *Id*.

On February 8, 2018, MSHA Inspector Nicholas Basich arrived at the Natividad Plant to begin the second day of a routine 11-day inspection.[2] Tr. 23. He entered the mine site by turning off of Old Stage Road into the mine driveway and proceeded approximately 400 feet to the mine office. Ex. S–2, S–3; Tr. 25. Basich checked in at the office and arranged to meet a Lhoist representative in the office parking lot to begin the inspection. Tr. 29-30. While waiting, Basich observed Tejeda drive a flatbed truck into the parking lot, park, and enter the mine office. Tr. 30-31. The truck had a "Rain for Rent" insignia on its door and a Department of Transportation Number, and Basich concluded that Tejeda intended to sign in and enter the quarry site. Jt. Stip. #9; Ex. S–5; Tr. 33-35. Basich noticed the truck rock back and forth once parked, which led him to believe that Tejeda did not set the parking brake. *Id*. Basich approached the truck and, unable to see the brake through the truck's windows, opened the driver side door for a better look. Tr. 32-33. He confirmed that the parking brake was not set and began to take photographs of the condition when Tejeda exited the office and returned to the vehicle. Tr. 32-33, 35. Basich identified himself to Tejeda as a MSHA inspector, stated that he was conducting an inspection of the truck based upon his belief that the parking brake was not set, and stated that the parking brake was in fact not set. Tr. 35-36. He issued Citation No. 8785566 alleging a violation of 30 C.F.R. § 56.14207:

> The Ford F-550 Flatbed truck (Rain for Rent company truck), in a parked an unattended attended [*sic*] condition adjacent to the mine office at the mine, does not have the parking brake set. The truck is parked on flat, level ground with the transmission in park. The practice of not setting the parking brake when leaving a truck or mobile equipment unattended on a mine site exposes miners to the unplanned and unwarned movement of the vehicle/mobile equipment. No lost time injuries would be expected from the truck parked in this locate and in this condition. If the truck were parked on a slope or grade, serious potentially fatal crushing type injuries would be expected.

Ex. S–4. Inspector Basich designated the citation non-S&S, unlikely to result in lost workdays, and the result of Rain for Rent's moderate negligence. *Id*. The Secretary assessed a penalty of $116.00. Rain for Rent quickly terminated the citation. Jt. Stip. #5, 11; Tr. 35, 95.

[2] Inspector Basich has worked as an MSHA Inspector for five years. Tr. 22. He worked in the heavy construction industry for 42 years prior to joining MSHA. *Id*. He has completed 21 weeks of MSHA training at Beckley Academy and has completed on the job training, special investigation training, and mobile equipment training. Tr. 23.

IV. DISPOSITION

Rain for Rent denies the validity of the citation on multiple grounds.[3] Respondent contends that MSHA lacked jurisdiction over the parking lot and its truck. It argues that the parking lot is not a "mine" as defined by the Act. Respondent's Post-Hearing Brief ("Resp. Br.") at 8. It further argues that Tejeda was not "performing services" at the mine at the time the citation was issued and was therefore not an "operator" as defined by the Act. *Id*. at 5. Rain for Rent also contends that Inspector Basich violated its Fourth Amendment rights when he entered the truck while Tejeda was away from the vehicle in contravention of the regular and certain inspection procedures required by the Mine Act. Resp. Br. at 14; Respondent's Reply to Secretary's Post-Hearing Brief ("Resp. Rep.") at 3. Rain for Rent also argues Basich's denial of its walkaround rights pursuant to § 103(f) of the Mine Act resulted in actual prejudice and justifies vacatur of the citation in and of itself. Resp. Br. at 17. Finally, Respondent contests the fact of violation as well as the negligence and gravity designations in the citation. Resp. Br. at 12; Resp. Rep. at 2.

The Secretary contends that MSHA properly asserted jurisdiction over the lot and the truck. Secretary's Post-Hearing Brief ("Sec'y Br.") at 6. The Secretary further contends that the search of the truck was reasonable because § 103(a) grants MSHA Inspectors the right to enter and inspect the truck without providing advance notice. *Id*. at 4. The Secretary also argues that Rain for Rent was not denied its walkaround rights because Tejeda returned to the truck and spoke with Inspector Basich while he was still conducting the inspection. *Id*.

For the reasons set forth below, I affirm the citation as written.

A. Jurisdiction

The Office and Parking Lot

The Mine Act provides that "[e]ach coal or other mine . . . and each operator of such mine . . . shall be subject to the provisions of this Act." 30 U.S.C. § 803. Thus, in order to prove that MSHA had jurisdiction to issue the subject citation in this case, the Secretary must prove that the violation occurred at a "mine" and that the citation was issued to an "operator."

[3] As a preliminary matter the court denies Respondent's request for a new hearing based on the Supreme Court's recent decision in *Lucia v. Securities and Exchange Commission*, 135 S.Ct. 2044 (2018). *See* Respondent's Post-Hearing Brief, at 21, n. 17. The full Commission unanimously ratified the appointment of its ALJs on April 3, 2018, more than a month prior to this hearing. Federal Mine Safety and Health Review Commission, *Commission Ratification Notice*, http://www.fmshrc.gov/about/news/commission-ratification-notice (Apr. 3, 2018). Thus, this court was constitutionally appointed as required by *Lucia* and Respondent is not entitled to a new hearing. *See Lucia*, 135 S. Ct. at 2050; *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 512-13 (2010); *see also Jones Bros. Inc. v. FMSHRC*, No. 17-3483, slid op. at 11 (6th Cir. July 31, 2018).

The Act defines a "coal or other mine" as

> (A) an area of land from which minerals are extracted in nonliquid form . . . (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 including impoundments, retention dams, and tailings ponds, on the surface or underground, used in, or to be used in, or resulting from, the work of extracting such minerals from their natural deposits in nonliquid form, . . . or used in, or to be used in, the milling of such minerals, or the work of preparing coal or other minerals . . . .

30 U.S.C. § 802(h) (1). The Secretary has interpreted subsection (A) of this definition to refer to "extraction areas and everything within their boundaries." *See Sec'y of Labor v. Nat'l Cement Co. of Cal.*, 573 F.3d 788, 793 (D.C. Cir. July 2009). He interprets subsection (B) to include roads but not the vehicles on them, while (C) reaches equipment including vehicles, tools, and other property used in mining but not located within an extraction area. *Id*. at 795. This interpretation has been accepted by the D.C. Circuit. *Id.* (holding that the Secretary's interpretation of subsection B is reasonable as part of the Mine Act's overall enforcement scheme). The Commission has applied subsection (C) to find that jurisdiction existed over a warehouse located one mile from the closest extraction site because it was a "facilit[y] … used in mining." *Jim Walter Res., Inc.*, 22 FMSHRC 21 (Jan. 2000). The Commission has also affirmed MSHA's jurisdiction over various "equipment … used in mining," including trucks and conveyors used in the screening process but located on a public road, *State of Alaska, Dep't of Transp.*, 36 FMSHRC 2642, 2647 (Oct. 2014); a dragline being assembled at a site one mile from where coal was being mined, *Justis Supply & Machine Shop*, 22 FMSHRC 1292, 2000 WL 1682492 (Nov. 2000); and a garage adjacent to an asphalt plant and used for mining work, *W.J. Bokus Industries, Inc.*, 16 FMSHRC 704 (Apr. 1994). The recent Sixth Circuit case *Maxxim Rebuild* suggests that application of subsection (C) may be limited to locations in or adjacent to a working mine. *Maxxim Rebuild v. FMSHRC*, 848 F.3d 737, 740 (6th Cir. 2017).

The legislative history of the Act indicates that the intention of Congress was 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). Accordingly, the Commission has construed Section 3(h) (1) broadly in favor of Mine Act coverage. *See, e.g., State of Alaska, Dep't of Transp.*, 36 FMSHRC 2642, 2647 (Oct. 2014); *Calmat Co. of Ariz.*, 27 FMSHRC 617, 622, 624 (Sept. 2005).

I find that the Plant office and the parking lot were "facilit[ies] used in the work of" mining in accordance with subsection (C). The Natividad Plant is a working mine. The office and parking lot are located on mine property and adjacent to the Plant's active extraction sites. Ex. S–1, S–2; Tr. 26. Lhoist directed mining operations out of the office and kept paperwork and examination records there. Tr. 30. The parking lot serviced the office and was adjacent to the Plant's primary plant crusher. Tr. 30, 64-65, 79. Miners, contractors, and vendors parked their professional vehicles in the lot to sign in and receive authorization to enter the mine site to

perform work. Tr. 30, 79. The office and parking lot are thus geographically and functionally related to the mining process at Natividad Plant and are subject to MSHA jurisdiction under the Act.

Respondent contends that the Secretary's assertion of jurisdiction over the office and parking lot is inconsistent with the structure and purpose of subsections (B) and (C) because the Secretary has taken conflicting stances on his inspection policy. Resp. Br. at 8. It contends that Inspector Basich put forth two novel interpretations of MSHA's jurisdiction over parking lots at hearing to improperly include the lot at issue. *See* Resp. Br. at 9. Respondent contends that these interpretations, which it nicknamed the "doing business test" and "lease test," would lead to absurd results that would permit MSHA to assert jurisdiction over miners' vehicles in parking lots located away from the mine or in lots adjacent to but not affiliated with the mine. *Id*. at 9-10. Rain for Rent similarly claims that the Secretary's interpretation necessarily and inappropriately extends his jurisdiction over any private vehicles located in the parking lot.[4] Resp. Br. at 12.

Respondent's hypothetical scenarios contain material facts that are not present in the instant case and are therefore of minimal relevance to its disposition. *See Nat'l Cement Co.*, 573 F.3d 788, 796 (D.C. Cir. July 2009) ("The theoretical possibility that an agency might someday abuse its authority is of limited relevance in determining whether the agency's interpretation of a congressional delegation is reasonable"). Here the Secretary reasonably applied the plain language of subsection (C) to assert jurisdiction over the parking lot in question. The parking lot is on Natividad Plant property, adjacent to active extraction sites, and used for mine-related purposes. Likewise, the Secretary did not assert jurisdiction over any private vehicles in this case, and Inspector Basich took reasonable steps to demonstrate that it was not his intent to do so. He testified that the truck was clearly labeled as a Rain for Rent vehicle, and Tejeda drove it on behalf of Rain for Rent to the parking lot with the intent to perform professional services at the mine. Jt. Stip. #9; Ex. S–5, S–7; Tr. 33-35.

The parking lot is a facility used in the mining process and is subject to the jurisdiction of the Act.

Rain for Rent's Operator Status

Rain for Rent also argues that it was not an "operator" subject to the Act because Tejeda was not "performing services" at the mine when the citation issued. Resp. Br. at 5. Section 3(d) defines an "operator" as "any owner, lessee, or other person who operates, controls, or supervises a coal or other mine or any independent contractor performing services or construction at such mine." 30 U.S.C. § 802(d). The Commission has held that the independent contractor language

[4] Respondent notes that its inability to conduct discovery in this matter prevented it from determining where Inspector Basich discerned MSHA policy prohibiting the inspection of personal vehicles. Resp. Br. at 11, n. 6. The court acknowledges that simplified proceedings limited discovery as required by 29 C.F.R. § 2700.100(b)(5). This does not amount to a deprivation of due process rights that Respondent alleges. The legal questions presented in this case and my findings are in no way dependent on Respondent's inability to depose Inspector Basich. Respondent had the opportunity to ask the Inspector about MSHA policy at hearing, and indeed did so. Tr. 91.

of Section 3(d) "covers any independent contractor performing more than *de minimis* services at a mine."[5] *Musser Eng'g, Inc.*, 32 FMSHRC 1257, 1267–1270, 1276-79 (Oct. 2010) (Company that prepared permit application and maps contained therein for a mine was an independent contractor "performing services" at the mine).

The Commission has interpreted the language of § 3(d) to include a wide array of services that need not be performed on mine property as long as the services are related to the mine site and its operations. *Joy Techs., Inc.*, 17 FMSHRC 303, 307-08 (Mar. 1995) (Contractor that sold a continuous miner machine to a mine and performed maintenance services at the mine site on four occasions was an operator because its work was more than *de minimis* and essential to extraction at the mine); *Thompson Electric, Inc*., 39 FMSHRC 1228 (June 8, 2017) (ALJ) (Contractor that provided electric services but was never present at the mine site for more than 5 consecutive days was an operator because the contractor was performing maintenance of mine equipment on mine property); *Agapito Assocs., Inc.,* 34 FMSHRC 3465 (Dec. 2012) (ALJ) (Consulting company that performed services remotely and spent only 27 days on mine site over a 12-year period and provided analysis of potential for retreat mining was an operator because its work influenced the mine's roof control plan).

I find that Rain for Rent is an "operator" under the Act. Rain for Rent was performing ongoing services at the Natividad Plant that were related to the mine and its extraction process. *See Musser Eng'g*, 32 FMSHRC at 1269; *Joy Techs.*, 17 FMSHRC at 307-08; *Agapito Assocs., Inc.*, 34 FMSHRC at 3465. Respondent has an MSHA Mine Contractor Identification Number and contracted with Lhoist to pump floodwater out of the Natividad Plant's quarry pit. Jt. Stip. #2; Tr. 42-43. Lhoist was unable to extract lime from the quarry while water accumulated in the pit and Rain for Rent's services therefore facilitated the extraction process.

Rain for Rent's presence at the mine was also more than *de minimis*. Prior to the inspection at issue Tejeda drove the cited truck onto mine property on multiple occasions to install, repair, and replace a water pump on the mine site. Ex. S–7; Tr. 42-43. On the day of the citation, Tejeda parked the truck in the office parking lot with the intent to enter the mine site to perform those same services. *Id*. Lhoist's sign in sheets show that Tejeda remained at the mine site for nearly two hours after signing in. Ex. S–7. Rain for Rent therefore contracted to perform more than *de minimis* services directly related to mine operations at the Natividad Plant at the time of the inspection.

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[5] Previous Commission cases applied a two-prong test addressing the independent contractor's "proximity to the extraction process and the extent of its presence at the mine." *Otis Elevator Co.*, 11 FMSHRC 1896, 1902 (Oct. 1989); *see also Old Dominion Power Co. v. Donovan*, 772 F.2d 92 (4th Cir.1985). However, the D.C. Circuit explicitly rejected this approach in its review of the *Otis Elevator* decision, and no Circuit Court has applied the test since. *Otis Elevator Co. v. Secretary of Labor*, 921 F.2d 1285, 1290 (D.C. Cir. 1990) ("Section 3(d) does not extend only to certain "independent contractor[s] performing services ... at [a] mine"; by its terms, it extends to "any independent contractor performing services ... at [a] mine."); *see also N. Ill. Steel Supply Co. v. Sec'y of Labor*, 294 F.3d 844, 848-49 (7th Cir. 2002); *Joy Techs., Inc. v. Sec'y of Labor*, 99 F.3d 991, 999-1000 (10th Cir. 1996). Commissioner Cohen in *Musser* stated that a test based on the text of the statute is more appropriate and that the Commission's older precedent "merits reexamination." *Musser*, 32 FMSHRC at 1267 n.10.

Rain for Rent's contention that Tejeda was not "performing services" because he had not yet signed in and entered the mine site at the time of the citation unduly narrows the scope of § 3(d). *See Agapito Assocs., Inc.*, 34 FMSHRC at 3470 ("'[T]he totality of the work' performed upon the pertinent project, not just the work relating to the underlying citations, 'must be considered on the jurisdiction issue") citing *Musser Eng'g Inc.*, 32 FMSHRC at 1269. Rain for Rent was performing pumping services for Lhoist and Tejeda was an employee of Rain for Rent tasked with performing those services. Tejeda's work on behalf of Rain for Rent entailed entering the Plant office to sign in and make his presence known on the site. The mere fact that Tejeda had not yet signed in does not alter the professional nature of his visit or otherwise diminish Rain for Rent's status as an operator. *See Musser Eng'g*, 32 FMSHRC at 1269 (holding that even services performed away from mine property are considered to be performed at a mine if those services "relate to the mine"). The court declines to limit the jurisdictional reach of § 3(d) based upon down-to-the-minute actions of contractor employees on mine property when the purpose of their presence is to perform services directly related to the extraction process.

Rain for Rent's claim that the Secretary's interpretation would improperly subject contractor vehicles on mine property for purely personal reasons to liability under the Act is unfounded and irrelevant to the facts surrounding the alleged violation. Resp. Br. at 7. Tejeda's truck was a business vehicle and Basich took clear and reasonable investigatory steps to reasonably conclude that the truck was at the mine on behalf of Rain for Rent and that he was therefore authorized to inspect it. Tr. 31-35, 73, 92. He credibly testified that the truck had a "Rain for Rent" decal and a Department of Transportation Number. Tr. 31-35. Basich observed Tejeda exit the truck and enter the mine office, and concluded that Tejeda intended to enter the extraction site. *Id*.

Accordingly, I find that MSHA has jurisdiction over Rain for Rent's employee and truck.

B. Fourth Amendment Considerations

Inspector Basich's search of Respondent's truck in Tejeda's absence complied with the Act's regular and certain inspection procedures provided by § 103(a) and approved by the Supreme Court.

The Supreme Court has held that the general inspection program of warrantless inspections authorized by § 103(a) of the Mine Act does not violate the Fourth Amendment. *Donovan v. Dewey*, 452 U.S. 594, 605 (1981). The dangerous nature of mining and ease with which health or safety hazards can be concealed upon advance notice of an inspection indicate that a warrant requirement would significantly frustrate the purposes of the Act. *Id*. at 603. The Court found that in light of these factors, the Mine Act's warrantless inspection program was a constitutionally adequate substitute for the Fourth Amendment's warrant requirement because it notified operators of regular and frequent searches, outlined what health and safety standards must be met to comply with the Act, curtailed the extent of government searches, and prohibited forcible entry by requiring the Secretary to file a civil action when denied entry onto a mining facility. *Id*. at 605. All mine owners and operators should thus be aware and even expect continuous and frequent inspections without a warrant or probable cause. *Id*.

The Commission thus held that a deprivation of §103(f) walkaround rights during an inspection does not violate the regular and certain inspection procedure provided for by the Mine Act in violation of the Fourth Amendment because no advance notice is required to conduct an inspection. *SCP Investments, LLC* ("*SCP I*"), 31 FMSHRC 821, 837 (Aug. 2009) (holding that the failure of an MSHA inspector to permit a representative of the operator to accompany him on an inspection "does not curtail the inspector's right to enter and inspect the mine"); *see also Big Ridge, Inc.*, 36 FMSHRC 1677, 1725-26 (June 2014) (ALJ); *DJB Welding Corp.*, 32 FMSHRC 728, 731, 32 (June 2010) (ALJ). Section 103(a) provides MSHA Inspectors with a right of entry to, through, or upon any coal or other mine for the purpose of conducting an inspection without giving advance notice, and includes the "the right to use any investigatory technique reasonably related to the discovery of violations, so long as it is employed with reasonable limits and in a reasonable manner." *DJB Welding Corp.*, 32 FMSHRC at 731-32.

In *DJB Welding*, the court held that an MSHA Inspector's entry into a contractor's welding truck without notice or permission was reasonable because the truck was a work vehicle that could present hazardous conditions on the mine site. *Id*. The search was thus an acceptable investigatory technique that was reasonably related to enforcement of the Act. *Id*.

Much like the welding truck in *DJB Welding*, Inspector Basich's search of the truck was part of a routine inspection conducted at Natividad plant. The truck was a work vehicle located on mine property and owned by a contractor performing work on the mine site, and could have presented hazardous conditions on the site. Section 103(a) thus granted Inspector Basich the right to enter the truck to inspect for potential violations without providing advanced notice to the driver or waiting for him to return to the vehicle. Rain for Rent is an MSHA-registered contractor and has been subject to MSHA inspections in the past; it should have a reasonable expectation that regular inspections of its equipment could occur. *Dewey*, 452 U.S. at 603; c*f*. *Big Ridge, Inc.*, 36 FMSHRC 1677, 1726 (June 2014) (ALJ).

Furthermore, Basich's decision to open the door was reasonably related to determining whether Rain for Rent violated § 56.14207 of the Act. Basich testified that he noticed the Rain for Rent truck rock back and forth in a manner that suggested the parking brake was not set. Tr. 33-35. He opened the door in furtherance of this investigation because he could not observe the parking brake through the window or in any other manner. Tr. 32-33. This investigatory technique was reasonable and necessary to determine whether the truck presented a hazardous condition. There was nothing irregular or uncertain about Inspector Basich's inspection of the truck that would run afoul of the Supreme Court's decision in *Dewey*, require a warrant, or otherwise violate Rain for Rent's Fourth Amendment rights.

I reject Respondent's argument that Inspector Basich's search deprived Respondent of its claimed right to refuse an inspection based on jurisdictional grounds pursuant to §108(a)(1)(D).[6] Section 108(a)(1)(D) does not expressly confer operators the right to refuse an inspection but prohibits forcible entry and requires that the Secretary file a civil action in federal court when a mine owner refuses entry onto a mine site or to mine equipment. *See Dewey*, 452 U.S. at 604. The prohibition of forcible entry is not necessarily the same as the granted right to deny an inspection. That the Act authorizes the Secretary to issue a citation to any operator that refuses or interferes with an inspection indicates that MSHA's right of entry under § 103(a) is to be construed broadly and that an operator's refusal or interference with an MSHA inspection is forbidden and a "dereliction of [operators'] duty under the Act." *Topper Coal Co.*, 17 FMSHRC 945, 948 (June 1995) (ALJ) citing *Waukesha Lime & Stone Co.*, 3 FMSHRC 1708 (July 1981).

Nor does the language of § 103(f) suggest that walkaround rights entail an operator's right to deny entry. That provision requires that an Inspector give an operator the opportunity to accompany an inspection for the purpose of "aiding such inspection and to participate in pre- or post-inspection conferences held at the mine." 30 U.S.C. § 813(f). Thus, walkaround rights by their very definition entail participation in an inspection, not refusal. *Cf. SCP I*, 31 FMSHRC at 832 ("There is nothing in either section 103(f) *or the remainder of the Mine Act* that indicates than an operator would have the extraordinary power to essentially nullify an inspection by refusing to participate in it") (emphasis added).

Respondent's interpretation would also curtail the Secretary's right of entry by requiring inspectors to provide notice to operators and contractors before each inspection in order to allow them the opportunity to refuse entry. *SCP I*, 31 FMSHRC at 837, 842 ("There is no language in section 103(a) that makes the inspector's right to enter the mine, or to conduct an inspection and cite conditions that violate mandatory standards, contingent upon…compliance with…section 103(f)"). Such a requirement is contrary to the language in §103(a) prohibiting advance notice and would frustrate the objectives of the Act by affording operators the opportunity to address perceived safety violations before allowing entry. *See Dewey*, 452 U.S. at 603. To grant all operators subject to a Mine Act inspection the right to refuse entry would subjugate the § 103(a) inspection program to the operator's perceived right to deny inspections and require advance notice be provided to operators to the detriment of the Mine Act's enforcement goals.

As a result, Respondent's interpretation would essentially render any violation of § 103(f) walkaround rights a *per se* violation of the Fourth Amendment and nullify otherwise valid

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[6] Section 108(a)(1)(D) states in relevant part:

> The Secretary may institute a civil action for relief, including a permanent or temporary injunction, restraining order, or any other appropriate order in the district court of the United States for the district in which a coal or other mine is located or in which the operator of such mine has his principle office, whenever such operator or his agent…refuses to permit the inspection of a coal or other mine…"

30 U.S.C. § 818(f).

enforcement actions in contravention of Commission precedent and § 103(f) itself. 30 U.S.C. § 813(f) ("Compliance with this subsection shall not be a jurisdictional prerequisite to the enforcement of any provision of this chapter"). As noted above, the Commission and its judges have consistently held that even the arbitrary denial of § 103(f) walkaround rights is not a violation of the Fourth Amendment's protections against warrantless searches. *See SCP I*, 31 FMSHRC at 841-842 (opn. of Comm'r Jordan); *Big Ridge, Inc.*, 36 FMSHRC at 1725-26; *DJB Welding*, 32 FMSHRC at 731-32. I decline to limit the Act's constitutionally approved general inspection program in such a drastic manner.

Accordingly, the inspection at issue did not violate Rain for Rent's Fourth Amendment Rights.

C. Section 103(f) Walkaround Rights

I next turn to whether Inspector Basich violated § 103(f) when he began his inspection of the truck in Tejeda's absence. Section 103(f) states in relevant part:

> Subject to regulations issued by the Secretary, a representative of the operator and a representative authorized by his miners shall be given an opportunity to accompany the Secretary or his authorized representative during the physical inspection of any coal or other mine made pursuant to the provisions of subsection (a) of this section, for the purpose of aiding such inspection and to participate in pre- or post-inspection conferences held at the mine…Compliance with this subsection shall not be a jurisdictional prerequisite to the enforcement of any provision of this chapter.

30 U.S.C. § 813(f).

Section 103(f) is a qualified right and the Commission has recognized a crucial substantive difference between the absence of walkaround participation that is not intended to vitiate any citations and penalties, and the unauthorized denial of such walkaround rights. *SCP Invs., LLC* ("*SCP I*"), 31 FMSHRC 821, 831-32, (Aug. 2009) (Inspector arbitrarily denied operator's walkaround rights when he refused to allow the mine owner onto the mine site because he had not received new miner training); *Big Ridge, Inc.*, 36 FMSHRC 1677 (June 2014) (ALJ) (Inspector arbitrarily denied operator's walkaround rights because he did not permit mine representative to call for additional representatives to accompany three different teams performing an impact inspection in different areas). The denial of walkaround rights in itself is not sufficient to merit vacatur. *SCP I*, 31 FMSHRC at 834. Commission judges must determine (1) whether the operator's walkaround rights were denied arbitrarily and (2) the effect of that denial on the operator's case to determine the proper remedy. *SCP I*, 31 FMSHRC at 821, 827, 829, 830-31; *see also DJB Welding*, 32 FMSHRC at 734.

In *SCP I*, the Commission found that the inspector arbitrarily denied the mine owner his walkaround rights but remanded the case to permit the Judge to determine the effect of a deprivation of walkaround rights on the operator's ability to present its defense. *SCP I*, 31 FMSHRC at 822. Two members of the Commission suggested that the second step of the analysis should entail an exclusionary hearing to determine what prejudice, if any, resulted from

the violation of walkaround rights and exclude evidence accordingly. *Id*. at 822, 834. One Commissioner suggested that the Judge retained discretion at hearing to determine the proper civil penalty with the consideration that a violation of walkaround rights may have affected the mine's ability to present evidence relevant to its case. *Id*. at 839-40. The fourth and final Commissioner found that the exclusion of the operator from the inspection had no effect on the trial of the case. *Id*. at 842-43.

Consequently, subsequent ALJ decisions have diverged on whether the deprivation of an operator's walkaround rights may merit vacatur or necessarily precludes it in favor of applying the exclusionary rule. *See SCP Invs., LLC* ("*SCP II*"), 32 FMSHRC 119, 128-29 (Jan. 2010) (ALJ) (holding that a violation of § 103(f) rights is *per se* prejudicial and vacating citations based upon improper denial of walkaround rights "on due process, abuse of discretion and/or prejudice grounds); *DJB Welding*, 32 FMSHRC at 734-36 (holding that an operator's abuse of discretion in denying walkaround rights provides a sufficient basis for vacating the citations); *contra Big Ridge Inc.*, 36 FMSHRC at 1735-36 (holding that the Commission requires a showing that denial of § 103(f) walkaround rights actually prejudiced the preparation or presentation of operator's defense and applying the exclusionary rule accordingly).

I find that Rain for Rent was not arbitrarily denied the opportunity to exercise its walkaround rights. Section § 103(f) requires that operators be given the opportunity to accompany an inspector during the inspection, and Tejeda was given that opportunity upon his return. 30 U.S.C. § 813(f). Mr. Tejeda returned to the truck a few minutes into the inspection while Basich was still taking photographs of the unset parking brake. Tr. 35-36. Basich identified himself to Tejeda as an MSHA inspector, explained his authority over the vehicle, and explained why he was inspecting the truck. *Id*. Tejeda was permitted and able to observe the violative condition and was present when the citation was issued and abated. Tr. 35, 95. Tejeda therefore had sufficient opportunity to view the alleged violation, open a dialogue with Inspector Basich regarding the inspection, and offer mitigating circumstances prior to and after the issuance of the citation in accordance with § 103(f). *Id*. I find this opportunity sufficient under § 103(f).

Even assuming arguendo that Inspector Basich arbitrarily denied Rain for Rent its walkaround rights, the facts do not merit vacatur or the exclusion of evidence derived from the search.

Inspector Basich did not abuse his discretion in beginning the inspection without Tejeda. The Commission has found an abuse of discretion "when there is no evidence to support the decision or if the decision is based on an improper understanding of the law." *SCP II*, 32 FMSHRC at 128-29. As discussed above, Basich inspection and entry into the truck in Tejeda's absence to determine whether it presented safety hazards was a lawful exercise of his § 103(a) right of entry. The inspection was well within MSHA's authority because it was part of a routine inspection conducted to enforce the safety and health provisions of the Act. It was further based upon Inspector Basich's reasonable belief that the truck's back and forth motion while parked indicated that the brake was not set in violation of the Act. Basich's actions were therefore supported by evidence and based on a proper understanding of MSHA's right of entry granted pursuant to § 103(a) of the Act.

Respondent argues that Basich abused his discretion because he did not make every reasonable effort to wait for Tejeda's return before inspecting the truck. Resp. Br. at 19. I disagree. Basich took reasonable steps to discover the violation before exercising his right of entry when he looked into the windows. He had no obligation under the Act to wait for Tejeda's return to open the truck door. An inspector has broad discretion on how to approach an inspection, and an inspector's decision not to delay an inspection is not a *per se* abuse of discretion. *DJB Welding*, 32 FMSHRC at 735. Even if Basich's decision to conduct an inspection initially deprived Rain for Rent of its walkaround rights, he nonetheless had the right to inspect the truck and gave Tejeda the opportunity to view the scope of the alleged violation only minutes later. *See SCP I*, 31 FMSHRC at 887, 842.

Nor did the hypothetical denial result in actual prejudice meriting the exclusion of any evidence derived from the inspection. *See Big Ridge*, 34 FMSHRC at 1736-37. Actual prejudice occurs when an operator can show that the denial of the walkaround rights resulted in its inability to observe the condition as cited in order to prepare or present its defense on the merits before the Commission. *Id.* (citations omitted). Tejeda returned to the truck while the inspection was ongoing and the violative condition still existed. Tr. 35-36, 95. He observed the violative condition unchanged from when Inspector Basich first opened the door and was present when the citation was abated. Respondent does not identify, and the court does not conceive of any procedural, jurisdictional, or substantive challenges that were lost or adversely affected because Tejeda was not present at the precise moment Basich opened the door to the truck. Tejeda's short absence therefore did not actually prejudice Rain for Rent's ability to argue its case before this court.

For the reasons explained above, I find that Rain for Rent was not arbitrarily denied an opportunity to accompany Inspector Basich on his search of the truck.

D. Citation No. 8785566

Rain for Rent also challenges the fact of violation, gravity, and negligence designations of the citation. Resp. Rep. at 2.

The Violation

Inspector Basich issued Citation No. 8785566 for a violation of 30 C.F.R. § 56.14207. That standard provides 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. When parked on a grade, the wheels or tracks of mobile equipment shall be either chocked or turned into a bank." 30 C.F.R. § 56.14207.

The Secretary has proven that Rain for Rent violated the standard. The truck was "mobile equipment" as defined by the regulation. *Cortez Gold Mines*, 16 FMSHRC 148, 156 (Jan. 1994) (ALJ Morris) ("Mobile equipment" includes F-150 pickup truck). Mr. Tejeda parked the truck and did not set the parking brake before leaving the truck to enter the mine office. Tr. 38. Inspector Basich provided photographs clearly indicating that the parking brake was not set when the truck was parked and left unattended. Ex. S–5.

Respondent contends that the vehicle was not unattended because the driver was ten yards away and could see the vehicle through the Plant's office windows. Resp. Br. at 12. This argument fails. Commission precedent has found vehicles to be "unattended" for the purposes of section 56.14207 when a miner is not behind the wheel of the vehicle and cannot control the mobile equipment. *See Blanchard Machinery Co.*, 38 FMSHRC 1786, 1794 (July 2016) (ALJ) (deferring to the Secretary's reasonable interpretation); *Knife River Constr.*, 36 FMSHRC 2176, 2181 (Aug. 2014) (ALJ). Here, there is no question that Mr. Tejeda could not control the truck while in the mine office.

Accordingly, I affirm the violation of section 56.14207.

Negligence

Under the Mine Act, operators are held to a high standard of care, and "must 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." 30 C.F.R. § 100.3(d). The Mine Act defines reckless disregard as conduct which exhibits the absence of the slightest degree of care, high negligence as actual or constructive knowledge of the violative condition without mitigating circumstances; moderate negligence as actual or constructive knowledge of the violative condition with mitigating circumstances; and low negligence as actual or constructive knowledge of the violative condition with considerable mitigating circumstances. 30 CFR § 100.3: Table X.

The Commission and its judges are not bound to apply the part 100 regulations that govern MSHA's determinations addressing the proposal of civil penalties. *Newtown Energy, Inc.*, 38 FMSHRC 2033, 2048 (Aug. 2016), *citing Brody Mining, LLC*, 37 FMSHRC 1687, 1701–03 (Aug. 2015). The Commission instead employs a traditional negligence analysis, assessing negligence based on whether an operator failed to meet the requisite standard of care. *Brody*, 37 FMSHRC at 1702. In doing so the Commission considers what actions a reasonably prudent person familiar with the mining industry, the relevant facts, and the protective purpose of the regulation, would have taken under the same circumstances. *Id*. Commission judges are thus not limited to an evaluation of mitigating circumstances but may instead consider the totality of the circumstances holistically." *Id.*; *see also Mach Mining*, 809 F.3d 1259, 1264 (D.C. Cir. 2016).

I find Rain for Rent to be moderately negligent. Inspector Basich testified that Tejeda was unaware that he violated the standard. Tr. 40. Section 56.14207 is a Rule to Live By Standard. Tr. 35-37. Rain for Rent is a registered mine contractor and is required to train its employees on the importance of the Rules to Live By standards. *Id*. Although the truck was on level ground and the violative condition did not pose a serious threat of injury, Tejeda should have known that failure to set the parking brake upon parking and exiting the vehicle constituted a safety violation.

I affirm the moderate negligence designation.

Gravity

The Commission has stated that gravity is to be approached "holistically," focusing on factors including the likelihood of injury, the severity of an injury if it occurs, and the number of miners potentially affected. *Consol. Penn. Coal Co*., 39 FMSHRC 1893, 1902-03 (Oct. 2017); *Newtown Energy, Inc.*, 38 FMSHRC 2033, 2049 (Aug. 2016).

Inspector Basich testified that the violation was unlikely to result in lost workdays because the truck was parked on level ground with the engine off and the transmission in the parked position. Tr. 38-39. Even if the truck were to pop out of the park position, it was unlikely to roll a significant distance or gain sufficient speed to cause an injury. Tr. 39. Thus, the worst possible injury would be bruising or contact with a miner's foot. *Id*. I credit Inspector Basich's testimony and affirm the designation.

V. PENALTY

It is well established that Commission administrative law judges have the authority to assess civil penalties de novo for violations of the Mine Act. *Sellersburg Stone Company*, 5 FMSHRC 287, 291 (Mar. 1983). The Act requires that in assessing civil monetary penalties, the Commission ALJ 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).

Rain for Rent's violation history is minimal. Ex. S–8. The Secretary assessed the statutory minimum penalty and Rain for Rent does not contend that the penalty is disproportionate to its business or would affect its ability to continue in business. I discussed the negligence and gravity of the violation in more detail above. I found the violation to be non-S&S and unlikely to result in lost workdays and the result of Rain for Rent's moderate negligence. Rain for Rent quickly abated the citation after being notified of its existence. Jt. Stip. #5, 11; Tr. 95. I assess a penalty of **$116.00**.

VI. ORDER

The Respondent is hereby **ORDERED** to pay the Secretary of Labor the sum of **$116.00** within 30 days of the date of this decision.[7]

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

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[7] 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

ADMINISTRATIVE LAW JUDGE ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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July 16, 2018

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), on behalf of KELLY RAWLEY, Complainant	DISCRIMINATION PROCEEDING Docket No. WEST 2018-0034-DM
v.	Mine: J.L. Sherman Excavation Co. Mine ID: 45-03100
J.L. SHERMAN EXCAVATION CO. and PAMELA AND JEFFREY SHERMAN, Respondents	

ORDER OF DISMISSAL
DECISION APPROVING SETTLEMENT
ORDER TO PAY

Before: Judge McCarthy

This case is before me upon a discrimination complaint filed by the Secretary of Labor on behalf of Kelly Rawley under section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d). This is the fourth Commission proceeding involving Rawley and Respondent, J.L. Sherman Excavation Company. The prior proceedings were settled, as outlined below. This matter is set for hearing on July 17-18, 2018 in Spokane, Washington. On July 12, 2018, the Secretary filed an Unopposed Motion for Approval of First Amended Settlement Agreement.

Complainant Kelly Rawley was employed at Respondent J.L. Sherman Excavation Company's mine. On October 5, 2015, Rawley complained to Respondent's owner, Jeffrey Sherman, about brakes on an endloader that made it unsafe to operate. On October 6, 2015, Jeffrey Sherman told Rawley not to speak with an MSHA inspector. Jeffrey Sherman also terminated Rawley's employment with J.L. Sherman.

On November 12, 2015, Rawley filed a Discrimination Complaint with MSHA, alleging that Respondent interfered with his statutory rights and discriminated against him by instructing him not to speak with the MSHA inspector and by discharging him because of protected activity in violation of Section 105(c) of the Mine Act. Rawley withdrew his November complaint after a representative of Respondent informed him that he had been laid off for the winter, not terminated, and would be able to return to work in April of 2016.

In the spring of 2016, Respondent reopened the mine but did not recall Rawley. On April 2, 2016, Rawley filed a new 105(c) complaint with MSHA alleging that he had been terminated and not rehired by Respondent. MSHA conducted an investigation. On May 12, 2016,

the Secretary of Labor filed an Application for Temporary Reinstatement in Docket No. WEST 2016-0467-DM. On May 23, 2016, the parties filed a Settlement Agreement and Joint Motion for Temporary Economic Reinstatement. On May 26, 2016, Administrative Law Judge Barbour ordered that Rawley be economically reinstated.

On June 16, 2016, after completion of MSHA's investigation, the Secretary filed a Complaint of Discrimination alleging that Respondent interfered with Rawley's statutory rights by instructing him not to speak with MSHA, and discriminated against him through discharge or refusal to rehire. That Complaint was assigned Docket No. WEST 2016-0545-DM.

On April 19, 2017, the Secretary filed an Unopposed Motion to Approve Settlement Agreement in WEST 2016-0545-DM. The Settlement Agreement provided that Respondent had interfered with Rawley's rights under section 105(c) of the Act when Jeffrey Sherman instructed Rawley not to speak with MSHA on October 6, 2015. The Settlement Agreement further provided, inter alia, that Respondent would reinstate Rawley to his previous position as leadman, with specified backpay and benefits, and that Rawley would not be discharged for three years, except for good cause with advance written notice to Rawley and the Secretary. Rawley and Respondent's owners, Jeffrey and Pamela Sherman, also agreed to engage in at least one session of personal, workplace conflict resolution at Respondent's expense, no later than June 1, 2017. Respondent also agreed to provide annual, comprehensive, workplace training on miners' rights and responsibilities under the Mine Act.

By Order of Dismissal dated April 27, 2017, the undersigned granted the Secretary's Unopposed Motion and approved the Settlement Agreement. Thereafter, Rawley returned to work for Respondent in late April 2017.

On May 2, 2017, MSHA issued Citation No. 7958951 against Respondent for failing to pay back wages due Rawley under the terms of the Settlement Agreement. *See* App. for Temporary Reinstatement, Docket No. WEST 2017-0598, at 4 (July 25, 2017). Shortly after receiving Citation No. 7958951, Pamela Sherman allegedly "accused Rawley of calling MSHA and complained that he was costing her money because of the citation." *Id*.

On May 31, 2017, Rawley and Respondent participated in a workplace conflict resolution session pursuant to the Settlement Agreement in WEST 2016-0545-DM. *Id*. As part of that session, Rawley signed an agreement that he would "provide written notification to [Respondents] of any safety or maintenance concern before any complaint is filed with MSHA or any agency." *Id*. at 5 (herein referred to as the "prior notification policy").

On June 28, 2017, Respondent terminated Rawley's employment allegedly for violating company policy prohibiting the possession of alcohol on company premises. *Id*. Contrary to the terms of the settlement agreement approved in WEST 2016-0545-DM, which provided that Rawley would not be discharged for three years, except for good cause with advance written notice to Rawley and the Secretary, the June 28, 2017 termination was "effective immediately." On July 3, 2017, Rawley filed a new discrimination complaint with MSHA. *Id*.

On July 25, 2017, the Secretary filed a new Application for Temporary Reinstatement against J.L. Sherman Excavation Company and Jeffrey and Pamela Sherman. The Secretary alleged that the prior notification policy that was agreed to during the workplace conflict resolution agreement was contrary to public policy and interfered with Rawley's statutory right under section 103(g) to make an anonymous complaint to MSHA about safety or health issues before complaining to Respondent(s). The Secretary further alleged that Rawley's June 28, 2017 termination constituted discriminatory retaliation for prior protected activity under section 105(c) of the Mine Act. The Secretary's Application was assigned Docket No. WEST 2017-0598-DM.

On July 31, 2017, Respondent agreed to reinstate Rawley, pending the outcome of the Secretary's investigation. On August 1, 2017, the Secretary filed a Motion to Withdraw Application for Temporary Reinstatement. On August 8, 2017, the undersigned granted the motion and dismissed the temporary reinstatement proceeding.

As noted above, the instant case arises out of the same circumstances as the three previous proceedings involving Rawley and J.L. Sherman Excavation Company.

The Complaint in the instant proceeding was filed after the Secretary's investigation of Rawley's July 3, 2017 discrimination complaint to MSHA. The Secretary alleges that Respondents J.L. Sherman, Jeffrey Sherman, and Pamela Sherman engaged in unlawful discrimination by retaliatory discharge of Rawley because of prior protected activity, and interfered with Rawley's exercise of statutory rights under the Act though the prior notification policy and Pamela Sherman's alleged coercive statement. First Amended Compl. at 5. The Secretary seeks to impose a $25,000 civil penalty against all three Respondents. *Id*. at 5.

The Secretary has filed an Unopposed Motion for Approval of First Amended Settlement Agreement to resolve the proceedings in Docket No. WEST 2018-0034. The First Amended Settlement Agreement proposes a reduction in civil penalties from $25,000 to $6,500. First Amended Agreement at 3. Regarding the events of May 2, 2017 and Citation No. 7958591, the Settlement Agreement represents that the parties would have presented conflicting testimony at trial as to whether Pamela Sherman made certain alleged coercive remarks to Rawley about contacting MSHA and costing her money. *Id.* at 2. In the unopposed motion, the Secretary factually explains why he has agreed to withdraw this interference allegation. Unopposed Mot. at 3. Regarding the events of May 31 and the Voluntary Settlement Agreement, the First Amended Settlement Agreement represents that the Shermans "were unaware [that] the prior notification provision violated section 105(c) of the Mine Act, even though they should have been aware [that] the prior notification provision violated section 105(c) of the Mine Act." First Amended Agreement at 3. Respondents agree to expunge from Rawley's personnel file any records relating to the events of June 27, 2017 through August 4, 2017, including the termination of Rawley's employment and his reinstatement following the temporary reinstatement proceedings in Docket No. WEST 2017-0598. *Id*. at 4. Respondents also agree to pay Rawley $4,000 in economic damages.[1] The First Amended Settlement Agreement represents that Respondents have retired, are not now engaging in mining and will not again engage in mining in the future. As a

[1] Exhibit A attached to the First Amended Settlement Agreement indicates that both the $4,000 in economic damages to Rawley and the $6,500 in MSHA civil penalties are being paid by J.L. Sherman, rather than by Jeffrey and Pamela Sherman.

consequence, the First Amended Settlement Agreement does not require Respondent to post notification of miners' rights at their worksite. Respondents have instead agrees that they shall mail a copy of MSHA's Miners' Rights Poster to all miners employed at J.L. Excavation Company between at least June 1, 2017, and November 20, 2017. *Id*. at 4. Finally, the First Amended Settlement Agreement states that, aside from the terms outlined above, "the making of the Agreement is not intended to and shall not constitute an admission by Respondent as to the merits of the allegations made in the Complaint, or as to any violation of the Federal Mine Safety and Health Act of 1977 (Mine Act), except in future proceedings brought under the Mine Act." *Id*. at 4.

By email dated July 13, 2018, Rawley's counsel confirmed that Rawley has found other employment and waives any right to reinstatement with Respondents.

I have reviewed the settlement motion, as well as the parties' Settlement Agreement, and I conclude that the proposed settlement is appropriate under the criteria set forth in section 110(i) of the Mine Act, is fair, reasonable, and appropriate under the facts, and protects the public interest because it will further the intent and purpose of the Federal Mine Safety and Health Act, as amended.

Accordingly, the Secretary's Unopposed Motion for Approval of First Amended Settlement Agreement is **GRANTED,** and the parties are **ORDERED** to comply with the terms and conditions in the settlement agreement within 30 days of the date of this order.[1] Upon completion of the terms and conditions of the Settlement Agreement, the captioned proceeding is **DISMISSED.**

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

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

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Kelly Rawley, P.O. Box 0045, Laclede, ID 83841

/ccc

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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July 18, 2018

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

ORDER DENYING SECRETARY'S MOTION TO DISMISS

Before: Judge Simonton

This contest proceeding involves a §103(k) Order, No. 9104295 ("(k) Order"), issued to M-Class Mining, LLC ("M-Class" or "Contestant") on February 24, 2018.[1] Pursuant to an order of the court, the parties submitted briefs addressing, among other issues, whether the Court retains jurisdiction to review a terminated (k) Order and whether the termination action moots any residual factual disputes. The Secretary filed a motion for dismissal to accompany his brief. Based on the reasoning below, I deny the motion.

I. Factual and Procedural Background

M-Class Mining operates the MC#1 mine in Macedonia, Illinois. On February 24, 2018, M-Class miner Mitchell Mullens was admitted to the hospital after complaining of dizziness and nausea. The hospital detected elevated carbon monoxide levels in Mullens' blood and local police notified MSHA of the incident. M-Class and MSHA immediately opened investigations into the matter. Inspector Brandon Naas conducted the investigation on behalf of MSHA and

[1] Section 103(k) of the Mine Act provides that:

> In the event of any accident occurring in a coal or other mine, an authorized representative of the Secretary, when present, may issue such orders as he deems appropriate to insure the safety of any person in the coal or other mine, and the operator of such mine shall obtain the approval of such representative, in consultation with appropriate State representatives, when feasible, of any plan to recover any person in such mine or to recover the coal or other mine or return affected areas of such mine to normal.

30 U.S.C. § 813(k).

concluded that Mullens was operating the mine's No. 1 Diesel Air Compressor when the symptoms began to present. Naas issued a § 103(k) Order to remove the compressor from service pending completion of MSHA's investigation. The next day, MSHA modified the (k) Order to allow normal mining operations to continue while keeping the compressor out of service for the duration of its investigation. On March 1, 2018, M-Class submitted a proposal to terminate the (k) Order. MSHA denied that proposal and provided a list of requirements to be fulfilled for termination. M-Class submitted a second plan one week later but did not agree to implement MSHA's requirements.

On March 15, 2018, M-Class filed a Notice of Contest and Motion for Expedited Hearing. The court denied the motion and initially set the docket for hearing on May 16, 2018. On April 27, 2018, the Secretary notified the court via email that MSHA completed its investigation and terminated the (k) Order. Since the (k) Order did not carry an assessed penalty and the Secretary did not issue a corresponding § 104 citation, the Secretary assumed that M-Class would withdraw its notice of contest. However, M-Class declined to do so because it believed that the (k) Order was invalidly issued and should be vacated. On May 2, 2018, the court postponed the hearing and ordered the parties to submit briefs addressing the Commission's jurisdiction over a terminated (k) Order, whether termination renders the matter moot, and any other issues the parties deemed appropriate. The parties submitted briefs on June 18, 2018 and the Secretary concurrently submitted a Motion for Dismissal. The parties filed replies on June 29, 2018. The case is set for hearing on August 9, 2018.

II. Disposition

The Secretary contends that the court does not retain jurisdiction to review a terminated (k) Order because there is no accompanying citation, penalty assessment, or mine closure to adjudicate. Secretary's Brief in Support of Motion to Dismiss Notice of Contest, ("Sec'y Br.") at 6. The Secretary argues that Commission precedent ties its jurisdiction to review (k) Orders to a closure or withdrawal of a mine, and where, like here, the closure is no longer in effect, jurisdiction over the (k) Order ceases. *Id*. For these reasons, the Secretary also contends that the matter is moot because M-Class no longer has a legally cognizable interest in the outcome of the contest. *See* Sec'y Br. at 7-8.

M-Class contends that the court retains jurisdiction over a (k) Order that has not been vacated. Contestant's Brief in Support of Jurisdiction for Administrative Contest, ("Cont. Br.") at 4. Contestant argues that § 103(k) Orders are similar to other orders under the Mine Act, and therefore operators have the right to contest the issuance or modification of (k) Orders and the Commission has authority to affirm, modify, or vacate a (k) Order regardless of whether it has been terminated. *Id*. at 5. M-Class argues that the case is not moot because the termination of the (k) Order did not resolve the factual disputes surrounding its issuance. Contestant's Response in Opposition to the Secretary's Motion to Dismiss ("Cont. Resp.") at 5. Therefore, M-Class maintains a legally cognizable interest in having the (k) Order vacated and removed from its safety record. *Id*. at 3. In the alternative, M-Class cites the D.C. Circuit's decision in *Performance Coal Co. v. FMSHRC*, 642 F.3d 234, 239 (D.C. Cir. 2011), to argue that the terminated (k) Order falls within the "capable of repetition yet evading review" exception to the mootness doctrine. *Id*. at 7.

A. Jurisdiction

I find that the court retains jurisdiction over terminated § 103(k) Orders that no longer impose restrictions on mine operations.

The parties do not dispute that the Mine Act's structure and legislative history grant the Commission authority to review active § 103(k) Orders. *See Pocahontas Coal Co., LLC*, 38 FMSHRC 176 (Feb. 2016) (hereinafter "*Pocahontas I*"). The Act's legislative history states that "an operator…may appeal to the Commission the issuance of a closure order." *Pocahontas Coal Co., LLC*, 38 FMSHRC 157, 162 (Feb. 2016) (hereinafter "*Pocahontas II*") citing *American Coal Co. v. Dep't of Labor*, 639 F.2d 659 (10th Cir. 1981). The Act's structure authorizes review of citations and abatement orders under § 104 and imminent danger orders under § 107(a), and thus similarly grants the Commission authority to affirm, vacate, or modify § 103(k) Orders. *See Pattison Sand Co., LLC v. FMSHRC*, 688 F.3d 507, 515-16 (8th Cir. 2012) citing *Am. Coal Co. v. U.S. Dep't of Labor*, 639 F.2d 659, 660-61 (10th Cir. 1981). As such, the Commission may and in fact has reviewed the validity and scope of a (k) Order, as well as whether an operator violated the terms of such an Order. *See Jim Walter Res., Inc.*, 37 FMSHRC 1868 (Sept. 2015); *Kentucky Fuel Corp.*, 38 FMSHRC 2905 (Dec. 2016) (ALJ).

It follows that the Commission's authority to affirm, modify, or vacate a (k) Order extends to the review of terminated (k) Orders. As with § 104 Orders, termination does not resolve or address the factual disputes surrounding the initial issuance of the Order. The Secretary's decision to terminate rests upon the end of the action or condition that prompted its issuance and not a determination of whether the issuance was supported by fact and law. Commission judges have reviewed whether the Secretary abused his discretion in issuing (k) Orders on multiple occasions. Although none of those cases appear to have directly addressed a terminated (k) Order, the court sees no compelling reason to restrict its review in this context. Since Contestant is seeking vacatur, this court has jurisdiction to review whether the circumstances surrounding the alleged incident support the issuance of the (k) Order. [2]

The Secretary argues that the termination of (k) Orders is dissimilar to the termination of § 104 orders because (k) Orders do not allege a violative condition and cannot be abated. Secretary's Response to Contestant's Memorandum ("Sec'y Rep.") at 4-5. He proceeds to contend that this difference restricts review of terminated (k) Orders because, once terminated, these Orders no longer affect the "closure" of a mine. *Id*. at 5. While true, the court does not believe that this difference strips the Court of jurisdiction. Even if "termination" carries a different meaning in the context of (k) Orders, a distinction between the termination and the vacatur of a (k) Order must remain. The elimination of the "closure" requirement of a (k) Order does not eliminate the Order from the mine's record and does not address whether the Order was validly issued, just as the termination of a § 104 citation or order through abatement does not resolve the validity of its issuance. The Secretary's argument effectively treats the termination of (k) Orders as similar if not identical to vacatur. However, the Secretary's refusal to vacate the (k) Order in this circumstance highlights that this cannot be the case. The Secretary does not provide

[2] At this time, the Court passes no judgment on the appropriate standard of review for (k) Orders or the validity of the (k) Order at issue.

and the court is unable to determine any other reason for the Secretary's refusal to do so save to protect the validity of its initial issuance, which is the crux of M-Class's contest.[3] To preclude such a contest from review deprives the operator of its right to challenge the (k) Order's legitimacy regardless of whether it remains in effect.

Accordingly, the court retains jurisdiction to review the terminated (k) Order.

B. Mootness

I next turn to the related issue of whether the Secretary's termination of the (k) Order rendered M-Class's contest moot. The Commission has recognized that a case is moot when "the issues presented no longer exist or the parties no longer have a legally cognizable interest in the outcome." *North American Drillers, LLC*, 34 FMSHRC 352, 358 (Feb. 2012), citing *Climax Molybdenum Co.*, 703 F.2d 447, 451-52 (10th Cir. 1983). When there is a substantial likelihood that an allegedly moot question will recur, the matter remains justiciable, and administrative orders remain justiciable if they are short term orders capable of repetition, yet evading review. *Id*.

I find that a live case or controversy exists over the validity of the (k) Order. While the Secretary's decision to terminate the (k) Order allowed M-Class to resume using the diesel compressor, the termination did not resolve any of the issues outlined in its notice of contest. *See* Cont. Resp. at 7. The termination does not vacate the (k) Order, does not resolve whether the Secretary abused his discretion in issuing the Order, and does not determine whether an "accident" occurred that was necessary to justify the issuance of the (k) Order. *Id*. M-Class also notes that the (k) Order remains present on its safety record. *Id*. at Ex. 1. Mine operators have a right to challenge Orders issued against it and have a clear interest in maintaining a clean safety record in the context of the Mine Act and public opinion. It therefore follows that these unresolved issues sustain M-Class's legally cognizable interest in the outcome of its contest.

Since a live case or controversy remains, I need not address whether M-Class's contest escapes mootness because it falls under the "capable of repetition but evading review" exception to the mootness doctrine as discussed in the D.C. Circuit's decision in *Performance Coal Co.*, 642 F.3d 234 (D.C. Cir. 2011). Cont. Br.at 7. Nonetheless, I take the time to discuss that decision in order to demonstrate that, even if no live case or controversy exists, the exception likely applies here.

In *Performance Coal Co. v. FMSHRC*, the Court rejected the Secretary's argument that the operator's challenge to certain terms of a § 103(k) Order was moot because the Secretary had

[3] Even if "vacatur" and "termination" were interchangeable terms in the context of § 103(k) Orders, the Commission has noted that the Secretary's exercise of his discretion to vacate a citation or order does not necessarily divest the court of its jurisdiction over that matter. *See North American Drillers, LLC*, 34 FMSHRC 352, 355-56 (Feb. 2012). It follows that the Commission's jurisdiction would not necessarily cease upon the termination of any citation or order, especially if "legal and procedural requirements after the vacatur of a citation or order, such as questions of mootness or the appropriateness of declaratory relief," remain. *Id*. at 356.

since changed the terms of the Order. 642 F.3d at 237-39. The Court noted that a party can escape mootness where it can establish that the duration of the challenged action is too short to be litigated fully before it expires and there is the a reasonable expectation the party will be subjected to the same action. *Id*. at 237. The Court held that the case was not moot under this exception because (1) the Secretary modified the challenged terms of the (k) Order well before Performance Coal's challenge could be fully litigated, and (2) there was a reasonable expectation that the operator would be subjected to the similar actions in the future. *Id*. at 238. M-Class contends that this exception applies to the instant case.

M-Class clearly satisfies the first prong of the analysis because MSHA terminated the (k) Order while the notice of contest was still in the prehearing phase. *See Performance Coal Co.*, 642 F.3d at 237 ("This court's jurisprudence recognizes that agency actions which tend to expire within two years are too fleeting to be litigated fully") (citations omitted). Here the (k) Order was issued in February of 2018 and terminated in April, a month before the set hearing date, and M-Class had no opportunity to bring its challenge before the court.

Analysis of the second prong requires further examination. In *Performance Coal*, MSHA clearly articulated to the court and the operator that it would continue to modify the (k) Order during its investigation process. *Id*. at 237. Contestant would therefore continue to be subjected to the different terms of the same (k) Order. Unlike that case, there is no indication here that MSHA intends to reissue a similar (k) Order to M-Class or otherwise restrict the use of the compressor in the future. The Secretary argues that this difference defeats Contestant's mootness claim and renders the *Performance Coal* decision irrelevant. *See* Sec'y Br. at 8-9; Sec'y Resp. at 5-7.

The Secretary construes the second prong too narrowly. In *Performance Coal*, the court noted that the proper question is not "whether [the operator] will again be subjected to the precise protocol at issue, but whether it will be subjected to further modifications from which it will seek temporary relief." *Performance Coal*, 642 F.3d at 237. Here, the court must therefore determine whether M-Class is likely to again be subjected to a (k) Order that is terminated before review can take place. MSHA's Mine Data Retrieval System shows at least three (k) Orders issued to M-Class at the MC#1 Mine since the (k) Order at issue. *See* MSHA Mine Data Retrieval System, *Mine Citations Orders and Safeguards*, https://arlweb.msha.gov/drs/ASP/MineAction.asp (last visited July 12, 2018). I find it reasonably likely that M-Class will again file a notice of contest against a (k) Order that is later terminated.

Accordingly, I find that the court has jurisdiction to review the validity of the terminated § 103(k) and the matter is not moot. The Secretary's motion is **DENIED**, and the parties are hereby **ORDERED** to comply with the terms of the May 3, 2018 Amended Notice of Hearing.

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

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