

**July 2011**

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07-08-2011	SECRETARY OF LABOR o/b/o THURMAN WAYNE PRUITT vs. GRAND EAGLE MINING	KENT2008-562	<a href="#">Page 1726</a>
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Review was granted in the following cases during the month of July 2011:

Secretary of Labor, MSHA on behalf of Peter L. Dunne v. Vulcan Construction Materials, Docket No. LAKE 2011-327-DM. (Judge Harner, unpublished order Denying Motion to dissolve Order of Temporary Economic Reinstatement)

Secretary of Labor, MSHA v. Black Beauty Coal Company, Docket No. LAKE 2009-570. (Judge Miller, June 21, 2011)

Lakeview Rock Products, Inc. v. Secretary of Labor, MSHA, Docket No. WEST 2010-1856-RM. (Judge Andrews, June 22, 2011)

Review was denied in the following case during the month of July 2011:

Secretary of Labor, MSHA v. Spring Creek Materials, Inc., Docket Nos. CENT 2010-317-M, et al., (Interlocutory Review of June 24, 2011 order by Chief Judge Lesnick)

Secretary of Labor, MSHA v. Black Beauty Coal Company, Docket No. LAKE 2009-470. (Judge Miller, June 21, 2011)



## **COMMISSION DECISIONS AND ORDERS**



**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

July 11, 2011

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

v.

OMYA CALIFORNIA

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Docket No. WEST 2011-604-M  
A.C. No. 04-00167-239737

Docket No. WEST 2010-1360-RM  
Citation No. 8560265

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

**DIRECTION FOR REVIEW AND ORDER**

BY THE COMMISSION:

These matters arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) (“Mine Act”).<sup>1</sup> On February 3, 2011, the Commission received a motion by counsel for Omya California (“Omya”) in Docket No. WEST 2011-604-M requesting to reopen a penalty assessment pertaining to Citation No. 8560265 that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a). On February 18, 2011, the Commission received a response from the Secretary of Labor stating that she does not oppose the request to reopen the assessment. While the motion was pending, Chief Administrative Law Judge Robert J. Lesnick dismissed Omya’s contest proceeding pertaining to Citation No. 8560265 (Docket No. WEST 2010-1360-RM) on the basis that the penalty assessment was never contested. On June 20, 2011, the Commission received a motion to rescind dismissal arguing that the proceeding had been erroneously dismissed due to clerical error.

We treat Omya’s motion to rescind dismissal as a petition for discretionary review and grant it. We conclude that, because Omya was in the process of contesting the penalty assessment, the dismissal was premature. Accordingly, the contest proceeding in Docket No. WEST 2010-1360 is hereby reinstated.

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<sup>1</sup> Pursuant to Commission Procedural Rule 12, on our own motion, we hereby consolidate docket numbers WEST 2010-1360-RM and WEST 2011-604-M, both captioned *Omya California* and both involving similar issues. 29 C.F.R. § 2700.12.

With respect to Docket No. WEST 2011-604-M, 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 section 105(a) orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure under which, for example, a party could be entitled to relief from a final order of the Commission on the basis of mistake, inadvertence, or excusable neglect. *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).



Having reviewed the facts and circumstances of this case, the operator's requests, and the Secretary's response, we hereby reopen the penalty proceeding contained in Docket No. WEST 2011-604-M 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. In addition, we vacate the order of dismissal issued in Docket No. WEST 2010-1360-RM.

/s/ Mary Lu Jordan  
Mary Lu Jordan, Chairman

/s/ Michael F. Duffy  
Michael F. Duffy, Commissioner

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

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

/s/ Patrick K. Nakamura  
Patrick K. Nakamura, Commissioner

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Chief Administrative Law Judge Robert J. Lesnick  
Federal Mine Safety & Health Review Commission  
601 New Jersey Avenue, N. W., Suite 9500  
Washington, D.C. 20001-2021

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

July 12, 2011

LAFARGE NORTH AMERICA, INC.	:	
	:	
v.	:	Docket No. LAKE 2010-481-M
	:	Docket No. LAKE 2010-22-RM
	:	Docket No. LAKE 2010-23-RM
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA)	:	

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

## DIRECTION FOR REVIEW AND ORDER

BY THE COMMISSION:

These matters arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) (“Mine Act”).<sup>1</sup> On June 21, 2011, the Commission received a motion by counsel for LaFarge North America, Inc., (“LaFarge”) in Docket Nos. LAKE 2010-22-RM and LAKE 2010-23-RM requesting that those contest proceedings be reopened “due to mistake and clerical error.” On June 3, 2011, Chief Judge Lesnick had dismissed the operator’s section 105(d) contests of Citation No. 6403907 and Order No. 6403908, which had been docketed as Nos. LAKE 2010-22-RM and LAKE 2010-23-RM, respectively. These contest cases had previously been stayed pending the assessment of the proposed penalties. The contest proceedings were dismissed because the Judge believed that the operator had failed to file an answer in the civil penalty proceeding involving the same citation and order and was therefore in default. That civil penalty proceeding had been docketed as No. LAKE 2010-481-M.

We treat LaFarge’s motion to rescind dismissal of the contest proceedings (Nos. LAKE 2010-22-RM and LAKE 2010-23-RM) as a petition for discretionary review and grant it. We conclude that, because LaFarge had filed an answer in the civil penalty proceeding (No. LAKE 2010-481-M), the contest proceedings should not have been dismissed. We also construe the motion as a request to reopen the civil penalty proceeding.

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<sup>1</sup> Pursuant to Commission Procedural Rule 12, on our own motion, we hereby consolidate Docket Nos. LAKE 2010-481-M, LAKE 2010-22-RM, and LAKE 2010-23-RM, all captioned *LaFarge North America, Inc.*, and involving similar issues. 29 C.F.R. § 2700.12.

On March 16, 2011, Chief Judge Lesnick had issued an Order to Show Cause and Default Order in the civil penalty proceeding. The order stated that a timely answer to the Secretary's petition for civil penalty had not been received by the Commission. Accordingly, LaFarge was ordered to file an answer within 30 days. Under the terms of the order, a failure to file an answer would automatically place the case in default on the 31st day.

Subsequently, the file in No. LAKE 2010-481-M did not indicate that an answer from LaFarge in response to the show cause order was ever received. As a result, the civil penalty proceeding was automatically placed in default status and the proposed penalties for the citation and order became final orders of the Commission.

In evaluating requests to reopen final section 105(a) orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure under which, for example, a party could be entitled to relief from a final order of the Commission on the basis of mistake, inadvertence, or excusable neglect. *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).

In its motion to rescind dismissal received on June 21, 2011, LaFarge contends that the judge's dismissal of the contest proceedings was in error, because it had timely filed an answer in No. LAKE 2010-481-M with the Commission within 30 days of receipt of the petition for assessment of civil penalty. LaFarge attached a copy of the answer and a signed certificate of service dated March 29, 2010. We accept the representation of counsel for LaFarge that the answer was sent.

Having reviewed the facts and circumstances of these cases, we hereby reopen the civil penalty and contest proceedings 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. We also vacate the June 3, 2011, order dismissing the contest proceedings.

/s/ Mary Lu Jordan  
Mary Lu Jordan, Chairman

/s/ Michael F. Duffy  
Michael F. Duffy, Commissioner

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

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

/s/ Patrick K. Nakamura  
Patrick K. Nakamura, Commissioner

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# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

July 13, 2011

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

v.

CAM MINING, LLC

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Docket No. KENT 2010-1630  
A.C. No. 15-18911-222233

BEFORE: Jordan, Chairman; Duffy, Young, Cohen, and Nakamura, 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. (2006) (“Mine Act”). On September 22, 2010, the Commission received from CAM Mining, LLC, a motion requesting that the Commission 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). On October 22, 2010, the Commission received a response from the Secretary of Labor stating that she does not oppose the request to reopen the assessment.

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 section 105(a) orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure under which, for example, a party could be entitled to relief from a final order of the Commission on the basis of mistake, inadvertence, or excusable neglect. *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).

Having reviewed the facts and circumstances of this case, the operator'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. 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/ Mary Lu Jordan  
Mary Lu Jordan, Chairman

/s/Michael F. Duffy  
Michael F. Duffy, Commissioner

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

/s/ Robert F. Cohen Jr.  
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/s/ Patrick K. Nakamura  
Patrick K. Nakamura, Commissioner



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# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

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WASHINGTON, DC 20001

July 13, 2011

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

v.

MILESTONE MATERIALS DIVISION/  
MATHY CONSTRUCTION COMPANY

Docket No. LAKE 2010-844-M  
A.C. No. 47-03213-206165

BEFORE: Jordan, Chairman; Duffy, Young, Cohen, and Nakamura, 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. (2006) (“Mine Act”). On July 16, 2010, the Commission received from Milestone Materials Division/Mathy Construction Company a motion by its counsel 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). On July 29, 2010, the Commission received a response from the Secretary of Labor stating that she does not oppose the request to reopen the assessment.

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 section 105(a) orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure under which, for example, a party could be entitled to relief from a final order of the Commission on the basis of mistake, inadvertence, or excusable neglect. *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).

Having reviewed the facts and circumstances of this case, the operator'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. 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/ Mary Lu Jordan  
Mary Lu Jordan, Chairman

/s/Michael F. Duffy  
Michael F. Duffy, Commissioner

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

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

/s/ Patrick K. Nakamura  
Patrick K. Nakamura, Commissioner

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# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

July 13, 2011

SECRETARY OF LABOR,	:	Docket No. WEST 2010-1619-M
MINE SAFETY AND HEALTH	:	A.C. No. 02-00135-216202-01
ADMINISTRATION (MSHA)	:	
	:	Docket No. WEST 2010-1620-M
v.	:	A.C. No. 02-00135-216202-02
	:	
ASARCO LLC	:	

BEFORE: Jordan, Chairman; Duffy, Young, Cohen, and Nakamura, 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. (2006) (“Mine Act”). On August 2, 2010, the Commission received motions by counsel from ASARCO LLC requesting to reopen penalty assessments that had become final orders of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).<sup>1</sup> On August 12, 2010, the Commission received a response from the Secretary of Labor stating that she does not oppose the requests to reopen the assessments.

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 section 105(a) orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure under which, for example, a party could be entitled to relief from a final order of the Commission on the basis of mistake, inadvertence, or excusable neglect. *See* 29 C.F.R. § 2700.1(b) (“the Commission and its Judges shall be guided so far as practicable

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<sup>1</sup> Pursuant to Commission Procedural Rule 12, on our own motion, we hereby consolidate docket numbers WEST 2010-1619-M and WEST 2010-1620-M, both captioned *ASARCO LLC* and both involving similar procedural issues. 29 C.F.R. § 2700.12.

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).

Having reviewed the facts and circumstances of this case, the operator’s requests, 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. 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/ Mary Lu Jordan  
Mary Lu Jordan, Chairman

/s/Michael F. Duffy  
Michael F. Duffy, Commissioner

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

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

/s/ Patrick K. Nakamura  
Patrick K. Nakamura, Commissioner

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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

601 NEW JERSEY AVENUE, NW

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July 13, 2011

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

v.

CEMEX CALIFORNIA CEMENT, LLC

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Docket No. WEST 2010-1782-M  
A.C. No. 04-05701-225178

BEFORE: Jordan, Chairman; Duffy, Young, Cohen, and Nakamura, 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. (2006) (“Mine Act”). On September 7, 2010, the Commission received from Cemex California Cement, LLC, a motion requesting that the Commission 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). On September 27, 2010, the Commission received a response from the Secretary of Labor stating that she does not oppose the request to reopen the assessment.

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 section 105(a) orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure under which, for example, a party could be entitled to relief from a final order of the Commission on the basis of mistake, inadvertence, or excusable neglect. *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).



Having reviewed the facts and circumstances of this case, the operator'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. 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/ Mary Lu Jordan  
Mary Lu Jordan, Chairman

/s/Michael F. Duffy  
Michael F. Duffy, Commissioner

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

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

/s/ Patrick K. Nakamura  
Patrick K. Nakamura, Commissioner

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# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

July 13, 2011

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Docket No. WEVA 2010-788
ADMINISTRATION (MSHA)	:	A.C. No. 46-09217-204747
	:	
v.	:	Docket No. WEVA 2010-810
	:	A.C. No. 46-09280-204750
INR-WV OPERATING, LLC	:	

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

## ORDER

BY THE COMMISSION:

These matters arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) (“Mine Act”).<sup>1</sup> On March 23 and 26, 2010, the Commission received motions by INR-WV Operating, LLC (“INR-WV”) 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).

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 section 105(a) orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure under which, for example, a party could be entitled to relief from a final order of the Commission on the basis of mistake, inadvertence, or excusable neglect. *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

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<sup>1</sup> Pursuant to Commission Procedural Rule 12, on our own motion, we hereby consolidate docket numbers WEVA 2010-788 and WEVA 2010-810, both captioned *INR-WV Operating, LLC*, and involving the same procedural issues. 29 C.F.R. § 2700.12.

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).

On December 2, 2009, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued Proposed Assessment Nos. 000204747 and 000204750 to INR-WV. The operator states that it failed to timely contest the proposed assessments due to a mistake by its accounting department. INR-WV contends that it followed normal procedures for processing the assessment forms in that the safety director received and reviewed the assessment forms, determined which penalties to contest and which to pay, and forwarded the forms to the accounts manager to prepare check requests and forward the requests and assessment forms to the accounting department for payment and processing. The operator contends that the failure occurred when the accounting department prepared the checks for payment, but did not submit the forms to MSHA's Arlington office or return them to the safety director so that he could submit them. The operator also states that it timely contested one of the underlying citations, pending in Docket No. WEVA 2010-260-R, which is the subject of the proposed assessment it seeks to reopen in Docket No. WEVA 2010-788. The operator filed its requests to reopen less than a month after receiving MSHA's delinquency notices in both cases.

On April 6, 2010, the Commission received responses from the Secretary of Labor stating that she does not oppose the requests to reopen the assessments. She confirms that the operator timely submitted payment for the uncontested portions of both proposed assessments.

Having reviewed the facts and circumstances of these cases, the operator's requests, and the Secretary's responses, 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 petitions for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.

/s/ Mary Lu Jordan  
Mary Lu Jordan, Chairman

/s/ Michael F. Duffy  
Michael F. Duffy, Commissioner

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

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

/s/ Patrick K. Nakamura  
Patrick K. Nakamura, Commissioner

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33 FMSHRC Page 1587

Consistent with our opinion in *Secretary of Labor on behalf of Gray v. North Fork Coal Corp.*, 33 FMSHRC 27, 33-44 (Jan. 2011), we affirm the judge's order denying Vulcan Materials' motion to dissolve the temporary reinstatement order.

/s/ Mary Lu Jordan  
Mary Lu Jordan, Chairman

/s/ Patrick K. Nakamura  
Patrick K. Nakamura, Commissioner



Commissioner Cohen, concurring:

Consistent with my opinion in *Secretary of Labor on behalf of Gray v. North Fork Coal Corp.*, 33 FMSHRC 27, 45-52 (Jan. 2011), I agree that the judge's order denying the motion to dissolve the temporary reinstatement order should be affirmed.

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

Commissioners Duffy and Young, dissenting:

Consistent with our opinion in *Secretary of Labor on behalf of Gray v. North Fork Coal Corp.*, 33 FMSHRC 27, 53-58 (Jan. 2011), we disagree that the judge's order denying the motion to dissolve the temporary reinstatement order should be affirmed, and instead would reverse the judge's order denying the motion and dissolve the temporary reinstatement order.

/s/ Michael F. Duffy

Michael F. Duffy, Commissioner

/s/ Michael G. Young

Michael G. Young, Commissioner

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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

601 NEW JERSEY AVENUE, NW

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July 21, 2011

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

v.

BARRETT PAVING MATERIALS, INC.

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Docket No. LAKE 2010-1037-M  
A.C. No. 33-00115-219165

BEFORE: Jordan, Chairman; Duffy, Young, Cohen, and Nakamura, 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. (2006) (“Mine Act”). On September 27, 2010, the Commission received from Barrett Paving Materials, Inc. (“Barrett”) a letter 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). On October 27, 2010, the Commission received a response from the Secretary of Labor stating that she does not oppose the request to reopen the assessment.

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 section 105(a) orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure under which, for example, a party could be entitled to relief from a final order of the Commission on the basis of mistake, inadvertence, or excusable neglect. *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).

Having reviewed the facts and circumstances of this case, the operator'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. 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/ Mary Lu Jordan  
Mary Lu Jordan, Chairman

/s/Michael F. Duffy  
Michael F. Duffy, Commissioner

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

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

/s/ Patrick K. Nakamura  
Patrick K. Nakamura, Commissioner

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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

601 NEW JERSEY AVENUE, NW

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July 21, 2011

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

v.

EXCALIBAR MINERALS, LLC

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Docket No. SE 2010-957-M  
A.C. No. 40-03183-216330

BEFORE: Jordan, Chairman; Duffy, Young, Cohen, and Nakamura, 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. (2006) (“Mine Act”). On July 19, 2010, the Commission received from Excalibar Minerals, LLC a motion by counsel 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). On August 3, 2010, the Commission received a response from the Secretary of Labor stating that she does not oppose the request to reopen the assessment.

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 section 105(a) orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure under which, for example, a party could be entitled to relief from a final order of the Commission on the basis of mistake, inadvertence, or excusable neglect. *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).

Having reviewed the facts and circumstances of this case, the operator'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. 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/ Mary Lu Jordan  
Mary Lu Jordan, Chairman

/s/ Michael F. Duffy  
Michael F. Duffy, Commissioner

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

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

/s/ Patrick K. Nakamura  
Patrick K. Nakamura, Commissioner



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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

601 NEW JERSEY AVENUE, NW

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July 25, 2011

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

v.

GRAND EAGLE MINING, INC.

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Docket No. KENT 2009-1116  
A.C. No. 15-16231-145671-02

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

ORDER

BY: Duffy, Young, and Nakamura, Commissioners

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) (“Mine Act”). On June 4, 2009, the Commission received from Grand Eagle Mining, Inc. (Grand Eagle”) a motion by counsel to reopen part of 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. *Id.*

However, we have held 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 section 105(a) orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure under which, for example, a party could be entitled to relief from a final order of the Commission on the basis of mistake, inadvertence, or excusable neglect. *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).

Grand Eagle states that, in completing the contest form for Assessment No. 000145671 to contest five of the proposed penalties, it inadvertently indicated that it was contesting the penalty proposed for Citation No. 6695856, when it instead meant to contest the penalty proposed for Citation No. 6695859. The contest form was timely submitted to the Secretary. The Secretary states that she does not oppose the reopening of the proposed penalty assessment.<sup>1</sup>

Having reviewed Grand Eagle's request and the Secretary's response, in the interests of justice, we hereby reopen this matter,<sup>2</sup> and remand it to Administrative Law Judge Jacqueline Bulluck for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.<sup>3</sup>

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<sup>1</sup> Though the Secretary did not identify a final order date in her response with respect to the uncontested penalties in the assessment, we note that it is likely that Grand Eagle's motion here was filed more than a year after its receipt of the assessment. Thus, there may be an issue as to whether the motion is time barred under Rule 60. *See* Fed. R. Civ. Pro. 60(c)(1). The Mine Act does not address the fact that penalties may be proposed via assessments that contain multiple proposed penalties, some of which may be contested while others are not. *See* 30 U.S.C. § 815(a). Consequently, in these limited circumstances, where the operator erred by contesting a specific penalty different from the one that it intended to contest, we will treat the request as akin to a motion to amend a pleading, in this case the contest form. The Secretary's non-opposition to Grand Eagle's request indicates that she will not be prejudiced by permitting the limited amendment sought by the operator. Consequently, we will grant the request. *See Cyprus Empire Corp.*, 12 FMSHRC 911, 914-15, 916 (May 1990) (upholding, as consistent with the provisions of Rule 15(a) of the Federal Rules of Civil Procedure regarding the amendment of pleadings, the judge's decision to permit the citation and order at issue to be modified shortly before the hearing).

<sup>2</sup> Given that all the evidence indicates that the operator met the initial contest deadline, we cannot agree with the dissent that Commission case law regarding operators who fail to meet contest deadlines is relevant in this instance. In any event, an operator's realizing a year or so later that it made a mistake in completing a contest form is likely explained by the time lag between the filing of the contest and the adjudication process. We cannot see what would be gained by denying the motion just to have the operator explain that on the record in this case.

<sup>3</sup> Judge Bulluck is currently presiding over related proceedings (Docket No. KENT 2008-882).

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/ Michael F. Duffy  
Michael F. Duffy, Commissioner

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

/s/ Patrick K. Nakamura  
Patrick K. Nakamura, Commissioner

Chairman Jordan and Commissioner Cohen, dissenting:

The Secretary of Labor issued a proposed penalty assessment to Grand Eagle Mining, Inc. (“Grand Eagle”) on April 3, 2008. The operator mistakenly checked the wrong box on the penalty assessment form and thus contested a penalty different from the one it intended to challenge. The penalty it wished to contest became a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a) (presumably some time in May 2008). However, it was not until June 2009 – over a year later – that Grand Eagle filed a motion to reopen the final order.

As the majority states, the Commission evaluates requests to reopen final section 105(a) orders by referring to Rule 60(b) of the Federal Rules of Civil Procedure, under which a party may be entitled to relief from a final order of the Commission on the basis of mistake, inadvertence, or excusable neglect. Slip op. at 1. Although our colleagues acknowledge that, pursuant to Rule 60(c)(1), the operator’s motion may be time barred, *id.* at 2 n.1, they proceed to grant relief by invoking Rule 15(a) of the Federal Rules of Civil Procedure and treating the operator’s request as a motion to amend a pleading (the contest form).

In so doing, they have, in effect, rewarded the operator for its lengthy delay in filing its request to reopen. In treating this request under the more lenient standards of Rule 15 instead of under Rule 60(b), the majority skipped the required inquiry under Rule 60(b)(1) as to whether the operator was entitled to relief on the basis of mistake, inadvertence, or excusable neglect. Moreover, at this stage in the proceedings, we cannot amend the penalty assessment form by substituting one citation (the one Grand Eagle wished to contest) for another (the citation it actually contested). This is because the latter citation was settled, presumably with the operator receiving the benefit of its mistaken contest.<sup>1</sup> If we were truly amending the penalty assessment form by substituting one citation for another, the operator would be paying the other penalty in full, as though it did not contest it.

We believe the better course would be to deny this motion without prejudice. The operator did not provide any explanation for why it waited a year to request relief. We would ask the operator to confirm the date it received the proposed penalty assessment (30 days from which would be the date it became a final order of the Commission), and thus such confirmation would permit us to calculate whether the motion was filed more than one year later. We would also ask it to submit information as to why it waited until June 2009 to seek relief. *See Con-Agg of Mo, LLC*, 33 FMSHRC \_\_\_\_, slip op. at 3 n.2, No. CENT 2011-193-M (June 1, 2011) (denying without prejudice the operator’s request to reopen and stating that a renewed request to reopen should indicate when the operator first became aware that it had missed the contest deadline and whether it acted promptly in filing its motion to reopen).

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<sup>1</sup> We would have thought that as Grand Eagle proceeded to settle the case it had not intended to contest, it would have been put on notice that it had failed to contest the proper citation.

Accordingly, we respectfully dissent.

/s/ Mary Lu Jordan  
Mary Lu Jordan, Chairman

/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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July 25, 2011

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

v.

M3 ENERGY MINING COMPANY

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Docket No. KENT 2010-33  
A.C. No. 15-19180-181571

BEFORE: Jordan, Chairman; Duffy, Young, Cohen, and Nakamura, 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. (2006) (“Mine Act”). On October 8, 2009, the Commission received from M3 Energy Company (“M3”) a motion from counsel to reopen a penalty assessment that may have become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

Based on the statements set forth in M3’s motion, which the Secretary states that she does not oppose, it appears that the proposed assessment at issue was never received by M3. Consequently, the proposed penalty assessment did not become a final order of the Commission, and M3’s motion to reopen is therefore denied as moot. We hereby remand this matter to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission’s Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the



Secretary shall file a petition for assessment within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.

/s/ Mary Lu Jordan  
Mary Lu Jordan, Chairman

/s/ Michael F. Duffy  
Michael F. Duffy, Commissioner

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

/s/ Robert F. Cohen Jr.  
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Chief Administrative Law Judge Robert J. Lesnick  
Federal Mine Safety & Health Review Commission  
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Washington, D.C. 20001-2021

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

July 25, 2011

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

v.

AMES CONSTRUCTION, INC.

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Docket No. WEST 2009-693-M

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

**DECISION**

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

In this civil penalty proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) (“Mine Act”), Judge Margaret Miller upheld a citation charging Ames Construction, Inc., (“Ames”) with a violation of 30 C.F.R. § 56.9201. 32 FMSHRC 347 (Mar. 2010) (ALJ). Section 56.9201 provides that “[e]quipment and supplies shall be loaded, transported, and unloaded in a manner which does not create a hazard to persons from falling or shifting equipment or supplies.” The Commission granted Ames’s Petition for Discretionary Review, which challenges the judge’s determination that Ames violated the safety standard in section 56.9201. For the reasons that follow, we affirm the judge’s decision in result.

**I.**

**Factual and Procedural Background**

This proceeding concerns the events surrounding a delivery of pipes at the Kennecott Tailings Facility near Magna, Utah, and a fatal accident which occurred in connection with the delivery. Ames contracted with Kennecott to construct and raise a tailings dam, pipe, and roadways at the Kennecott Tailings Facility. 32 FMSHRC at 347 (citing Stip. 4, Tr. 261-262). As the construction at the facility progressed, it was necessary to extend a pipeline used to transport waste product. Tr. 55-56. Consequently, Ames regularly received deliveries of pipes at the property. Approximately 60 to 70 loads of pipe were delivered to the facility during 2008. Tr. 226-27.

The pipes were manufactured by WL Plastics and purchased by Kennecott. Gov't Ex. 5 at 8; Tr. 65. At the WL Plastics factory, pipes were loaded onto the trailer of a delivery truck bound for the Tailings Facility. Tr. 65. In this instance, the delivery truck was owned by Bob Orton Trucking ("Orton") and driven by an employee of Orton. 32 FMSHRC at 348. The driver, William Kay, was 81 years old and had 55 years of experience as a truck driver. *Id.*, Stip. 28.

On October 29, 2008, Kay arrived at the Tailings Facility with a trailer loaded with nine pipes, each of which was about 50 feet in length and 3,000 pounds in weight. *Id.* (citing Tr. 65). After arriving at the facility, Kay stopped at the Ames office. *Id.* at 349 (citing Tr. 151). Ames employees check with each driver to determine if the driver holds a hazard card. Tr. 55. On this particular morning, Kay displayed his Kennecott hazard card, which indicated that he had received hazard training. 32 FMSHRC at 348 (citing Tr. 88, Gov't Ex. 11). However, the hazard training Kay had received did not involve the unloading of materials from a truck. *Id.* (citing Tr. 104, 118).

According to the policy at the Tailings Facility, Ames's employees would escort outside drivers while they were on the property. Stip. 9. Greg Davis, a member of the Ames crew, retrieved a truck to use while escorting Kay to the pipe unloading area. Tr. 204. While walking to the truck, Davis observed the load of pipes and noticed that it lacked chocks, which are normally included to prevent rolling. Tr. 204. Additionally, he observed that the dunnage was smaller than the four-by-four blocks normally used.<sup>1</sup> Tr. 204.

Davis, along with two additional members of the Ames crew, James Hilton and Juan Florez, escorted Kay to the unloading area. 32 FMSHRC at 349 (citing Tr. 151). The Ames crew drove the separate truck during the approximately eight-mile long drive. *Id.* (citing Tr. 154). Upon reaching the designated unloading area, only Florez exited the Ames truck. *Id.* (citing Tr. 160; Stip. 12, 13). Davis instructed the truck driver, Kay, to "stay right here." Stip. 13. Davis and Hilton then left to retrieve a forklift located elsewhere on the facility. Stip. 12. Florez remained with Kay, but the two did not speak while they waited at the site. Stip. 14, 16.

Normally the Orton drivers do not unload the truck on their own, but do participate in the unloading process by loosening the straps that secure the load with a long tool that they carry in the truck. 32 FMSHRC at 349 (citing Tr. 90). The remainder of the process is performed by the contractor who is in charge of the site. *Id.*

After the Ames truck left, Florez crossed the road and remained for several minutes before returning to the unloading area. 32 FMSHRC at 349. On his return, Florez waited near the passenger side of the truck for the crew to arrive with the forklift. *Id.* During their time together at the unloading area, Florez observed Kay near his toolbox. *Id.* Florez's attention was

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<sup>1</sup> Dunnage is wood placed down the length of the trailer between each level of pipe, in order to maintain the stability of the load. Tr. 16, 129. It creates a separation between the pipes so the forklift cover can fit neatly between the pipe sections as they are unloaded, so it does not damage the pipe. Tr. 46-47.

on the road when he heard a loud crack. *Id.* The noise came from a pipe which had dislodged and rolled off the trailer. Stip. 17. Kay had removed all of the straps from the load without any supplemental support. Stip. 17. Kay received fatal crushing injuries from the pipe. Stip. 17. At the time of the accident, Davis and Hilton had not yet returned to the unloading area with the forklift. Stip. 18.

At the conclusion of the accident investigation, MSHA issued Citation No. 6328009 to Ames for an alleged violation of the safety standard in section 56.9201 and designated the violation as “significant and substantial” (“S&S”).<sup>2</sup> Ames subsequently contested the citation as well as the associated civil penalty, which was proposed to be \$13,268.

On March 23, 2010, the judge issued a decision, after a hearing on the merits, in which she concluded that the pipes were not unloaded safely as required by section 56.9201, that the violation was “S&S,” and that Ames was strictly liable for the violation.<sup>3</sup> 32 FMSHRC at 351-54. She found that the unloading process began when the truck was parked at the unloading area and a member of the Ames crew was present for the purpose of unloading. *Id.* at 351. The judge also found that the truck driver was “transporting the pipes for the use of Ames, on property that was under the control of Ames.” *Id.* at 350. The judge found “it [was] Ames’ responsibility to unload the pipes.” *Id.* at 349. Finally, she stated that once the unloading process began, “Ames was responsible for doing it correctly.” *Id.* at 351. In concluding that Ames was strictly liable for the violation, the judge erroneously believed that Orton was a subcontractor of Ames and relied, in part, on the Commission’s decision in *Mingo Logan Coal Co.*, which states that “the Act’s scheme of liability provides that an operator, although faultless itself, may be held liable for violative acts of its employees, agents and contractors.” 19 FMSHRC 246, 249 (Feb. 1997) (quoting *Bulk Transp. Serv., Inc.*, 13 FMSHRC 1354, 1359-1360 (Sep. 1991)).

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<sup>2</sup> 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 and health hazard.”

<sup>3</sup> Citation No. 6328010 was issued to Orton for a violation of the same safety standard and alleged a violative condition or practice identical to the condition described in Citation No. 6328009. A civil penalty of \$35,000 was proposed for Citation No. 6328010. Orton and MSHA agreed to a reduction in the penalty to \$5,000. In the Decision Approving Settlement, Judge Miller stated that the settlement terms were based on the respondent’s “financial condition and the impact the originally assessed penalty would have had on the operator’s ability to continue in business.” *Bob Orton Trucking*, Docket No. WEST 2009-774, Unpublished Order (June 17, 2010).

## II.

### Disposition

Ames contends that the judge erred factually in determining that Orton was its subcontractor. A. Br. at 9-10. Ames further contends that its employees could not have prevented the accident. A. Br. at 11-12, 15. Ames maintains that in the absence of a contractual relationship with Orton, it is not liable for the violation of section 56.9201. Instead, it asserts that it was a third party “bystander,” and therefore the liability scheme applied by the judge was “wholly misplaced.” A. Br. at 13-15. Additionally, Ames disputes that it was in a supervisory position at the time the driver began to unstrap the load. A. Br. at 15-16; Reply Br. at 8-9. Thus, Ames denies that it engaged in any activity which violated section 56.9201. A. Br. at 15-17. Finally, Ames contends that the Secretary, in urging Ames’s liability for the acts of an unrelated third party, is “unjustifiably expanding the potential for liability to an unconscionable extent.” A. Br. at 17-19; Reply Br. at 3-8.

The Secretary concedes that the judge’s finding that Orton was a subcontractor of Ames is not supported by the record. S. Br. at 8. However, the Secretary asserts that Ames is strictly liable for the violation of the safety standard in section 56.9201 because it controlled the pipe unloading area and supervised the unloading of the pipes. S. Br. at 8-10. She argues that an operator is strictly liable for violations that take place under its control or supervision. S. Br. at 10-19.

At the outset, we recognize that the judge was incorrect in stating that Orton was a subcontractor of Ames. However, in view of the judge’s findings regarding Ames’s supervision of the unloading process, her error about Orton being Ames’s subcontractor does not control the outcome of this appeal.<sup>4</sup>

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<sup>4</sup> The Secretary litigated the case before the judge on the theory of Ames’s strict liability for the violation based on its control of the pipe unloading area and supervision of the unloading process. The Secretary’s theory was clearly set forth in her written Pre-Hearing Statement, and in her opening statement at trial. Tr. 22-24. Hence, Ames cannot claim surprise, even though the judge’s decision relied on the erroneous conclusion that Orton was Ames’s subcontractor. As the Supreme Court stated in *Dandridge v. Williams*, 397 U.S. 471, 475-76 n.6 (1970), “[t]he prevailing party may, of course, assert in a reviewing court any ground in support of his judgment, whether or not that ground was relied upon or even considered by the trial court. As the Court said in *United States v. American Ry. Express Co.*, 265 U.S. 425, 435-36 (1924), ‘[I]t is likewise settled that the appellee may, without taking a cross-appeal, urge in support of a decree any matter appearing in the record, although his argument may involve an attack upon the reasoning of the lower court or an insistence upon matter overlooked or ignored by it’” (other citations omitted). See also *BethEnergy Mines, Inc.*, 15 FMSHRC 981, 985 n.4 (June 1993), citing *Sec’y on behalf of Price v. Jim Walter Res., Inc.*, 12 FMSHRC 1521, 1529 (Aug. 1990) (citations omitted).

We conclude that the issue of Ames's liability in this case is appropriately resolved by referring to the plain language of the Mine Act and the undisputed facts in the record. Ames has stipulated that during the relevant period of time it "was a contractor constructing a tailings dam and raising the tailings dam, pipe, and roadways at the Kennecott Tailings Facility near Magna, Utah." Stip. 4. As such, Ames was an operator of the mine, since section 3(d) of the Mine Act defines that term 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). Ames' concession that it was a contractor constructing a tailings dam places it squarely within the statutory definition of "operator."

Section 110(a) of the Mine Act provides that "[t]he operator of a coal or other mine in which a violation occurs of a mandatory health or safety standard . . . shall be assessed a civil penalty by the Secretary . . ." 30 U.S.C. § 820(a). This provision has been held to impose liability for violation of a standard against an operator without regard to fault. *Allied Products Co. v. FMSHRC*, 666 F.2d 890, 893-94 (5th Cir. 1982); *Sewell Coal Co. v. FMSHRC*, 686 F.2d 1066, 1071 (4th Cir. 1982); *Western Fuels-Utah, Inc.*, 10 FMSHRC 256, 260-61 (Mar. 1988), *aff'd on other grounds*, 870 F.2d 711 (D.C. Cir. 1989); *Asarco, Inc.*, 8 FMSHRC 1632, 1634-36 (Nov. 1986), *aff'd*, 868 F.2d 1195 (10th Cir. 1989).

Since a violation of a mandatory standard occurred at a mine at which Ames is an operator, under the plain meaning of section 110(a), Ames could be found strictly liable for that violation. Ames maintains, however, that the Mine Act's liability scheme should not apply to a situation like the one here, in which the Secretary seeks to hold independent contractor Ames liable for a violation committed by a third party with which Ames has no contractual relationship. A. Br. at 17-19.

Section 110(a) imposes strict liability for violations which occur at a mine. However, as the D.C. Circuit has noted, strict liability "means liability without fault[;] [i]t does not mean liability for things that occur outside one's control or supervision." *Sec'y of Labor v. National Cement Co. of Cal., Inc.*, 573 F.3d 788, 795 (D.C. Cir. 2009) (citation omitted). Here, because Ames supervised a process, the unloading of pipes, it is responsible for the violation that occurred. Ames's emphasis on its lack of a contract with Orton trucking is, at bottom, an argument that it lacked the level of control needed to justify imposition of strict liability for violations committed by Orton drivers. Because, as discussed below, we conclude that Ames was cited for an unsafe condition that occurred in connection with an activity for which it had supervisory responsibility, we find the lack of a contract to be immaterial to our determination.<sup>5</sup>

Indeed, this approach is consistent with the Commission's decision in *Joy Technologies, Inc.*, 17 FMSHRC 1303 (Aug. 1995). In that case, Joy entered into a contract with the mine operator for the sale of equipment. Although Joy made follow-up visits to the mine to

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<sup>5</sup> Although we recognize that a contractor may also be liable under the Mine Act for violations which occur within an area of the mine which the contractor controls, we need not reach that issue in this case, because Ames is liable on the basis of its supervision of the unloading process.

troubleshoot the equipment, it argued that it was not an independent contractor under the Mine Act because there was no contract to perform those services. The Commission nevertheless determined that Joy could be held liable for the Mine Act's training requirements, noting "[o]ur focus is on the actual relationships between the parties, and is not confined to the terms of their contracts." 17 FMSHRC at 1306 (quoting *Bulk Transp. Serv.*, 13 FMSHRC at 1358 n.2). This principle was cited approvingly by the Tenth Circuit. *Joy Techs., Inc.*, 99 F.3d 991, 995-96 (10th Cir. 1996). Accordingly, in determining that liability is appropriately imposed against Ames, we have considered its relationship with Orton's drivers, particularly during the unloading process, a process which Ames supervised and controlled. This focus is consistent with our case law, albeit in a different context.<sup>6</sup>

Ames was cited for a violation of 30 C.F.R. § 56.9201, which requires that "[e]quipment and supplies shall be . . . unloaded in a manner which does not create a hazard to persons from falling or shifting equipment or supplies." The judge found that it was "Ames' responsibility to unload the pipes from the truck." 32 FMSHRC at 349. Not only is this finding supported by substantial evidence, it is not even seriously disputed by Ames. *See* Tr. 264-65 (testimony of Robert Parker, Ames's Industrial Division Manager, that unloading the pipes was Ames's responsibility under its contract with Kennecott). Indeed, Ames stipulated:

Orton drivers are instructed to follow the policies and procedures of the recipient regarding safety and the unloading process. Orton drivers are instructed to follow the instructions of the supervisor of the unloading process.

Tr. 271.

Moreover, the record contains a Safety, Health, and Environmental Action Plan (SHEAP), which is a site-specific project safety plan detailing the safety requirements imposed on Ames by Kennecott. Tr. 240-41; Gov't Ex. 8; Stip. 21. The SHEAP includes a section on the safe unloading of materials using forklifts. Tr. 240-41; Gov't Ex. 8, sec. 3.g., at 3. Under the section entitled "Ames Construction Safety Management – Authority," the SHEAP provides: "Supervisors, foremen and safety supervisors are authorized to stop work that would place

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<sup>6</sup> We therefore reject Ames's contention that the imposition of strict liability in this context is a "new policy," which has been implemented without the benefit of rulemaking or even deliberate internal policy-making, and that its lack of notice that the statute would be enforced in the manner that it was in this case deprives it of due process. A. Reply Br. at 6, 8. The imposition of liability on a contractor for violations that occur during a process supervised by the contractor is not a new policy. It is entirely consistent with, and indeed required by, the Mine Act's fundamental imposition of responsibility for activities undertaken, controlled or supervised by any contractor as an operator regulated under the Act. *See* 30 U.S.C. § 802(d) (definition of operator regulated under the Act includes "independent contractors"). In this case, we are simply applying this well-established legal principle to a novel set of facts. Thus, we also disagree with our dissenting colleague's statement that we are "[b]reaking new ground." Slip op. at 9.



employees, equipment or property in immediate danger, and to ensure that all unsafe conditions are corrected.” Gov’t Ex. 8, at 5. Obviously, the ability to stop unsafe work implies supervisory authority.

The operator’s own Job Safety Analysis (“JSA”) also supports the judge’s finding that Ames was responsible for unloading the pipes. The JSA is a document used by Ames that identifies the potential hazards of forklift operations. Gov’t Ex. 9. The JSA recommends that forklift operators “make sure [the] load is secure before removing straps from truck or trailer.” Gov’t Ex. 9; Stip. 19. At the time of the incident, Ames crew members were familiar with the JSA. 32 FMSHRC at 349 (citing Tr. 140).

However, the operator argues that Florez was without power or authority to prevent Kay from proceeding with the unloading. A. Br. at 15-16. The record does not support this view. Ames controlled the drivers’ access to the site and, upon admission, escorted them to the unloading area. 32 FMSHRC at 349 (citing Tr. 151). Orton drivers were required to follow the instructions of the supervisor of the unloading process. Tr. 271. Florez himself testified that it was his responsibility to ensure that Kay stayed safe. Tr. 167. Moreover, the Ames superintendent at the facility testified that on past occasions, he had prevented drivers from taking actions he believed were dangerous. Tr. 229. At oral argument, Ames’s counsel acknowledged that on previous occasions Ames employees had stopped truck drivers from loosening the straps. Oral Arg. Tr. 18. In any event, whether Kay would have refused to obey instructions from Ames’s agents is beside the point, because no attempt was made to prevent him from beginning the unloading process, or to prevent him from encountering any other hazards. Tr. 169-74.

Ames disputes that the unloading of pipes had begun when Kay was killed, because the operator had not intended it to commence as of the time when Kay began to loosen the straps. This position is untenable as a matter of law and common sense. The judge found that unloading had in fact begun at that point: “[O]nce [Ames] escorted Kay to the loading site and left an employee with him . . . , the unloading process had begun and Ames was responsible for doing it correctly.” 32 FMSHRC at 351. The judge further found that the unloading began with Kay loosening a number of straps running the entire length of the flatbed, and that Florez should have seen this and stopped Kay from proceeding. *Id.* (citing Tr. 114-15).

According to the judge, unloading began with the first steps necessary to the process. Not only is her finding supported by substantial evidence, it would defy logic to hold otherwise. Before Kay’s intervention, the pipes were on the truck. Afterward, at least one had departed the truck as a result of human activity. This is “unloading” by any reasonable definition.

### III.

#### Conclusion

In summary, Ames was an operator of the mine pursuant to the clear language of section 3(d) of the Mine Act, because it was a contractor performing services at the mine. As such, it is liable under section 110(a) of the Mine Act, without regard to fault for the violation at issue, since the unloading of the pipes from the trucks (which was the subject of the citation) was Ames's responsibility. Accordingly, we conclude that the judge's decision that Ames violated 30 C.F.R. § 56.9201 should be affirmed in result.

/s/ Mary Lu Jordan  
Mary Lu Jordan, Chairman

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

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

/s/ Patrick K. Nakamura  
Patrick K. Nakamura, Commissioner

Commissioner Duffy, dissenting:

I would reverse the judge and vacate the citation.

As I see it, strict liability of mine operators under the Mine Act is derived from the interrelationship of sections 104(a) and 110(a) of the statute. The former imposes liability on an operator who “has violated” the Act, a mandatory standard, an order, or a rule promulgated under the Act. 30 U.S.C. § 814(a). The latter imposes liability for a civil penalty sanction on an operator of a mine “in which a violation occurs.” 30 U.S.C. § 820(a). Thus, an operator can be held liable for violations it commits outright or through its agents, or it can be held liable if a violation occurs anywhere within a location deemed to be a mine that is owned, controlled, or supervised by that operator. The Commission has explicitly found section 110(a) to be the ultimate source of operator liability:

The liability of an operator is governed by section 110(a), 30 U.S.C. § 820(a), which states: “*The operator of a . . . mine in which a violation occurs* of a mandatory health or safety standard . . . shall be assessed a civil penalty. . . .” (Emphasis added). The occurrence of the violation is the predicate for the operator’s liability.

*Asarco, Inc.–Northwestern Mining Dep’t*, 8 FMSHRC 1632, 1635 (Nov. 1986), *aff’d*, 868 F.2d 1195 (10th Cir. 1989).

In the instant case, the mine site where the violation occurred included multiple employers, among them independent contractor Ames. Rather than look to section 110(a), and determine whether Ames was an “operator” of the mine for purposes of the violation of 30 C.F.R. § 56.9201, the majority departs from Commission precedent and allocates liability not by reason of the area of the mine where the violation occurred, but, rather, by reason of the “process” for which a given “operator” is responsible. Indeed, the majority explicitly declines to reach the issue of whether Ames could be held liable on the basis that it controlled the area where the violation of section 56.9201 occurred. Slip op. at 5 n.5.

While I appreciate that the majority is attempting to resolve the issue this case presents on grounds as narrow as possible, I cannot join them. Breaking new ground in finding the source of an operator’s liability, as the majority does, may result in unforeseen problems.

I instead conclude that *if* Ames is liable at all for the violative conduct of Mr. Kay, it would be on the basis that Ames was in control of the area encompassing the Kennecott Tailings Facility where the fatal accident took place. However, I further conclude that Ames should not be held strictly liable for the violation committed by Mr. Kay because he was not an employee of Ames and because he engaged in unforeseeable conduct that cannot be attributable to Ames.

In *Western Fuels–Utah, Inc.*, 10 FMSHRC 256 (Mar. 1988), then Chairman Ford in his dissent in that case made a compelling argument in favor of allowing an operator to assert an affirmative defense against a citation if the operator could show that it was blameless and that the violation was owing to the unforeseeable and idiosyncratic conduct of its employee. *Id.* at 263-

72. The Chairman's position did not prevail among three of his colleagues (*id.* at 258-62), or on appeal to the D.C. Circuit (*Western Fuels-Utah, Inc. v. FMSHRC*, 870 F.2d 711 (D.C. Cir. 1989)), but I firmly believe the principles upon which he based his dissent are fully applicable in instances such as are presented in this case, where the violative conduct is carried out by a *non-employee* of the cited operator. It may well be that a principle adopted under the OSHA statute should also be applicable here:

Fundamental fairness would require that one charged with and penalized for violation be shown to have caused, or at least to have knowingly acquiesced in, that violation. Under our legal system, to date at least, no man is held accountable, or subject to fine, for the totally independent act of another.

*Brennan v. OSHRC*, 511 F.2d 1139, 1145 (9th Cir. 1975).

Just because the Secretary may be authorized to take a particular action, doesn't necessarily mean that she should. This is just such an instance. I would therefore encourage Ames to seek judicial review of whether the strict liability doctrine under the Mine Act should apply to an operator when a non-employee of that operator engages in unforeseeable conduct that violates the Act or the standards.

/s/ Michael F. Duffy  
Michael F. Duffy, Commissioner

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

Docket Nos. CENT 2010-317-M  
CENT 2010-318-M

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We have determined that neither condition set forth in Rule 76 has been met in this case. Accordingly, the petition filed by Spring Creek is denied.

/s/ Mary Lu Jordan

Mary Lu Jordan, Chairman

/s/ Michael F. Duffy

Michael F. Duffy, Commissioner

/s/ Michael G. Young

Michael G. Young, Commissioner

/s/ Robert F. Cohen Jr.

Robert F. Cohen, Jr., Commissioner

/s/ Patrick K. Nakamura

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Chief Administrative Law Judge Robert J. Lesnick  
Federal Mine Safety & Health Review Commission  
601 New Jersey Avenue, N.W., Suite 9500  
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# **ADMINISTRATIVE LAW JUDGE DECISIONS**



**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

UNITED STATES CUSTOM HOUSE  
721 19<sup>TH</sup> Street, Suite 407  
Denver, Colorado 80202  
(303) 844-3409 / Fax (303) 844-3759

July 7, 2011

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

v.

LAFARGE NORTH AMERICA,  
Respondent

CIVIL PENALTY PROCEEDING

Docket No.: CENT 2010-4-M  
A. C. No.: 13-00125-197511

Davenport Plant

(Judge Patrick B. Augustine)

Appearances: Joshua Raines Patrick, Esq., Office of the Solicitor, U. S. Department of Labor,  
Denver, Colorado  
For the Petitioner

Mark Savit, Esq. and Donna Vetrano Pryor, Esq., Patton Boggs LLP, Denver,  
Colorado  
For the Respondent

Before: Administrative Law Judge Patrick B. Augustine

**DECISION AND ORDER**

**Procedural History**

This case is before the court upon a petition for assessment of civil penalties under Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §801 *et. seq.* (the “Act”). This case involves the issuance of citations by the Department of Labor’s Mine Safety and Health Administration (“MSHA”) under Section 104(a) of the Act alleging four separate violations of 30 C.F.R. §56.14100(c) (“Citations”) at the Respondent’s Davenport Plant. On February 18, 2011 the court approved a Partial Settlement Agreement entered into between the parties in which all the other citations subject to this case were settled. Respondent timely contested the remaining Citations and a trial was held in Davenport, Iowa on May 4, 2011.

**Stipulation of Facts**

The parties stipulated to the following facts which were accepted into the Record at Tr.7:

1. The Lafarge North America, Inc. Davenport Plant, Mine ID 13-00125 (hereinafter “Lafarge”) is a Portland cement facility located in Iowa which operates on

three, eight-hour shifts, working seven days a week. Total employment at the site is approximately 100 persons.

2. Lafarge is engaged in mining in the United States and its mining operations affect interstate commerce.

3. Lafarge is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 801 et. seq.

4. The Federal Mine Safety and Health Review Commission has jurisdiction in this matter.

5. Citation Nos. 6413382, 6413383, 6413384 and 6413385 were properly served by a duly authorized representative of the Secretary of Labor upon an agent of Lafarge on the dates and places stated therein and were admitted into evidence for the purpose of establishing their issuance, and not for the truthfulness or relevancy of any statements asserted therein.

6. With the exception of Petitioner's Exhibit 10, which was admitted into evidence at the trial on May 4, 2011, the exhibits offered by the parties were stipulated to be authentic but no stipulation was entered into as to their relevance or the truth of the matters asserted therein.

7. The proposed penalties will not affect Lafarge's ability to continue in business.

8. The operator demonstrated good faith in abating the violations.

9. Unless otherwise stated, all the below stipulated facts were extant in 2009.

10. Citation No. 6413382 relates to the Chevy 2500 pick-up Co. #70161.

11. Citation No. 6413383 relates to the Ford F 250 pick-up Co. # 70152.

12. Citation No. 6413384 relates to the Ford F 250 pick-up Co. #70147.

13. Citation No. 6413385 relates to the Euclid haul truck Co. #70144.

14. There have been no fatal accidents at the Lafarge Davenport Plant.

15. There was no injury or accident in relation to Citation Nos. 6413382, 6413383, 6413384 and 6413385.

16. When performing the inspections that resulted in the issuance of Citation Nos. 6413382, 6413383, 6413384 and 6413385, Inspector Howard Wood used no instruments to take measurements of the alleged movement in the ball joints and/or tie rods.

17. When performing the inspections that resulted in the issuance of Citation Nos. 6413382, 6413383, 6413384 and 6413385, Inspector Howard Wood did not have the subject vehicles raised in any manner.

18. Inspector Howard Wood performed the inspection of the vehicles indicated in Citations 6413382, 6413383, 6413384 and 6413385 while the subject vehicles were on the ground as he was trained to do.

19. Inspector Howard Wood did not rely on the service manual procedures or specifications for the above-referenced vehicles when performing his inspections of the steering linkages or when making the determination that a violation had occurred.

### **The Cited Regulation**

The Petitioner alleges four separate violations of 30 C.F.R. §56.14100(c) which states as follows:

when defects make continued operation hazardous to persons, the defective items, including self-propelled mobile equipment, shall be taken out of service and placed in a designated area posted for that purpose, or tag or other effective method of marking the defective items shall be used to prohibit further use until the defects are corrected.

In order to establish a violation of the above regulation, the Petitioner must prove by a preponderance of the evidence; (i) the existence of a defect; (ii) continued operation would be hazardous to persons and (iii) the defective item was not removed from service until the defects were corrected.

### **Discussion and Analysis**

The Petitioner has the burden of establishing some objective or reasonable standard which provides notice to the Respondent that certain actions or inactions would result in non-compliance with the standard. *Gates & Fox Co. v. Occupational Safety & Health Rev. Comm'n*, 790 F.2d 154, 156 (D.C. Cir. 1986)("[D]ue process...prevents...deference from validating the application of a regulation that fails to give fair warning of the conduct it prohibits or requires."); *see also Sec'y of Labor v. Energy West Mining Co.*, 17 FMSHRC 1313, 1317-18 (Comm'n August 31, 1995).

Inspector Howard Woods (the "Inspector") testified that to test the ball joints, he looked under the cited vehicles while all four tires were on the ground and instructed a Lafarge employee to move the steering wheel. (Tr. 30). The Inspector admitted that he was looking for an excess of 1/8-inch movement in the ball joints. (Tr. 39). He testified that he relied on the measurements set out in the Commercial Vehicle Safety Alliance ("CVSA"), which requires maintenance of ball joints where there is movement in excess of 1/8-inch "measured with hand pressure only". (Ex. C-4; Tr. 39).

Mr. Ron Medina, the Petitioner's expert witness, also an employee of MSHA, suggested that the CVSA guidelines were not applicable to any of the vehicles subject to the Citations because the CVSA guidelines generally apply to heavy equipment in excess of 26,000 lbs. (Tr. 171). Mr. Medina found, in his expert opinion, that the 1/8-inch standard used by the Inspector was not applicable. In addition, Mr. Medina could not state any measurement or standard that would be considered objective or reasonable to test the ball joints. (Tr. 194).

Mr. Medina then went on to address tests, standards, methods and measures set forth in service manuals of the respective vehicles. However, none of these tests were applied by the Inspector in the issuance of the citations. (Ex. C-5, C-8, C11 and C-12 and Tr. 145). The court notes the attempt to make these service manuals applicable after the fact to support the issuance of the Citations does not provide the Respondent with objective notice of the criteria applicable in order to assess compliance with the cited standard before the issuance of the Citations. In short, if MSHA's own employees could not agree by the time of trial on the proper basis and standards for examining vehicle ball joints, how could Respondent have proper notice of the appropriate standard of compliance?

The Petitioner has the burden of demonstrating some consistent and objective measure of establishing a violation of the cited standard. When the Inspector and the Petitioner's expert witness disagree on what the consistent and objective criteria should be in order to determine compliance, the court finds it a violation of fair notice and due process to hold the Respondent to a moving target. Accordingly, the Petitioner has failed to carry its burden and Citations 6413382, 6413383, 6413384 and 6413385 will be VACATED.

### **ORDER**

Based upon the foregoing, it is ORDERED that Citations 6413382, 6413383, 6413384 and 6413385 are VACATED.

/s/ Patrick B. Augustine

Patrick B. Augustine

Administrative Law Judge

Date:

Denver, Colorado

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

721 19th STREET, SUITE 443  
DENVER, CO 80202-2500  
303-844-5266/FAX 303-844-5268

July 12, 2011

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. LAKE 2009-483
Petitioner,	:	A.C. No. 12-02010-185538-03
	:	
v.	:	
	:	
BLACK BEAUTY COAL COMPANY,	:	
Respondent.	:	Mine: Air Quality

**DECISION**

Appearances: Natalie Lien and Nadia Hafeez, Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner;  
R. Henry Moore, Jackson Kelly PLLC, Pittsburgh, Pennsylvania, for Respondent.

Before: Judge Miller

This case is before me on a petition for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration, against Black Beauty Coal Company at its Air Quality mine, pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820 (the “Mine Act” or “Act”). The case includes 34 violations with a total proposed of \$171,483.00. As set forth more fully below, the parties have agreed to resolve all but three of the violations, leaving those for decision here. The parties presented testimony and documentary evidence at the hearing held in Evansville, Indiana commencing on April 20, 2011.

**I. FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Black Beauty Coal Company (“Black Beauty”) operates the Air Quality #1 mine (the “mine”), a bituminous coal mine near Vincennes, Indiana. The mine is subject to regular inspections by the Secretary’s Mine Safety and Health Administration (“MSHA”) pursuant to section 103(a) of the Act. 30 U.S.C. § 813(a). The parties stipulated that Black Beauty is the operator of the Air Quality mine, that the mine’s operations affect interstate commerce, and that it is subject to the jurisdiction of the Mine Act. Jt. Stip.1-5. Black Beauty, like a number of other mines in the Indiana-Illinois area, is owned by Peabody Energy. The mine is a large operator, utilizing the room and pillar mining method. (Tr.8-9).

*a. Citation No. 8415328*

On April 10, 2009, Inspector Phillip Herndon issued Citation No. 8415328 to Air Quality for a violation of section 75.220(a)(1) of the Secretary's regulations. The regulation requires the mine to comply with the provisions of its approved roof control plan. The citation alleges that:

A continuous miner operator was observed positioned in the Red Zone between the Co. No. 53 Joy continuous miner and the No. 1 entry coal rib on the MMU-001 as he was tramming out of the face. The miner operator was removed immediately from the unsafe condition. The condition was a factor that contributed to the issuance of Imminent Danger Order No. 8415327 dated 04/10/2009. Therefore no abatement time was set.

The inspector found that a serious injury was highly likely to occur, that the violation was significant and substantial, that one person would be affected, and that the violation was the result of moderate negligence on the part of the operator. The Secretary has proposed a civil penalty in the amount of \$9,882.00. An imminent danger order was issued with this citation.

**1. The Violation**

Phillip Herndon, an MSHA mine inspector, has worked for the Mine Safety and Health Administration for the past four years. He has worked in surface and underground coal mines since 1982, and worked at Air Quality for eight years prior to becoming a mine inspector. On April 10, 2009, Herndon was at the Air Quality mine to conduct a spot inspection. Terry Courtney, the mine foreman, accompanied Herndon on that day. During the course of his inspection, Herndon issued a citation for a ventilation violation at the working face and, as a result, the continuous mining machine had to be pulled back from the face area to make room to extend a curtain. Herndon testified that, while the continuous miner was being trammed out, the miner operator entered the red zone. (Tr. 15 -18).

Herndon explained that the Red Zone is any place considered a pinch point between the continuous mining machine and the coal rib, and any area around the machine where the miner operator could be crushed. (Tr. 18). The roof control plan requires that "no one shall be in red zone while a miner is being trammed from place to place or while being positioned in a working place." Sec'y Ex. 4, p. 6, no. 8. Herndon demonstrated where Carie, the operator of the continuous miner, was standing, near the tail while tramming the machine, by drawing a line on the diagram on page 6a of the roof control plan. (Tr. 19- 20). Herndon testified that while he was writing up the ventilation violation he looked up, and saw Carie moving the machine while in the red zone. Herndon immediately issued an imminent danger order to stop the action and remove Carie from his position. Herndon believed that the pump motor had not been turned off while Carie was standing between the miner and the rib. (Tr. 21); Sec'y Ex. 2.



At the close out conference, Herndon asked Courtney where Carie was standing, and Herndon understood Courtney to agree that Carie was standing in the tail area with the pump motor in the on position. (Tr. 23). The red zone is created only when the continuous miner is energized, i.e., the pump motor is running. *Cooper v. Ingersoll Rand Co.*, 628 F. Supp. 1488, 1492 (W.D. Va. 1986). There are a number of tasks that the miner operator must undertake in an area next to the mining machine while the pump motor is turned off. Conducting those activities with the pump motor off is not violative of the red zone prohibition. (Tr. 26). However, if a miner is positioned between the mining machine and the rib while the pump motor is running, the miner is considered to be in the “red zone.”

Trent Harris, a lead man for Air Quality, has been in the mining industry for a number of years and was present when Herndon issued the imminent danger order. (Tr. 37) According to Harris, Herndon first issued a citation for “low air” and, as a result, Harris instructed Carie to reposition the miner in order to extend the ventilation curtain. Carie had to back up the continuous miner, and he did so in the proper position behind the machine. He backed the miner up about ten feet, then realized that the cable was too close to the miner, so he hit the button on the remote control to turn off the pump motor and, in effect, shut down the miner. Carie then stepped next to the miner to move the cable and the water line, at which point Herndon shouted out that there was an imminent danger, as he believed Carie to be positioned between the rib and the machine while the continuous miner was still in operation. Harris could not understand why Herndon believed this to be an imminent danger because, in his view, the pump motor was turned off. Carie was not near the miner when it was tramming, but after turning off the pump motor he did walk next to the miner. Harris is certain that the pump motor had been turned off prior to Carie entering the red zone to move the cable. (Tr. 37-38).

Matthew Carie was operating the continuous miner when Herndon issued the citation. (Tr. 37). Carie was a roof bolter in April, 2009, but was filling in to operate the continuous mining machine. Carie was trained in the concept of the red zone when he received other training on November 10, 2008. On January 16, 2009, he was task trained on the operation of the continuous miner, and specifically to “keep workers out of red zone.” (Tr. 45-48).

On April 10, 2009, Carie was operating the continuous miner when he was told by Harris to back the miner out of the entry to allow workers to extend a ventilation curtain. He backed out, turned off the machine, but was then instructed to back the machine further out so that the curtain could be accessed. After beginning to do so, he realized that the cable was in the way, so he once again turned the pump motor off, and started to walk toward the machine. As soon as he reached the tail area, Herndon shouted at him about the red zone. Carie credibly testified that the pump motor on the miner was turned off at the time he entered the tail area to move the cable. (Tr. 49-50).

Terry Courtney, has worked more than 17 years in the mining industry and has held a number of positions at Air Quality. (Tr. 61). He was present when Herndon issued the red zone citation, but he had his back to the miner and did not observe the condition alleged by Herndon. After Herndon issued the ventilation citation, Courtney’s attention was directed toward correcting the condition so he flagged off the loader while the ventilation was being corrected. (Tr. 62). He turned to see Carie near the miner only after he heard Herndon shout that there was

an imminent danger. (Tr. 62-63). Carie was near the tail and did not have his hands on the box, so Courtney understood that the pump motor was off. Even so, after Herndon issued the order, Courtney had Carie removed from the mine, both to investigate the allegation and to terminate the citation. Courtney explained that Air Quality takes the issue of the red zone very seriously, as they have had a fatality and another miner seriously injured when in the red zone. Violating the company policy regarding the red zone will result in termination of an employee. (Tr. 63-65).

Gerald Haantz is the operation superintendent with Air Quality and was the underground mine superintendent at the time the citation was issued by Herndon. (Tr. 76). He conducted an investigation into the incident and, based upon the information he learned, found that Carie was not in the red zone as alleged and, therefore, Carie was not terminated from his employment. The mine has let go two miners in the past few years for violating the red zone rule. (Tr. 77-78).

While there is no question that Carie was standing next to the continuous miner, between the machine and the rib, which is an area that is considered the red zone, there is clearly a dispute of fact as to whether or not the pump motor was in the off position while Carie was in that area to move the cable. Just prior to entering the red zone, Carie was backing out the machine for the second time. He explained that he turned off the pump motor after tramming and before entering the red zone. (Tr. 52). Herndon testified that Carie was tramming, and that the pump motor was on while Carie was in the area between the rib and miner. (Tr. 21). Courtney did not know if the motor was off, but Harris testified that Carie had turned off the motor, and Carie asserts that he turned off the motor prior to entering the area near the miner. (Tr. 38, 63-64). The Secretary's evidence is minimal at best, as the inspector did not describe how he knew the pump motor was on, other than to say that he observed Carie tramming with it on. (Tr. 21). The other witnesses all agree that Carie was tramming before he entered the red zone and, therefore, would have had the pump motor running while tramming. It is quite plausible that Herndon observed the tramming but did not see Carie de-energize the pump motor prior to entering area to move the cable. I find Carie to be a credible witness and credit his testimony that the pump motor was not running when he walked between the rib and the continuous miner.

"The Mine Act imposes on the Secretary the burden of proving each alleged violation by a preponderance of the credible evidence." *In re: Contests of Respirable Dust Sample Alteration Citations*, 17 FMSHRC 1819, 1878 (Nov. 1995), *aff'd sub nom. Sec'y of Labor v. Keystone Coal Mining Corp.*, 151 F.3d 1096 (D.C. Cir. 1998) (quoting *Garden Creek Pocahontas Co.*, 11 FMSHRC 2148, 2152 (Nov. 1989). "The preponderance standard, in general, means proof that something is more likely so than not so." *In re: Contests of Respirable Dust*, 17 FMSHRC at 1838. I find that the Secretary has not met her burden of proof in this case and therefore the citation is vacated.

*b. Citation No. 9942562*

On April 8, 2009, Inspector Charles Weilbaker issued Citation No. 9942562 to Air Quality for a violation of Section 70.100(a) Secretary's regulations. The citation alleges that:

The average concentration of respirable dust in the working environment of the designated occupation was 2.512 milligrams per cubic meter which exceeds the 2.0 milligrams per cubic meter standard. This finding was based on the results of five (5) valid dust samples collected by the operator. The operator shall take corrective action to lower the respirable dust. The corrective action must be submitted to the MSHA District Manager for review. After the corrective action has been reviewed and acknowledged, the mine operator must sample each production shift until five (5) valid samples are collected. The operator must notify MSHA at least 24 hours in advance of the date and shift that sampling will commence. The samples must be submitted to the Pittsburgh Respirable Dust Processing laboratory.

The inspector found that a serious injury was reasonably likely to occur, that the violation was significant and substantial, that 12 persons would be affected, and that the violation was the result of high negligence on the part of the operator. The Secretary has proposed a civil penalty in the amount of \$18,271.

## **1. The Violation**

The parties agree that the mine operator submitted the dust samples for MMU-001, as required by MSHA, and that the testing of the five samples indicated an exposure of 2.512, which constitutes a violation of the dust standard as alleged by the Secretary. The parties also agree, given the decisions issued by the Commission regarding respirable dust, that the violation is properly designated as S&S. Given the agreement of the parties, I find that a violation is established and that the violation is significant and substantial as alleged by the Secretary. The issues that remain for decision are the amount of negligence attributed to the operator and the number of persons affected.

Weilbaker found that the violation was the result of high negligence on the part of the mine operator and that 12 persons were exposed to the dust. He testified that he is retired from MSHA, but was with MSHA for twenty years as a supervisory health and safety specialist. He has a BA, served as an industrial hygienist, received training in such, and worked as a mine inspector. As a part of his duties, he spoke regularly with mine management regarding conditions at the mine, including problems due to the excessive dust. His purpose was to encourage management to look for the source of the respirable dust when over-exposed and make changes as necessary. (Tr. 90-92). He issued the citation on MMU-001 after receiving the notice from the Pittsburgh lab. The results, Sec'y Ex. 6, show the five sample results to be 3.438, 2.560, 4.259, .897 and 1.408. (Tr. 96). He looked at the total number of people on the section and the fact that several of the concentrations were very high, and believed that the exposure continued into the second shift, thereby exposing twelve persons in all. Weilbaker determined that 6 of the 9 persons on the shift would have been affected, including the miner operator, roof bolters, and car operators. Further, both shifts were exposed, thereby creating an exposure to 12 miners in total. (Tr. 96); Sec'y Ex. 6. However, there were no samples taken on the second shift and no evidence of production amounts, such that Weilbaker can only presume

that an over exposure occurred on that shift as well. (Tr. 96).

Weilbaker determined that the negligence was high based upon what he knew about the dust conditions at the mine, prior samples, and the conversations he held with persons at the mine after he received the results of the sampling. After he received the results of the samples, Weilbaker called the mine and spoke with Ron Madlen in an attempt to discover the problem with the respirable dust and the over exposures. (Tr. 98). From his conversation he understood that the mine had been cutting into rock, causing the higher than normal concentration. (Tr. 98-99). Weilbaker reviewed the previous bi-monthly samples, and found that the samples were lower while the production higher, leading him to agree with the conclusion that the mine had been cutting rock at the time of the overexposure. Based upon his experience, he testified that the dust is easier to see when cutting rock and should be a good indication that there is high respirable dust during that time and, therefore, greater precautions are necessary. (Tr. 98-100). The mine asserts, on the other hand, that there are a number of scenarios that can result in high dust samples. Further, and more significantly, Air Quality has dealt with the issue of rock in the seams for an extended period of time and its ventilation plan takes the cutting of rock into consideration. The mine disagrees that miners working on the section the day the samples were taken could see a significant increase in dust in the air, particularly when the production was reduced during those shifts. (Tr. 102).

Weilbaker asked the mine to amend the ventilation plan in order to abate the violation. (Tr. 100). Although the mine had an approved plan in place and they may well have been in compliance with the plan when the over exposure was found, Weilbaker believes they should have done more. He agrees that there are reasons other than cutting into rock that would lead to high concentrations of dust. The set of samples that the mine provided prior to this violation indicate that the mine was in compliance when that set was sampled. Further, Air Quality had not been cited for a violation of dust concentration since January 2008 and it had averaged under 2.0 mg for some period of time. (Tr. 102).

The conclusion drawn by Weilbaker, that the failure on the part of the mine to allow the overexposure to occur was the result of high negligence, is not supported by the record as a whole. Since any number of items, or a combination thereof, could have caused the overexposure, and there is no credible evidence that the mine saw or was aware of high concentrations at the time of sampling, the high negligence has not been demonstrated. Nor is there substantial evidence that the mine was put on notice through earlier sampling that there was a dust issue to be addressed. The same is true for the number of persons exposed. Therefore, I find that the negligence was moderate and that the three persons who were wearing pumps that demonstrated a concentration above 2.0 mg were exposed. However, I do find over exposure to dust concentrations for three persons to be a serious violation and I assess a penalty of \$10,000.

c. *Citation No. 8017946*

Inspector James Preece issued this citation for a violation of Safeguard No. 7018511, which requires safe access to travel under conveyor belts. The citation states:

An adequate cross under was not being provided on the 4 West "A" belt conveyor located at the No. 1 crosscut. Multiple visible tracks were observed underneath the moving belt conveyor in by the haulage travel road towards the 4 main North flop gate. The height was measured from the mine floor to the bottom of the moving belt and measured from 4.5 to 6 feet. The exposed area above the mobile equipment tire tracks measured 39 feet in length.

Preece designated the violation as significant and substantial, with moderate negligence, and a penalty of \$946.00 has been proposed.

## **1. The Violation**

James Preece has been an inspector for the Mine Safety and Health Administration since October 2000. He began his career with MSHA as a surface specialist, then became a health specialist and, finally an inspector. He has worked in underground coal mines since 1975, is a graduate of the West Virginia school of technology, and has a mining engineering degree. (Tr. 123-125). Preece testified that on April 8, 2009, he was conducting a roof control evaluation at the mine and was accompanied by representatives of the mine during that evaluation. (Tr. 125).

Prior to traveling underground, Preece reviewed the mine file, including the safeguard at issue. (Tr. 126). While in the area of the 4 west A belt he observed footprints and tire tracks through the area, including under the unprotected belt conveyor. Preece photographed the area. Sec'y Ex. 12. The photographs indicate foot prints and tire tracks under the conveyor belt in areas not designated as safe crossing locations. In this part of the mine, Preece explained, there were two areas that were designated as cross-unders for this belt. One area was a roadway not far from the area cited, and the other area was a cross-under for miners on foot. The miners were not using the designated areas to travel under the conveyor and, instead, were taking shortcuts and walking under the belt conveyor in the areas cited by Preece.(Tr. 126-128); Sec'y Ex. 12.

The tracks and footprints under the belt lead Preece to believe that vehicles and foot traffic were crossing under the belt conveyor at an area not designated for such traffic. Further, the areas were not protected against the moving belt overhead. Preece testified that any number of vehicles could be using the undesignated cross-under, including vehicles that transport miners. (Tr. 128). Preece measured the height of the belt, over the course of 39 feet and the belt ranged from 4.5 feet to 6 feet above the travel area. Preece believes, given the need to examine and clean around the belt, there were many miners crossing under the belt each day in areas that were not protected. In his experience, a miner would contact the moving belt above and would suffer serious injuries after becoming entangled. Although Preece observed no one traveling under the belt, the footprints and tire tracks demonstrate that persons were crossing under the belt at the cited location. (Tr. 130-131). Preece explained that his concern was the hazard of the exposure to the moving belt. Preece indicated that crossing under the belt in the area cited, either on foot or while riding in mobile equipment, is likely to result in a miner coming into contact with the moving belt and rollers, thereby leading to an injury. (Tr. 132).

Sylvester DiLorenzo, the Vincennes field office supervisor, testified on behalf of the Secretary regarding the issuance of the safeguard that was the basis for the citation written by Preece. He has been with MSHA since May 2005 and had 30 years prior experience in the coal mining industry. (Tr. 114). Safeguard No. 7018511 was issued on June 4, 2003. (Tr. 115-116). The inspector who issued the safeguard was not available to testify but the notes were available. DiLorenzo reviewed the notes and testified regarding the basis for the safeguard. (Tr. 115). DiLorenzo explained that the hazard addressed by the safeguard is miners crossing under the moving unguarded conveyor belts and coming in contact with the moving belt and rollers. (Tr. 116-117). The safeguard cited 75.1403-5(j) which requires that “[p]ersons should not cross moving belt conveyors, except where suitable crossing facilities are provided.” The notes of the inspector who issued the safeguard, Sec’y Ex. 9, address the hazard as contacting the moving belt and being injured as a result. The notes include mention that contact with the belt is the hazard, and also that mud and water constitute tripping hazards under the belt. DiLorenzo does not understand the safeguard to include only foot traffic, and, in his view, it includes moving equipment (Tr. 122).

Ron Madlem worked at Air Quality for 17 years. His last position at the mine was safety supervisor. (Tr. 145). He accompanied Inspector Battistoni in 2003, on the day Battistoni issued the safeguard. At that time Madlem observed miners shoveling a coal spill on the back side of the belt. The miners had walked under the belt to access the area to be shoveled. (Tr. 146). There were cross-unders nearby, but, like the citation issued by Preece, the miners chose to use a different route under the belt instead of using the designated route with guarded cross-unders. (Tr. 147). In Madlem’s view, the use of vulcanized splices greatly reduces the breaks in the belt and thereby reduces the possibility of injury to a miner crossing under the belt. (Tr. 148). When the safeguard was issued it was in an area where, given the size of the pathway used by the miners, there was no vehicle access. (Tr. 149-150). In order to terminate the safeguard in 2003, a cross under was installed. Madlem stated that the safeguard made no mention of, and therefore does not apply to, vehicle traffic. (Tr. 150).

Rick Carie is the assistant manager of the mine. (Tr. 154). He traveled with Preece at the time the citation was issued. (Tr. 155). Carie testified that there were two cross-unders in the area, one on the road that leads under the conveyor and another for foot traffic. (Tr. 155). In the unlikely event that vehicles drive under the belt at an unprotected area, the vehicles have canopies, and, even for those few vehicles that do not, the belt is high enough that one can avoid the belt by ducking under the conveyor. The cross-under that was a road designated for use by vehicles had been in use for four to five years. The other crossing was for miners on foot and was installed in an effort to avoid using the road where vehicles traveled. (Tr. 156). The mine operates three shifts, with production on the first two shifts. During the third shift, maintenance is conducted and the belts are often shut down. In addition to maintenance activities, the belts are cleaned and rock dusted while shut down. (Tr. 157). Carie believes that if someone did cross under the belt in the area designated by Preece, the conveyor was high enough above the ground that one could easily walk under, although some ducking may be required. (Tr. 160).

#### I. The Underlying Safeguard

Black Beauty alleges that the notice to provide safeguard is invalid and, therefore, the

citation issued for a violation of such should be vacated. Black Beauty makes two arguments in support of its contention. First, Black Beauty argues that the notice to provide safeguard is not valid because there was no transportation hazard and the safeguard, therefore, does not specifically identify the nature of the hazard. Given that there were safe areas to cross under the belt, i.e., one for vehicles and one for foot traffic, within a short distance of the area cited, there can be no hazard. Second, Black Beauty argues that the notice to provide safeguard does not apply to the condition cited in this instance. A strict construction of the safeguard reveals that it addressed only foot traffic under the conveyor belt and did not apply to vehicles traveling under the belt. Black Beauty argues that “the safeguard was issued to specifically address walking under the conveyor belt in wet and sloppy conditions.”

The Secretary argues that the notice to provide safeguard identifies a transportation hazard as well as the conduct required to remedy the hazard. The safeguard, Sec’y Ex. 8, provides that “[t]his is a Notice to Provide Safeguard(s) requiring an adequate crossing facility at this location, and all other locations along belt conveyors where miners need to cross under the moving belt.” The paragraph contained above the safeguard notice describes that two miners advised the inspector they walked under the moving conveyor belt in an unguarded area where the mine bottom was wet and slippery. The Secretary argues that this safeguard refers to the standard, 75.1403-5(j), that deals with crossing under conveyors and the language specifically requires a safe crossing and describes with necessary specificity the hazard of coming into contact with the moving conveyor when walking or riding under it. Finally, this safeguard was issued in 2003 with presumably no objection to its validity until this hearing in 2011. The mine history, Sec’y Ex. 13, shows a number of safeguard violations in the 15 months prior to this citation, four of which are for violations of 74.1403-5(j).

Section 314(b) of the Mine Act grants the Secretary authority to issue “[o]ther safeguards adequate, in the judgment of an authorized representative of the Secretary, to minimize hazards with respect to transportation of men and materials.” 30 U.S.C. § 874(b). A representative of the Secretary, generally an inspector, may issue a notice to provide safeguard only after “determin[ing] that there exists . . . an actual transportation hazard this is not covered by a mandatory standard.” *Southern Ohio Coal Co.*, 14 FMSHRC 1, 8 (Jan. 1992). The Commission has held that, because a notice to provide safeguard is issued by an inspector and is not subject to the notice and comment procedural protections of section 101, the language of a notice to provide safeguard “must be narrowly construed” and is “bounded by a rule of interpretation more restrained than that accorded promulgated standards.” *Southern Ohio Coal Co.*, 7 FMSHRC 509, 512 (Apr. 1985). In recognition of such, and in order to provide proper due process, a notice to provide safeguard “must identify with specificity the nature of the hazard at which it is directed and the conduct required of the operator to remedy such hazard.” See *Cyprus Cumberland Resources Corp.*, 19 FMSHRC 1781, 1784-1785 (Nov. 1997).

Black Beauty argues that hazards were not identified with the necessary specificity. I find to the contrary. The notice to provide safeguard requires “an adequate crossing facility at . . . all locations along belt conveyors where miners need to cross under the moving belt.” The safeguard clearly identifies the hazard of “crossing under a moving belt.” The hazard or danger of walking under a moving belt is commonly understood in mining and need not be spelled out any more specifically in order for this safeguard to be valid. The inspectors determined, and I

agree, that the conditions, i.e. walking in an area under an unprotected moving conveyor, could affect the safe transportation of men and materials. Accordingly, I find that the notice to provide safeguard, is sufficiently specific as far as identifying the hazard.

The order to provide safeguard is required to specify the “conduct required of the operator to remedy such hazard.” *Southern Ohio Coal Co.*, 7 FMSHRC 509, 512 (Apr. 1985). The safeguard is clear in this instance and states that “an adequate crossing facility” is required to prevent the hazard of crossing under the moving belt. I find that the safeguard meets the requirement for specifically setting forth the conduct required. Given that the safeguard describes a specific hazard of traveling under a moving belt and that an adequate crossing facility is necessary to remedy the hazard, I find the safeguard is valid.

ii. Application of Facts to the Safeguard

I have found that the safeguard is valid and I now look to whether or not the Secretary has met her burden to prove a violation of the safeguard. I find that she has not. The safeguard requires an adequate crossing where miners need to cross under the moving belt. The Secretary has produced no substantive evidence that miners were crossing under the belt while it was in operation. While the Secretary would have me assume that the tracks and prints were made under the belt while it was in motion, there is nothing to substantiate that assumption. In fact, the Air Quality witnesses testified that maintenance, rock dusting, and cleaning of the belt, a time when footprints and vehicle tracks may well be made under the belt, is done at a time when the belt is shut down. Unlike the admission of the miners that they walked under the moving belt when the safeguard was initially issued, there is no evidence here that miners walked under or rode on vehicles under the belt while it was in motion.

The only testimony regarding discussions with miners by Preece is that he was told that guards were needed in the areas cited. He was not told that anyone had walked or ridden under the belt when it was in motion. While I agree with Preece that this is a heavily traveled area and that there was not adequate protection in the areas where he identified foot prints and tracks under the belt, I cannot agree that he has shown that any traffic was crossing under the belt while it was in operation. There is evidence to demonstrate that there are two areas in close proximity where both foot traffic and vehicles may safely cross under the belt while it is in motion. There is nothing to dispute that those safe cross-unders were not utilized while the belt was in motion. Based upon the above, the citation is vacated.

## II. PENALTY

The principles governing the authority of Commission administrative law judge 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 [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).

I accept the stipulation of the parties that the penalties proposed are appropriate to this operator's size and ability to continue in business and that the violations were abated in good faith. Jt. Stip. 9 -12; (Tr. 8-9). The history shows the past violations at this mine, including citations for the standards discussed above. The size of the operator is large. I have discussed the negligence and gravity associated with each citation above. Based upon the record as a whole, I assess the following penalties:

Citation No. 8415328	Vacated
Citation No. 8414037	\$10,000
Citation No. 8017946	Vacated

The parties have settled the remaining citations and orders contained in these dockets and the settlement is set forth below.

Citation/Order No.	Modification to Citation	Proposed Penalty	Amended Penalty
8415284	Modify from high to moderate negligence	\$2,106	\$1,472
7698694	Modify from reasonably likely to unlikely; non s&s	\$3,143	\$2,200
7698695	Modify from reasonably likely to unlikely; non s&s	\$4,329	\$3,030
8415524	Modify from high to moderate negligence	\$3,689	\$2,582
8415525	Modify from high to moderate negligence	\$6,696	\$4,687
8415287	Modify from fatal to permanently disabling; Modify from high to moderate negligence	\$15,570	\$10,899
8415528	No change	\$8,893	\$6,669
8415288	Modify from high to moderate negligence	\$3,689	\$2,600
8415531	No change	\$8,209	\$5,746
8415292	Modify from high to moderate negligence	\$19,793	\$13,855
8415293	Modify from high to moderate negligence	\$10,437	\$7,305
8415294	No change	\$117	\$100
8415534	Modify from reasonably likely to unlikely; non s&s	\$5,503	\$3,852
8415536	Modify to 3 people affected	\$5,503	\$3,852
6681977	No change	\$1,412	\$989

6681980	No change	\$1,412	\$989
6681398	No change	\$1,412	\$989
6681399	Modify from high to moderate negligence	\$11,306	\$7,914
6681981	Modify from lost workdays to no lost workdays; Modify from moderate negligence to low negligence	\$873.00	\$611
8017943	Modify from high to moderate negligence	\$8,893	\$6,225
6681984	No change	\$1,203	\$842
6681400	No change	\$807	\$565
8415319	Modify from fatal to no lost workdays	\$634	\$444
6681985	Modify from fatal to no lost workdays	\$2,473	\$1,731
8514320	Modify from reasonably likely to unlikely; non s&s	\$1,795	\$1,257
8417945	Modify from reasonably likely to unlikely; non s&s	\$2,473	\$1,731
8415706	No change	\$5,961	\$4,172
8415707	No change	\$585	\$410
	Total:	\$138,916	\$97,718

As to the proposed settlement, I have considered the representations and documentation submitted, and I find that the modifications are reasonable and I conclude that the proposed settlement is appropriate under the criteria set forth in section 110(I) of the Act. The motion to approve settlement is **GRANTED**.

### III. ORDER

Based on the criteria in section 110(I) of the Mine Act, 30 U.S.C. § 820(I), I assess the penalties listed above for a total penalty of \$10,000 for the citations decided after hearing and a total of \$97,718.00 for the citations that were settled. Black Beauty Coal Company is hereby **ORDERED** to pay the Secretary of Labor the sum of \$107,718.00 within 30 days of the date of this decision.

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

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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**  
601 NEW JERSEY AVENUE N. W., SUITE 9500  
WASHINGTON, D.C. 20001

July 13, 2011

SECRETARY OF LABOR, MSHA,	:	TEMPORARY REINSTATEMENT
on behalf of THURMAN WAYNE	:	PROCEEDING
PRUITT,	:	
Complainant	:	Docket No. KENT 2011-1152-D
	:	MADI-CD-2011-08
v.	:	
	:	
GRAND EAGLE MINING, INC.,	:	Grand Eagle Prep Plant
Respondent	:	Mine ID 15-19011

**DECISION AND ORDER GRANTING APPLICATION FOR  
TEMPORARY REINSTATEMENT**

Appearances: Jennifer Booth Thomas, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, on behalf of the Secretary;  
Jeffrey K. Phillips, Esq., Steptoe & Johnson, PLLC, Lexington, Kentucky, on behalf of the Respondent.

Before: Judge Melick

This case is before me pursuant to Section 105 (c)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., the (“Act”). Grand Eagle Mining Inc., (“Grand Eagle”) has requested a hearing on the Secretary’s application for temporary reinstatement of Thurman Pruitt filed June 8, 2011, pursuant to Commission Rule 45, 29 C.F.R. § 2700.45. Expedited hearings were thereafter held in Henderson, Kentucky.

Commission Rule 45(d), 29 C.F.R. § 2700.45(d) limits the scope of these proceedings as follows:

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

The Commission has further held that it is “not the judge’s duty . . . to resolve . . . conflict[s] in testimony at this preliminary stage of proceedings.” *Secretary of Labor on behalf of Albu v. Chicopee Coal Co., Inc.*, 21 FMSHRC 717, 719 (July 1999). At a temporary reinstatement hearing the judge must determine whether the evidence mustered by the miner to date establishes that his complaint is nonfrivolous, not whether there is sufficient evidence of discrimination to justify permanent reinstatement. *Jim Walter Resources Inc.* 920 F.2d 738 at 744 (11<sup>th</sup> Cir. 1990). The Circuit Court further stated that the “not frivolously brought” standard is indistinguishable from the “reasonable cause to believe” standard under the whistleblower provisions of the Surface Transportation Assistance Act. In addition, it is equated with a criteria of “not insubstantial or frivolous” and “not clearly without merit.” *Jim Walter Resources Inc.*, 920 F.2d at 745.

In a “Summary of Discrimination Action” form (MSHA Form 2000-124) signed by Mr. Pruitt on April 11, 2011, it is stated as follows:

Mr. Pruitt feels that he was unfairly treated from an [sic] similar incident that had previously happened to another worker who only got 3 days off and not terminated. He feels that he was terminated because he had turned in a safety issue in the past. He is requesting back pay, overtime, benefits, electrical class he was participating in and have his record cleared.

### *Complaint of Diesel Fuel Spill*

Complainant, Wayne Pruitt, testified that he began working for Grand Eagle on August 18 or August 19, 2008 as a service mechanic. He testified that upon arrival at the mine for his 2 p.m. shift on August 5, 2009 he was told that around noon that day someone had spilled diesel fuel. He estimated that “at least” 3,000 gallons had spilled and that some had run into his work area. The area smelled of diesel fuel and the vapors, enhanced by the heat that day, made him nauseous. The events that followed were described in the following colloquy at hearings:

Q [By Ms. Thomas] Okay. Let me ask you this. What did Mr. Ferris [Pruitt’s foreman] do in response to or, if anything, in response to your questions about the diesel fuel spill?

A [Mr. Pruitt] Oh, his reply was that they put sand down over my work area.

Q Did you go to the work area?

A Yes.

Q And did you see sand?

A Very little.

Tr. 16 L 4- L 12

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Q. [Ms. Thomas] Hold on just a second. Did the sand have any effect that you could appreciate --

A No.

Q -- in terms of the spill?

A None at all. None at all.

Q Okay. And did you tell Mr. Ferris that?

A Yes.

Q And what did he say in response?

A His -- I asked him if there was something else that they were going to do and he --

THE COURT: What did you talk to Mr. Ferris about?

THE WITNESS: This was at 2 o'clock, when I walked over and observed my work area, then I went back and talked to Mr. Ferris.

THE COURT: And what did you say to Mr. Ferris?

THE WITNESS: I asked him what they were going to do to clean that area up, and his reply was, I'll find out. So I did try to go back to work in my work area, and I was over there for about an hour and I was getting sick, and I went back to Mr. Ferris again and I told him that something has to be done because it's making me sick to try to work in this area.

Q (MS. BOOTH THOMAS CONTINUING) And is this the third time that you asked Mr. Ferris about the diesel spill?

A Yes.

Q And what did he say this third time to you?

A He told me that they were going to put gravel down in that area.

Q And what did you say in response to Mr. Ferris?

A I said -- I said, Jerry, this gravel is not going to seal these fumes that's already soaked through deep into the ground. I said the sun is pulling these vapors up and I said I cannot work in these conditions and I can't -- you know, I can't for the life of me understand why this company wants to put somebody through those kind of conditions.

Q What did Mr. Ferris say to you?

A He told me again that he would go find out to see what they would do to clean that up

Tr. 16 L 22-Tr. 18 L 13

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THE COURT: What did you say to Mr. Ferris at this point, if they're not going to clean it up?

THE WITNESS: Yeah. I told him if they're not going to clean it up, I said, there's -- there are means that I can use to get this spill cleaned up and he said, what do you mean by that?

Q (MS. BOOTH THOMAS CONTINUING) What did you say in response to that?

A I told him I could call MSHA and report a spill that they did.

Q Did you tell -- so you told Mr. Ferris that you could call MSHA?

A Yes.

Tr. 19 L 15- Tr. 20 L 2

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Q [Ms. Thomas] So after you told Mr. Ferris that you could call MSHA, what did he say in response?

A [Mr. Pruitt] He told me to do what I have to do.

Q And what did you say to him?

A I told him I was going up by the time clock, there's a bulletin board there that has the MSHA 800 number on it.

Tr. 20 L 13-L 19

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Q (MS. BOOTH THOMAS CONTINUING) Okay. What did you do after you had that conversation with Mr. Ferris?

A [Mr. Pruitt] I proceeded to the -- it's like a warehouse area with our time clock, that's where our time clock is, and there's a bulletin board on the wall. I proceeded up there, and I called the 800 MSHA hotline number and reported a spill that the company did not report themselves.

Q Okay. Okay. And where was Mr. Ferris during your telephone conversation with MSHA?

A While I was on the phone I had no idea where he was at.

Q Did you see him soon after you hung up?

A Yes. Yes.

Q Where was he?

A He was right outside the walk door, just a few feet from where I was on the phone, but he was standing outside the door as to where I couldn't see him.

Q Was the door open?

A Yes.

Q What did you say to Mr. Ferris when you saw him standing outside a few feet away from where you had the telephone call?

A Well, when I finished my phone call, when I walked through that doorway, he startled me because he was right there on the other side of the door. I didn't -- I didn't know he was there.

Q What did you say to him?

A I didn't say anything. He said the first word, he told me hold up, Wayne, and I said, yeah, Jerry. He said, did you make your phone call? I said, yes, I did. And he said, well, he said, just hang on right here. He said Mr. Rick Lam, which is the mine superintendent, he said Mr. Rick Lam is on his way over to see you. He wants to have a talk with you.

Q When did Mr. Lam -- did Mr. Lam show up?

A Yes, but when Jerry said that, my reply to Jerry was, am I going to get fired over this? And he said, "I don't know, Old Buck." That was his exact words. He said, we'll find out when Mr. Lam gets here.

Q Okay. When did Mr. Lam arrive after that conversation?

A Maybe three to four minutes.

Q Did you know if Mr. Ferris called Mr. Lam?

A I don't know. You know, he had to, to have talked to him, because Mr. Lam had already known that I had called MSHA.

Q Okay. And what was the first thing Mr. Lam did when he approached you?

A Well, as Mr. Lam entered the parking lot, he was traveling at a pretty accelerated rate of speed, and he come sliding in that parking lot in his truck, you know, locked the brakes up and jumps out like he's ready to fight, you know -- and, you know, I was kind of startled, somebody coming at me. You know, he is rushing towards me and he wanted to know what the hell is going on.

Q And was he directing that to you?

A I assumed that, but I wasn't sure. I didn't make any comment to that statement. And then he said -- he looked at me and asked me directly, Wayne, what's going on here?

Q What did you say in response?

A I told him that they had a diesel fuel spill that they weren't going to clean up, they expected me to work in that, and he interrupted me and he said I run this mine, you know, I'm in charge here, I say what goes here, what goes there, you know. He tried to put fear into me that -- that I done something.

THE COURT: Wait a second now. Again, I don't want to know your feelings. I want to know what he said.

THE WITNESS: Okay.

Q The judge wants to know what was said to you. Do you recall what Mr. Lam told you when you responded to him about the diesel fuel?

A He told me he would not tolerate anyone turning them in for a violation like they're going to get over this, and then he says that -- after he said that statement he directly backed up and said why didn't you call me first.

Q When he was saying this to you, what was -- was his voice elevated?

A Yes, it was elevated.



Q Was he standing directly in front of you?

A Right in my face.

Q Okay. How far away from you?

A This far, (indicating).

Q And for the Court, we got to kind of give -- for the record we got to give some distance.

A About one foot. Twelve inches, one foot, yeah.

Q And you said he backed up. What did he say when he backed up?

A When he backed away, he asked me why I did not call him first, to give him the first opportunity to make that situation good before I reported it to MSHA.

Q And what did you say in response?

A I told him that this was six hours into my shift, every hour I asked to get something done to resolve that issue in my work area. I told him I was not satisfied at all with the working conditions that they were putting me through working in those diesel fuel fumes, and he let me know that if I would have called him and contacted him that he would have told me that he had already called an emergency spill company to come and clean all of that up.

Q And was that the end of the conversation you had with Mr. Lam?

A Yeah. There was more words to it than that, but I don't exactly remember. There was still some more conversation and he let me know that that area would be cleaned up.

Q Okay. Did he say anything to you in a hostile tone, in a high tone, in a yelling tone?

A Yeah. When he first got there he was yelling, he was letting me know that that was his mine, he run the mine, he calls all the shots, and it was like he was directing towards me that I interfered with his operation and that he wouldn't stand for somebody working like that for him, under him, for him.

Q Was Mr. Ferris standing there --

A Yes, ma'am.

Q -- within earshot of the conversation?

A Yes, ma'am.

Q As a result, did MSHA actually come out to the mine?

A Yes, ma'am.

Q And did they do an investigation, as far as you know?

A As far as I know they did, yeah. They came over and inspected the area where the spill happened and they could see where it got into this drainage ditch and --

Q Okay. But they came in --

A Yeah.

Q -- and did an inspection?

A Yeah.

Q Did the EPA, the Environmental Protection Agency, did they come out to the mine as well?

A Yes, ma'am. They showed up the very next day. There was several involved with those.

Tr. 21 L 14- Tr. 27 L 2

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Q (MS. BOOTH THOMAS CONTINUING) Well, did the EPA actually come in?

A ( Mr. Pruitt) They didn't until I notified them. MSHA -- MSHA came out --

THE COURT: I'm sorry. You notified EPA?

THE WITNESS: Yes, sir.

THE COURT: Oh, all right. And when did you do that?

Q (MS. BOOTH THOMAS CONTINUING) Yeah, when did you do that?

A That -- let's see. The night that it happened, excuse me, I came in the following day and I didn't see much that MSHA, I didn't see or hear that MSHA assessed a penalty or a fine or MSHA had done, I didn't see anything MSHA done, nothing.

Tr. 28 L 23- Tr. 29 L 12

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Q [Ms. Booth] Did you have any other interactions with the EPA while you were at work when they were there?

A [Mr. Pruitt] Well, I take that back. There was -- I did call that number, they have a hotline number, and I had to give them my case number or the number they gave me when I made the initial call, and they did tell me there was an investigation going on, and that's about all they could tell me at that time, but after the fact, you know, I could see what took place, what happened, that they did take action and that the material that they hauled to the gob dump was removed, and it cost them several thousands of dollars.

Tr. 31 L 10 - L 21

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Q (MS. BOOTH THOMAS CONTINUING) Did Mr. Donahue [then Plant Manager] speak with you -- what was your first interaction with Mr. Donahue after the spill?

A There was not any immediate contact with each other until about two weeks after the spill.

Q And what happened? How were you contacted?

A Ed Donahue called me into his office and --

THE COURT: When was that that he called you?

THE WITNESS: This was about two weeks after the spill.

Q Was it during your shift?

A Yes. During my -- at the beginning of my shift.

Q Did he come and get you? Where were you?

A Yes. I was -- we have a pre-shift meeting where the man comes out. Like I said, I start work at 2 o'clock. Usually ten minutes until 2:00 the foreman will start telling everybody where to go, directing people, you're on this and you're on that.

Q Okay. And did Mr. Donahue come to you during that time?

A Yes, ma'am. Well, it was after -- after we disbursed to go relieve the day shift operators, that's when Mr. Donahue, he was out there at that time and he called me away from everybody, Wayne, I need to see you in my office.

Q Okay. And was anybody with you? Did anybody go with you?

A No, ma'am. I was by myself.

Q Okay. And what happened in the office? What did Mr. Donahue say to you when you first got into the office?

A Okay. Well, the office is a small mobile home trailer. There's only like three -- three offices. There's a plant manager, the secretaries, and the foremen all share one office. It's a small, little mobile home unit. And as I went into Ed's office at the end of the trailer he left the door open and when I -- he told me to have a seat. So I sat down, and he just looked me point blank in the eye and said -- said, Mr. Pruitt, he said in the future he said if you ever call MSHA and report this company for a violation again you will suffer the consequences.

Q And what did you say in response?

A My reply was instantly, Ed, you can't speak to me that way. You can't do that.

Q What did he say to you?

A He told me he could speak to me any way that he chose and as he was getting up out of his chair and walking around his desk towards me he again told me, I'm celling you, looked me right in my eye and he said, I'm telling you, he said, if you turn this company in again to MSHA for any reason you will, he exaggerated, (indicating), you will suffer the consequences.

Q And where were you when he said that?

A I was sitting in a chair in front of his desk.

Q And where was he?

A He was walking around his desk.

Q And how far was he away from you when he started pointing and saying you will suffer the consequences?

A Four feet.

Q Okay.

A Four to five feet.

Q Did he use any vulgar language towards you?

A Yeah.

Q What did he say?

A At that time he was approaching me, and he reached onto his side and grabbed his cell phone, and he slams his cell phone down on that desk corner right there in front of me. I mean, slammed it down hard, (indicating). And he said there's a telephone, he said, I dare you to call fucking MSHA. That was his term right there.

Q And what did you say in response?

A I was nervous, and I told him again, I said, Ed, I'm not listening to this type of talk from you. I don't have to. I said if you're going to -- I said if you have anything else to say to me, I said, I want a witness. And he told -- he hollered for Jayma. She is his --

Q Who is Jayma?

A -- secretary. Jayma Jackson is his secretary. Her office is right around from his, there's a little bathroom area and then there's her office. There's no doors on her office, and she could hear every word that we were saying.

Q Well, she was within earshot?

A Yes, ma'am. Yes, ma'am. Definitely. Well, he called for her.

Q Did she come?

A And I said no. Just as soon as he hollered for her, I said no. I said she is a salaried personnel. I said I want a witness with me right now if you're going to talk to me in this tone of voice, I said I want someone hourly. She did not come in there.

Q Okay.

A So I knew she could hear, because he --

Q Well, let's talk about --

A Okay.

Q -- what happened after you said you wanted an hourly person. What did he say?

A Well, he slammed -- he picked his phone up and, like I said, tried to get as close to me as he could on the edge of that desk and pointing at it, I dare you, I dare you, you want me to dial the damn number for you? I dare you to call MSHA and tell them how I'm talking to you right now. I got up. I had to squeeze between him and the chair I was in to walk out the door. I said I'm through with this conversation, Ed Donahue. If you've got anything else to say about this matter with me I'll be right back with one of my employees, one of the hourly guys as a witness, because I'm not listening to this type of conversation from you.

Q Did you have any more conversations with Mr. Donahue about the diesel spill?

A No, nothing. That was done.

Tr. 34 L 25 - Tr. 39 L 18

This testimony was not disputed at hearings and clearly evidences that Mr. Pruitt engaged in protected activity and that mine management showed animus toward Pruitt's protected activity.

*Report of Low Power on Loader*

Pruitt testified that in May or June 2010, he changed jobs and became a loader operator. Sometime during September 2010 he was operating the No. 731 loader which did not have "full power." The events that followed were described by Pruitt at hearings in the following colloquy:

[Mr. Pruitt] The 731 loader had power issues. It wasn't up to full power that it could function properly.

Q And how long had you been operating it where it wasn't up to full power?

A It was a couple of weeks that all three of us loader operators were running this particular loader. We have a pre-shift safety checklist that we check off and we write remarks on there as to any problems that you could be having with that equipment, and we were all writing low power, you know.

Q All three shifts?

A Yes, ma'am.

Q All three operators --

A Yes.

Q -- wrote low power on their pre-shift?

A Yes, ma'am.

Q And on that day what happened? Can you tell the Court what happened with your work refusal?

A Okay. I was on second shift. It was sometime towards the middle of my shift. I was taking a bucket of breaker rock, it comes out of the breaker, back up to the hill to work the stockpile. As I was climbing the incline of the hill before I crested the top I was just barely -- barely moving, just barely able to proceed up the hill and then the loader just stalled out and died. And when it died I slammed on the brakes. The brakes held the equipment. They're a hydraulic brake system.

Q Okay.

A And there's an accumulator on those loaders to give you just a little bit of power when the motor is not running. You only have two or three times you can push that brake pedal before there's no brakes at all.

Q And did you call anyone about the loader at that point?

A Yes, ma'am. I contacted my immediate foreman, Rob Edwards.

Q Okay. Now, I want to be clear so the Court can understand. At this point Jerry Ferris is not your immediate foreman; is that right?

A Right. Jerry Ferris had left and now Rob Edwards was my immediate foreman.

THE COURT: Well, now, left the company?

THE WITNESS: Well, he still worked for the company. He is at a different location.

THE COURT: Different mine site?

THE WITNESS: Different site.

Q (MS. BOOTH THOMAS CONTINUING) And did you tell Mr. Edwards about the problem with the loader?

A Yes, ma'am. I told Rob.

Q What did you say to him?

A We have a two-way FM radio, company radio, as we refer to it. I contacted Rob on the company radio and told him my situation, the loader stalled out on me on the hill, it's frightening me, scaring me, and that I was going to park the loader and tag it out, it was unsafe.

Q And what did Mr. Edwards say to you?

A He told me there was nothing wrong with that loader.

Q And what did you say to him in response?

A I told him, yes, there is, it just stalled out on me, there's no power.

Q What did he do in response to that?

A I told him that I was going to park that loader, I was going to put a tag on it, do not operate, and there were two additional loaders parked over there not in use, I was going to get one of the other loaders and go back and perform my job.

THE COURT: Is that what you told him, that you were getting another loader?

THE WITNESS: Yeah, because the one I was on was unsafe, I was refusing to operate that equipment.

THE COURT: How did you get it to the parking position if it had stalled out on you?

THE WITNESS: I had a load on the bucket when it stalled out and I was up on the hill. From the point I was at to once I climbed the hill and dumped that load, it's downhill all of the way.

THE COURT: Well, where did it stall out?

THE WITNESS: It stalled out going up the hill.

THE COURT: With a load?

THE WITNESS: With a load.

THE COURT: So you dumped the load at that point?

THE WITNESS: Yes.

THE COURT: And you were able to operate it at that point?

THE WITNESS: Yes. Yeah, it was low power It would function okay without a load, and the whole 2 route I had after dumping that bucket was downhill.

Q (MS. BOOTH THOMAS CONTINUING) And that was without a load?

A That was without a load, correct.

Q So your concerns were going up the hill with a load?

A Yes, ma'am.

Q Okay. And what did Mr. Edwards say to you when you told him that you were going to tag this equipment out?

A He told me that he had called Tim Ball, the safety director, and explained the situation at hand with him. They have a policy of, you know, if –

Q And when you say "they," you mean the operator?

A No. The company tells us that -- I've not seen a written policy, but I guess it's a verbal policy. They've told us that if you deem something unsafe that if your foreman thinks it is safe that they will get a second opinion. Okay. The second opinion was a phone call to Tim Ball relating to him the issue. My foreman never came and looked at that loader. Tim Ball never came.

THE COURT: What was his position?

THE WITNESS: Tim Ball is the safety director.

THE COURT: Safety director?

THE WITNESS: Yeah.

THE COURT: All right.

Q (MS. BOOTH THOMAS CONTINUING) Did Mr. Ball come and look at the loader?

A No, ma'am. No, ma'am. He -- Mr. Rob Edwards conferred with Tim Ball over the telephone, because that's the statement Rob had made to me, I called Tim Ball, Tim Ball said it's safe to run, he agreed with me, it's safe to run, you run that equipment.

Q And did you run the equipment?

A No, ma'am. No.

Q What did you do?

A I parked the loader, I put a tag on it, do not operate, and I got on another loader.

Q Did you complete your job that day?

A Yes, ma'am.

Q Okay. And did you speak with Mr. Edwards and Mr. Rick Lam the following day?

A Yes, ma'am. At the beginning of the shift.

Q Okay. And what did -- how did that conversation start?

A It started like I said earlier, kind of the same deal, we all meet out there before shift, and when we were disbursing Rick Lam was there with Rob Edwards, and Rick Lam said, Wayne, I need to see you a minute. There's a small conference room right there behind the time clock wall, and they walked into that conference room, Rob Edwards, Rick Lam, and myself.

Q Okay. And what was -- what did Mr. Lam say to you?

A Well, as we got in and sat down in that room Rob Edwards and Rick Lam sat facing -- facing me. Rob never made any comments. Rick Lam, the first question that he asked me was why I was refusing to do my job.

Q And what did you say?

A I said I did not refuse to do my job, I said I deemed a piece of equipment unsafe to operate and I got on another piece of equipment and done my job.

Q And what did he say to that?

A He got up out of his chair and walked towards me and he said I will -- he started pointing his finger. He said I won't tolerate a man not wanting to do his job. He said I run this mine, this is my mine. He said I've heard this story before from you. He said this is my mine. He said if a man is not doing his job he said I'll fire him on the spot.

Q How far away was he standing from you when he -- when he said that?

A Two feet.

Q Okay. And were you sitting in a chair?

A I was sitting down and he was pointing his finger at me, (indicating).

Q Did you say anything in response to what he said to you?

A I was confused. I said wait a minute, I turned a piece of equipment in as unsafe to operate. You know, I have that right to do that, and you're wanting to turn this around, Mr. Lam, and directing me that I refused to do my job. And he said you did refuse to do your job. When your foreman puts you on, assigns you a piece of equipment and you refuse to run that equipment, he said you refuse to do your job. And he said, like I told you, I won't tolerate that, I will fire a man for not -- for refusing to do his job. And he was in a loud tone of voice.

Q Okay. Did you say anything in response to that?

A Yeah. I kept saying, Mr. Lam, the equipment was unsafe. You know, I'm told by you, by the safety director, by my foreman if you think a piece of equipment is unsafe you park it, you tag it out. I was doing what I've been trained in my safety training to do.

Q Did Mr. Lam tell you that piece of equipment was being looked at or being considered for repairs? What did he say?

A At that time he said I have a Wayne Supply man on his way.

Q Well, hold on. Wayne Supply man?

A They're a mechanic, Caterpillar. It's a Caterpillar dealer/mechanic. He said I have a Caterpillar serviceman on the way and he's got a laptop computer. And after Mr. Lam told me that the Caterpillar man was on the way and he said you better hope they find something wrong with that equipment. And that was all that was said. You know, that was the end of the conversation. As I left the room they were out there getting the codes off of the -- the loader had like three injectors that wasn't working. It was low power.

Q Did you see that yourself, the codes --

A Yes.

Q -- from the --

A Well, I didn't actually see the codes on the computer. I seen the computer screen and I heard

what they -- what they said, that there was three injectors not working on that loader.

Q What does that mean?

A Each cylinder, you know, each motor --

Q In layman's terms. Yeah.



A A motor has so many pistons. On a diesel motor each piston has a fuel injector that sends fuel specifically for that cylinder. There was three cylinders that were not getting any diesel fuel, and that's like you took three pistons away from that engine. And I never heard an apology from them, I never heard them say, yeah, you were right, Wayne, you know, thanks for being safe. You know, I never heard nothing like that. I never heard another comment. I was just thankful that they did find something and Mr. Lam didn't fire me.

Tr. 42 L 11- Tr. 51 L 14

This testimony was not disputed at hearings and clearly establishes that Mr. Pruitt engaged in protected activity and that both his then-foreman Rob Edwards, and Operations Manager Rick Lam, showed animus toward this protected activity.

*Report of Gob Truck With Two Lights Out*

Pruitt testified that sometime during the month of February or March 2011, he reported to safety Director Tim Ball that two lights were out on the gob truck. Following this report, Ball reportedly “made them park the truck until it was fixed.” The following day Edwards told Pruitt that he had gotten in trouble “royally” over the issue. There is no evidence that Edwards knew that Pruitt had reported the condition to Ball. In any event, it is clear that Pruitt engaged in protected activity by reporting the condition to Ball. Pruitt was subsequently discharged by Grand Eagle on March 31, 2011. A letter informing him of his discharge dated April 1, 2011 reads as follows:

Dear Mr. Pruitt,

This letter is to inform you that your employment with Grand Eagle Prep Plant has been terminated, effective 3/31/2011. This action was taken due to a history of unsafe work activity. On January 14, 2011, you were suspended for three days due to unsafe work acts. On March 31, 2011, you were again observed engaging in unsafe work acts and subsequently suspended.

For this reason, we have no choice but to discharge you immediately. You will be notified in a separate letter from the Human Resources Department of your COBRA rights and eligibility.

Sincerely,

Richard Lam

Operations Manager

Pruitt acknowledged that in January 2011 he had backed a 988 Caterpillar loader into the tail roller of the stacker and received a three-day suspension for that accident. The testimony of current

Plant Manager Dwight Son that the resulting repairs cost \$30,000 is not disputed. Pruitt also acknowledges that on March 31, 2011 he was violating company safety rules by working on one of the belts without locking and tagging it out. He further acknowledges that he was also then violating company policy by working on the belt some 20 feet above the ground without fall protection. It is not disputed that Mr. Son was told by an MSHA official that Pruitt's failure to lock and tag out the belt before working on it and his failure to wear fall protection would have resulted in a "section 104(d)" closure order.

Pruitt claims however that his discharge was the result of disparate treatment in that other miners at this facility had similar incidents and were not discharged. In this regard he cited incidents by miners Randy Toms, Carroll Simmons, Shane Stone and Michael Crick. While the Complainant would have the burden at hearings on the merits to prove disparate treatment, his representations under oath of such treatment may be considered in determining that the complaint herein was not frivolously brought, the standard applicable in these proceedings.

In concluding that Pruitt's complaint herein was not frivolously brought, I give significant weight to the evidence, undisputed at hearings, that Pruitt engaged in a number of protected activities, that Respondent showed animus toward several of those activities and that there was a close connection in time, about one month or less, between his last alleged protected activity and his March 31, 2011 discharge.

While Respondent appears to assert that its discharge of Pruitt was based on his unprotected activities and may at hearings on the merits prove that assertion (the person who could provide the best evidence in this regard i.e. the person who actually discharged Mr. Pruitt, did not testify )and I find that Respondent's evidence at these hearings is not sufficient to demonstrate that Pruitt's complaint herein was frivolously brought.

#### ORDER

Based on the above findings, the Secretary's Application for Temporary Reinstatement is granted. Accordingly, Grand Eagle Mining Inc., is directed to immediately reinstate Wayne Pruitt to the same or equivalent job at the Grand Eagle Prep Plant at the same rate of pay and with the same benefits he had at the time of his discharge on March 31, 2011

/s/ Gary Melick  
\_\_\_\_\_  
Gary Melick  
Administrative Law Judge  
(202) 434-9977

Distribution:(By Certified Mail, and Email)

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/to

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

**OFFICE OF ADMINISTRATIVE LAW JUDGES**

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July 21, 2011

SECRETARY OF LABOR	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	(Judge Lewis)
ADMINISTRATION (MSHA),	:	
Petitioner,	:	Docket No. SE 2010-566
	:	A.C. No. 40-02545-210961
v.	:	
	:	
CARMEUSE LIME & STONE,	:	
Respondent,	:	Mine Name: Lime Plant

**DECISION**

Appearances: Joseph B. Luckett, Esq., Office of the Solicitor, U.S. Department of Labor, on behalf of the Secretary of Labor;  
R. Henry Moore, Esq., Jackson Kelly PLLC, on behalf of Carmeuse Lime and Stone.

Before: Judge John Kent Lewis

This case is before me on a petition for assessment of civil penalty, filed by the Secretary of Labor ("Secretary"), acting through the Mine Safety and Health Administration ("MSHA") against Respondent, Carmeuse Lime and Stone, Inc., ("Respondent"), at its lime plant pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §815 and 820 ("Mine Act" or "Act"). The case originally involved one docket with twelve (12) violations, and an assessed a total penalty of \$16,670.00. Prior to the hearing, the parties filed a motion to approve a partial settlement of six of the citations for a penalty of \$1,339.00.

This court has reviewed the documentation and representations submitted as to the aforementioned six citations.<sup>1</sup> I have considered the representations and documentation submitted in this case, and I conclude that the proffered settlement is appropriate under the criteria set forth in section 110(i) of the Act. Accordingly, an order approving the partial settlement and directing payment of those penalties is incorporated into this decision.

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<sup>1</sup> The following Citations are addressed pursuant to the settlement agreement: 6596509; 6596510; 6596513; 6596514; 6596519; 6596529.

As to the remaining six (6) citations, the parties presented testimony and documentary evidence at the hearing held on April 28, 2011 in Knoxville, Tennessee. The parties filed post-hearing briefs.

### FINDINGS OF FACT AND CONCLUSIONS OF LAW

Carmeuse Lime and Stone operates the Luttrell Lime Plant in Union County, Tennessee. The Luttrell operation mines limestone from underground and surface mines. The Plant produces lime, hydrate, limestone, and aggregate products for sale into the environmental, chemical, metallurgical, construction, building materials, agricultural, and consumer product markets. *See, inter alia*, Wolfenbarger Affidavit, Respondent Exhibit (Res. Ex.) 1, at 1.

The parties have stipulated, *inter alia*, that the operator is medium in size, that its mine's operations affect interstate commerce, that it is subject to the jurisdiction of the Mine Act and that the proposed penalty will not affect the operator's ability to proceed in business. *See* Joint Motion to Approve Partial Settlement. *See also* stipulations at Government Exhibit (Gov. Ex.) 1.

At hearing the parties also stipulated as to Respondent's violation history as set forth at Gov. Ex. 27 based upon the Secretary confirming that "0" on said "assessed violation history report" meant a vacated citation. *See* Hearing Transcript (Tr.) 20. The Secretary confirmed this interpretation by letter, dated May 10, 2011.

#### A. Citation No. 6596503

On January 5, 2010, Inspector Joe Norwood issued Citation No. 6596503 to Carmeuse Lime and Stone for a violation of 30 C.F.R. §56.12034. The citation alleged:

The 208 volt light attached to and about 20 inches above the handrail. Located on the 113 head pulley platform was not guarded to protect miners from accidental contact. Possible contact with the light result in electrical shock, burns, and/or cuts.

Gov. Ex. 2.

The inspector found that an injury was unlikely to occur, that an injury could reasonably be expected to be fatal, and that the negligence was high. *See* Gov. Ex. 2. Although inspector Norwood had originally indicated in his citation that the violation was not significant and substantial, he averred in his pre-hearing affidavit that it was significant and substantial ("S&S"). Norwood Aff. Gov. Ex. 2A, at 7. At the hearing Norwood testified that, upon further reflection, he was of the opinion that the violation was not significant and substantial.<sup>2</sup> *Compare* Norwood Aff. Gov. Ex. 2A, at 7, *with* Tr. 18, *and* Gov. Ex. 2. The Secretary accordingly agreed not to

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<sup>2</sup> In its pre-hearing Order, this court, over objections of the Secretary and Respondent, requested that the parties submit all direct examinations of each witness in writing in the form of an affidavit.

pursue such as an S&S<sup>3</sup> designation. *See* Tr. 17.

The standard for citation 6596503, 30 C.F.R §56.12034, Guarding Around Lights, reads, “Portable extension lights, and other lights that by their location present a shock or burn hazard, shall be guarded.” 30 C.F.R §56.12034 (2010).

At hearing, Inspector Norwood testified that the unguarded light was a mercury light, which was alongside a metal walkway. It was located on the corner where a miner would go up and down the steps. Norwood Aff. Gov. Ex. 2A, at 6. The area where the light was located was traveled heavily, as it went to the head pulley. *Id.* Donnie Wolfenbarger, Respondent’s plant manager, had advised Norwood that one miner would use the walkway at least once per shift. *Id.* The line plant operated two shifts per day, five days per week, beginning at approximately 6:00 A.M. and lasting until 10:00 P.M. or 11:00 P.M. Norwood Aff. Gov. Ex. 2A, at 6; Tr. 26.

Norwood opined that, given the icy and wet weather conditions, a miner could easily slip and then stumble into the light, subjecting him to a shock or burn hazard. A person hitting the light could break the bulb and be exposed to the full 208 voltage, resulting in possible electrocution and death. Norwood Aff. Gov. Ex. 2A, at 7; Tr. 32.

At hearing Mr. Wolfenbarger disagreed that the unguarded light constituted a hazard in that the light was pointed toward stone piles away from the walkway where persons would travel. Tr. 46. Anyone stumbling into the light would be exposed to the back of the light, not to the bulb. Wolfenbarger further denied that there was any work order pertaining to the light in question. Wolfenbarger Aff. Res. Ex. 1, at 7; Tr. 47.

#### ANALYSIS

The record clearly establishes that the location of the unguarded light in question was a violation of §56.12034 in that a shock, burn or cut hazard existed. Given the location of the light on a walkway and the poor weather conditions, there was a risk that a miner could come into contact with the light and be exposed to a fatal shock. *See inter alia* Gov Ex. 3. The ALJ accepts the testimony of Inspector Norwood and the Secretary’s argument that a shock hazard, however remote, was existent and could reasonably be expected to result in death. Tr. 18; *See also* Secretary’s (Sec’y’s) Post-Trial (PT) Brief (Br.) 4-5.

I find, given the totality of the circumstances, including that the light was pointing away from any approaching miner, that it was “unlikely” that any injury could occur. Indeed, the Secretary conceded such. *See* Tr. 17.

The Secretary’s position was that the negligence associated with the violation was high, but I find that the negligence is moderate. I resolve the conflict in the record as to how long the

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<sup>3</sup> “Significant and substantial” is a term included in section 104(d)(10) of the Act, which distinguishes as more serious any violation that “could significantly and substantially contribute to the cause and effect of a ...mine safety or health hazard.” (30 U.S.C. §814(d)(1)).

hazardous condition existed and when Respondent had notice of such in favor of Respondent. *Compare* Tr. 39 (Inspector Norwood claims Mr. Wolfenbarger told him there was a work order placed during a plant shut down that occurred between December 18, 2009 to January 4, 2010), *with* Tr. 44 (Wolfenbarger denies memory or record of work order before January 5, 2010). Furthermore, Respondent had abated the violation within the time frame given. Norwood Aff. Gov Ex. 2A, at 8; Tr. 39. Therefore, I find that the Secretary has not carried the burden of proving a high level of negligence on the part of Respondent.<sup>4</sup> Accordingly, this court finds that Respondent's negligence was moderate.

Based upon the foregoing, including evaluation of the six statutory criteria set forth in Section 110(i) of the Act, I find that a reduced penalty of \$1,000.00 is warranted for this citation.

B. Citation No. 6596504

On January 5, 2010, Inspector Norwood issued Citation No. 6596504 to Respondent for violation of a mandatory safety standard at 30 C.F.R. §56.11002. This citation reads:

Seven sections of toe boards were removed on the top of the chat bin. The openings measured from about 56 inches to about 18 inches. The walkway on top of the bin is used each shift. Miners were observed walking and operating mobile equipment about 40 feet below. Miners being struck from falling material from this height could be seriously injured.

Gov. Ex. 4.

The inspector found that an injury was reasonably likely to occur, that an injury could reasonably be expected to be permanently disabling, and that the negligence was high. *See* Gov. Ex. 4. Inspector Norwood averred in his pre-hearing affidavit that the violation was significant and substantial. Norwood Aff. Gov Ex. 2A, at 13.

The mandatory standard at §56.11002, "Handrails and toeboards" sets forth the following: "Crossovers, elevated walkways, elevated ramps, and stairways shall be of a substantial construction provided with handrails, and maintained in good condition. Where necessary, toe boards<sup>5</sup> shall be provided." 30 C.F.R. §56.11002.

At hearing, Inspector Norwood described the area in question as an elevated walkway or travelway on top of the chat bin. *See* Gov. Ex. 5; Norwood Aff. Gov. Ex. 2A, at 11; Tr. 65.

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<sup>4</sup> 30 CFR § 100.3, in pertinent part, defines negligence as "conduct, either by commission or omission, which falls below a standard of care established under the Mine Act to protect miners against the risks of harm."

<sup>5</sup> A toe board is a vertical barrier at floor level that is erected along exposed opening, such as a floor opening, platform, or runway. Toe boards prevent objects such as tools and materials from falling from one level to the next.

Conversely, Mr. Wolfenbarger contended that the area in question was not a cross-over, walkway, ramp or stairway. Rather it was a platform not regularly traveled by individuals. Wolfenbarger Aff. Res. Ex. 4, at 7; Tr. 81. He did admit, however, that miners cleaned the platform once a week and performed maintenance on it on rare occasions. Tr. 79-80.

When a miner cleans the platform, Mr. Wolfenbarger testified that the road below was barricaded to protect miners underneath from falling gravel. Tr. 75. According to Inspector Norwood's testimony, however, the flagging he witnessed was not a barrier that would prevent miners from passing underneath. Tr. 71.

#### ANALYSIS

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

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

*Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984) (footnote omitted); *see also*, *Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 135 (7<sup>th</sup> Cir. 1999); *Austin Power, Inc. v. Secretary*, 861 F.2d 99, 103-04 (5<sup>th</sup> Cir. 1988), *aff'g Austin Power, Inc.*, 9 FMSHRC 2015, 2021 (Dec. 1987) (approving *Mathies* criteria).

The Respondent has essentially asserted that the Secretary has failed to prove any of the four prongs of *National Gypsum*.

At hearing sufficient evidence was provided by the Secretary to show that individuals walked in the area in question such that it can reasonably be found to be an "elevated walkway" within the meaning of §56.11002 provisions. Whether utilizing a "Chevron I or II analysis," this Court finds that the Secretary has properly construed the area in question as an elevated walkway. The first inquiry in statutory construction is "whether Congress has directly spoken to the precise question at issue." *Chevron U.S.A. Inc. v. Natural Res. Defense Council, Inc.*, 467 US 837, 842 (1984); *Thunder Basin Coal Co.*, 18 FMSHRC 582, 584 (Apr. 1996). If a statute is clear and unambiguous, effect must be given to its language. *Chevron*, 467 US at 842-43. *Accord Local Union No. 1261, UMWA v. FMSHRC*, 917 F.2d 42, 44 (D.C. Cir. 1990) [FN4]. If, however, the statute is ambiguous or silent on a point in question, a second inquiry, commonly referred to as a "*Chevron II*" analysis, is required to determine whether an agency's interpretation of a statute is a reasonable one. *See Chevron*, 467 US at 843-44; *Thunder Basin*, 18 FMHSRC at 584 n.2. Deference is accorded to "an agency's interpretation of the statute it is



charged with administering when that interpretation is reasonable.” *Energy West Mining Co. v. FMHSRC*, 40 F.3d 457, 460 (D.C. Cir. 1994) (citing *Chevron*, 467 US at 844). The agency’s interpretation of the statute is entitled to affirmance as long as that interpretation is one of the permissible interpretations the agency could have selected. *Chevron*, 467 US at 843; *Joy Technologies, Inc. v. Sec’y of Labor*, 99 F.3d 991, 995 (10<sup>th</sup> Cir. 1996), *cert denied*, 520 US 1209 (1997). See Tr. 65 (Wolfenbarger takes Norwood to platform on chat bin).

This court further credits the testimony of Inspector Norwood that required toeboards were missing at various places in the elevated walkway. See Gov. Exhibits 7, 8, 9, 10, 11, and 12; Norwood Aff. Gov. Ex. 2A, at 12; Tr. 63.

Therefore, this court finds that there was an underlying violation of §56.11002.

Further, I credit the testimony of Inspector Norwood that this citation created a discrete safety hazard -- that is, exposure to falling objects, including chat and maintenance tools.

The challenge in finding a violation S&S normally comes with the third element of the *Mathies* formula. In *U.S. Steel Mining Co., Inc.*, 7 FMSHRC 1125, 1129 (Aug. 1985), the Commission provided additional guidance:

We have explained further that the third element of the *Mathies* formula “requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury.” *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1834, 1836 (August 1984). We have emphasized that, in accordance with the language of section 104(d)(1), it is the contribution of a violation to the cause and effect of a hazard that must be significant and substantial. *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1866, 1868 (Aug. 1984); *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574-75 (July 1984).

This evaluation is made in consideration of the length of time that the violative condition existed prior to the citation and the time it would have existed if normal mining operations continued. *Elk Run Coal Co.*, FMSHRC 899, 905 (Dec. 2005); *U.S. Steel Mining Co., Inc.*, 6 FMSHRC at 1574. The question of whether a particular violation is S&S must be based on the particular facts surrounding the violation. *Texasgulf, Inc.*, 10 FMSHRC 498 (Apr. 1988); *Youghioghenny & Ohio Coal Co.*, 9 FMSHRC 2007 (Dec. 1987).

There is a reasonable likelihood that missing toeboards could allow falling debris to strike and injure miners. Inspector Norwood stated that he had observed miners walking and operating mobile equipment below the travel way. Norwood Aff. Gov. Ex. 2A, at 13. This fact undermines Respondent’s claims that the area was only traveled on an “as needed” basis or that barricading was erected to prevent individuals from traveling under the area. See Tr. 76; Wolfenbarger Aff. Res. Ex. 4, at 8. By bringing Norwood onto the chat bin with workers beneath, Wolfenbarger showed that people used the top of the chat bin without barricading the area underneath.

It is reasonably likely that a miner on top of the chat bin could kick objects onto miners below, causing injury. Toeboards would stop tools or gravel from falling off of the edge of the chat bin. I find that the violation meets the third prong of the *Mathies* test for S&S.

Moreover, it is reasonable that falling chat or tools could injure a miner in a reasonably serious nature. Even small gravel falling 30 to 40 feet could cause severe injuries if it struck a miner. A falling tool striking a miner could cause a broken back, severe concussion, or other permanently disabling injuries. Thus, I conclude that there is a reasonable likelihood that the injuries caused by exposure to falling debris or tools would be of a reasonably serious nature so as to satisfy *Mathies*' fourth prong.

For this citation, the Secretary assessed a penalty of \$2,678.00. The Commission outlined its authority for assessing civil penalties in *Douglas R. Rushford Trucking*, stating that "the principles governing the Commission's authority to assess civil penalties *de novo* for violations of the Mine Act are well established." 22 FMSHRC 598, 600 (May 2000). While the Secretary's point system in 30 C.F.R., Part 100 provides a recommended penalty, the ultimate assessment of the penalty is solely within the purview of the Commission. *Id.* Thus, a commission judge is not bound by the penalty recommended by the Secretary. *Spartan Mining Co.*, 30 FMSHRC 699, 723 (Aug. 2008). The *de novo* assessment of civil penalties does not require each of the penalty assessment criteria to be given equal weight. *Thunder Basin Coal Co.*, 19 FMSHRC 1495, 1503 (Sept. 1997).

Nevertheless, after reviewing all of the relevant facts and weighing the §110(i) factors applicable to such, I find no reason to depart upward or downward from the penalty amount arrived at by the Secretary. Accordingly the \$2,678.00 penalty is warranted.

#### C. Citation No. 6596506

On January 5, 2010, Inspector Norwood issued Citation No. 6596506 to Respondent which averred as follows:

Toe boards were not provided for a 44 inch walkway at the pre-heater ram platform. Miners were observed working about 35 feet below. Miners travel this area each shift. Being struck from falling material from this height could cause serious injury.

Gov. Ex. 15.

The inspector found that an injury was reasonably likely to occur, that an injury could reasonably be expected to be permanently disabling, and that the negligence was moderate. *See* Gov. Ex. 15. Inspector Norwood averred in his pre-hearing affidavit that the violation was significant and substantial. Norwood Aff. Gov Ex. 2A, at 18.

The mandatory safety standard at §56.11002 has already been cited *supra*.

At hearing, Mr. Wolfenbarger testified that the walkway in question, which led to a step

to the platform, had a toeboard. Tr. 93. The cited toeboard or lip was a grated metal extension fabricated by Respondent which had approximately 1.5 inch designed height. *Id.*; *See inter alia* Wolfenbarger Aff. Res. Ex. 5, at 8. Although Inspector Norwood admitted that MSHA does not have a height requirement for toeboards, he did not feel that 1.5 inches was adequate to prevent miners from accidentally kicking objects off of the walkway. Tr. 84. Other sections of the walkway had toeboards with a height of about 4 inches. *See* Tr. 89.

Miners used the walkway both to access the step to the ram platform and as a work platform. *See* Tr. 86. According to Mr. Wolfenbarger, miners traveled this area each shift. Norwood Aff. Gov Ex. 2A, at 17.

Miners were working directly below this section of walkway. Inspector Norwood feared that they could be struck by falling objects. Tr. 85. Although Mr. Wolfenbarger did not deny that men were working below the walkway, he does not believe that they could be struck by falling objects. Tr. 91.

#### ANALYSIS

It was Respondent's position that the 1.5 inch toe board was of sufficient height to prevent tools or other items from falling off of the walkway. As there was no specific height requirement for toe boards in §56.11002, Respondent asserted that no violation had occurred. *See* Wolfenbarger Aff. Res. Ex. 5, at 7; Tr. 94.

I reject Respondent's argument that the 1.5 inch lip would be of sufficient height to prevent chat or tools or other objects from accidentally being kicked over the side. The toe boards in the immediately adjoining areas were several inches higher and plainly more suited to preventing injury from falling objects. Although there is no set statutory standard for the height of toe boards, I agree with Inspector Norwood's assessment that the lip of the grated area in question was clearly not of sufficient height to prevent chat or tools from accidentally being kicked over the top of such.

After careful review of the record, including a consideration of factors set forth in the previous citation analysis, I again find that a violation of §56.11002 took place as to this subject area, that a discrete safety hazard – exposure to falling objects – was created. There was a reasonable likelihood that the hazard contributed to would result in an injury, and that there was a reasonable likelihood that the injury in question would be of a reasonably serious nature. Thus, I conclude that the citation was properly designated S&S.

Accordingly, the assessed penalty of \$807.00 is appropriate for citation 6596506.

#### D. Citation No. 6596515

On January 5, 2010, Inspector Norwood also issued Citation No. 6596515 to Respondent, reporting that: "The 120 volt power cord plugged into the Lincoln pull along welder had the outer jacket rotted and cut. The inner conductors were exposed to the sharp metal, vibration and

weather.” Gov. Ex. 18.

The inspector found that an injury was reasonably likely to occur, that an injury could reasonably be expected to be fatal, and that the negligence was moderate. *See* Gov. Ex. 18. Inspector Norwood averred in his pre-hearing affidavit that the violation was significant and substantial. Norwood Aff. Gov Ex. 2A, at 24.

Standard 30 C.F.R §56.12004, electrical conductors, reads: “Electrical conductors shall be of a sufficient size and current-carrying capacity to ensure that a rise in temperature resulting from normal operations will not damage the insulating materials. Electrical conductors exposed to mechanical damage shall be protected.” 30 C.F.R §56.12004.

At hearing, Inspector Norwood testified that although the 120 volt cord carried the same voltage as in a residential home, it could still provide a fatal shock. Tr. 96. At the time of the inspection, the cord was not in use. Moreover, Mr. Buck testified that he did not know how long the cord was there or when it had last been used. Tr. 106.

Harold Hoskins, an employee of Respondent, does not believe that the inner conductor of the cord was damaged and, therefore, the cord was unlikely to shock any miners. Tr. 110.

Mr. Hoskins and Inspector Norwood disagree as to whether a 20 amp breaker providing overcurrent protection would protect a miner from receiving a shock from the cord. Hoskins suggested that it would, while Norwood was adamant that it would do nothing to protect a miner from a fatal injury. *Compare* Tr. 109 (Hoskins), *with* Tr. 118 (Norwood).

#### ANALYSIS

Respondent does not contest the violation of the mandatory safety standard at §56.12004. Respondent, however, does contest the designation of the violation as S&S.

The condition of the inner circuits of the cord is immaterial because the discrete safety hazard of exposure to electric current existed due to the damage to the outer jacket. I agree with the Secretary that the inner insulation did not provide protection from mechanical damage. The same work conditions that damaged the outer jacket could also damage the inner insulation, leading to the immediate exposure of a miner to electric current. The mandatory safety standard at §56.12004 specifically requires protection from mechanical damage to prevent this scenario. Damage to the outer jacket of the power cord would expose miners to electric current under normal working conditions, creating a discrete safety hazard.

Although the cord was deenergized during the inspection, it could be reenergized and used at anytime. Thus, it is reasonably likely that the hazard of exposure to electric current could contribute to an injury. The damage to the outer jacket of the power cord could injure any miner who came in contact with it, and every time the welder was used, there was a risk that a miner could come into contact with the cord. The discrete safety hazard of exposure to electric current was reasonably likely to contribute to an injury.

Furthermore, I credit Inspector Norwood's testimony that the 20 amp breaker would not protect a miner from injury. I likewise reject Respondent's argument that the conductor was not powerful enough to be a hazard and find that the power cord could reasonably cause a fatality. Respondent argues that because the electrical conductor in question only carried a level of voltage common to residential dwellings (120 volts), it would not pose a significant safety hazard to miners if exposed to mechanical damage. Res. PT Br. 22. Inspector Norwood testified that exposure to 120 volts of electricity kills more people than exposure to any other voltage. Tr. 101. Mr. Hoskins also testified that 120 volts can kill a person. See Tr. 112. It is reasonable that exposure to 120 volts could cause an injury of a reasonably serious nature.

It is reasonably likely that the discrete safety hazard of exposure to electric current caused by the damaged power cord could injure a miner, and it is reasonable that the injury could prove fatal. Accordingly, I find that the violation was S&S. I likewise agree with the Secretary's rationale as to gravity and negligence. Thus, I find that the penalty of \$1795.00 is warranted.

#### E. Citation No. 6596516

On January 5, 2010, Inspector Norwood also issued Citation No. 6596516 to Respondent, reporting the following:

The portable work light being used on the firing floor was not guarded. The light was in use and about 4 feet from the floor. Duct tape was being used from the top of the light. Contact with the hot energized lamp could cause electrical shock, burns, and or cuts.

Gov. Ex. 21.

The inspector found that an injury was reasonably likely to occur, that an injury could reasonably be expected to be fatal, and that the negligence was moderate. See Gov. Ex. 21. Inspector Norwood averred in his pre-hearing affidavit that the violation was significant and substantial. Norwood Aff. Gov Ex. 2A, at 29.

The mandatory safety standard at §56.12034 has already been cited *supra*.

At hearing, Inspector Norwood said that there was glass over the bulb, but the glass became hot enough to cause burns. Although there were three pieces of metal over the glass, Norwood did not believe that the metal could prevent someone from coming into contact with the glass. Tr. 119. Mr. Wolfenbarger insisted the pieces of metal constituted a guard; however, he did admit that the metal could not prevent someone from touching the glass. See Tr. 128. Mr. Hoskins further admitted that he would replace the light due to a missing lens. Tr. 131.

#### ANALYSIS

The unguarded light was only 4 feet tall and a worker was using the light as a stand during the inspection. Sec'y's PT Br. 18. Coming in contact with the light could cause burns.

Tr. 120. The light was unguarded, hot, and in the middle of a work area; thus, Respondent violated §56.12034 and clearly exposed miners to a discrete safety hazard in the form of burns.

However, it was unlikely that a miner could trip on a chain, fall, and contact the light at the precise angle to cause a burn. Thus, I conclude that a miner was not reasonably likely to sustain an injury from the light, precluding an S&S designation.

I further find that any injury actually suffered would not be fatal or permanently disabling in nature and would reasonably be expected to result in lost work days or restricted duty.

The negligence associated with this violation was only “low” in nature. Given the foregoing, the penalty of \$250.00 is appropriate.

#### F. Citation No. 6596533

On January 6, 2010, Inspector Norwood issued Citation No. 6596533 to Respondent, reporting: “The flex conduit was pulled from the 527 screw motor junction box. The motor wiring was exposed to vibration and the sharp metal. Electrical shock is reasonably likely if this condition continues to go uncorrected.” Gov. Ex. 24.

The inspector found that an injury was reasonably likely to occur, that an injury could reasonably be expected to be fatal, and that the negligence was moderate. *See* Gov. Ex. 24. Inspector Norwood averred in his pre-hearing affidavit that the violation was significant and substantial. *See* Norwood Aff. Gov Ex. 2A, at 34.

The mandatory safety standard at §56.12004 has already been cited *supra*.

Inspector Norwood testified that a conduit meant to protect inner conductors became detached, exposing the conductors to sharp edges that were moving due to vibration from the attached motor. Tr. 146.

The Respondent’s witnesses disagreed that the inner conductors could be damaged due to the loose conduit. Tommy Buck, Respondent’s Plant Supervisor, testified that the motor vibrates very little and that there are no sharp edges to damage the conductors. Tr. 148. Agreeing with Mr. Buck, Mr. Hoskins testified that there are no sharp edges on the conduit or near the area that attaches to the conduit. Tr. 151. Although he admitted that the conduit should be reattached, Hoskins also testified that the insulation of the inner conductors was unharmed and therefore, contacting the inner conductors would not shock a miner. Tr. 152.

#### ANALYSIS

I credit the testimony of Respondent’s witnesses that the loose flex conduit and exposed wires were sufficiently insulated and safe from mechanical damage. The approximately two inches of wire exposed when the flex conduit moved were insulated and were of sufficient size

and carrying capacity to prevent damage to the insulation under normal circumstances. Due to the low amount of vibration, the insulation and the location of the wires, they were protected from mechanical damage. Thus, I conclude that the cited condition did not violate the mandatory safety standard at §56.12004.

Accordingly, Citation No. 6596533 is hereby **VACATED**.

### GRAVITY AND NEGLIGENCE FINDINGS

The Gravity and Negligence findings as to all citations, where applicable, are set forth *supra*.

### ORDER

Based upon the criteria in section 110(i) of the Mine Act, 30 U.S.C. §820(i), the ALJ decides the following:

<u>Citation No.</u>	<u>30 C.F.R. §</u>	<u>Penalty</u>
6596503	§56.12034	\$1,000.00
6596504	§56.11002	\$2,687.00
6596506	§56.11002	\$807.00
6596515	§56.12004	\$1,795.00
6596516	§56.12034	\$250.00
6596533	§56.12004	<b>VACATED</b>
		<b>TOTAL: \$6,539.00</b>

For the reasons set forth above, citation No. 6596533 is hereby **VACATED**. The remaining citations are affirmed or modified as set forth herein. Respondent is **ORDERED** to pay the Secretary of Labor the sum of \$6,539.00.

Respondent is further **ORDERED** to pay the additional sum of \$1,339.00 it previously agreed to pay pursuant to its partial settlement agreement for Citation/Order Nos. 6596509, 6596510, 6596513, 6596514, 6596519 and 6596529.

Accordingly, Respondent shall pay a total penalty of \$7,878.00 within 40 days of the date of this Order.<sup>6</sup>

/s/ John Kent Lewis  
John Kent Lewis  
Administrative Law Judge

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/BJR

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<sup>6</sup> Payment should be sent to: Mine Safety and Health Administration, U.S. Department of Labor, Payment Office, P.O. BOX 790390, St. Louis, MO 63179-0390.



**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

OFFICE OF THE CHIEF ADMINISTRATIVE LAW JUDGE

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WASHINGTON, DC 20001-2021

TELEPHONE: 202-434-9958 / FAX: 202-434-9949

July 27, 2011

SECRETARY OF LABOR, (MSHA)	:	TEMPORARY REINSTATEMENT
on behalf of KENNETH R. WILDER,	:	PROCEEDING
Complainant	:	
	:	Docket No. KENT 2011-1224-D
v.	:	BARB CD 2011-06
	:	
PRIVATE INVESTIGATION AND	:	
COUNTER INTELLIGENCE	:	Abner Branch Mine
SERVICES, INC., and BLEDSOE	:	Mine ID 15-19132
COAL CORPORATION,	:	
Respondents	:	

**DECISION AND ORDER**  
**REINSTATING KENNETH R. WILDER**

Appearances: Tony Opegard, Esq., Lexington, KY, and Wes Addington, Esq., Appalachian Citizens' Law Center ("ACLC"), Whitesburg, KY, representing Kenneth R. Wilder. Matthew S. Shepherd, Esq., U.S. Department of Labor, Office of the Solicitor, Nashville, TN, representing the Secretary of Labor (MSHA) on behalf of Kenneth R. Wilder. John Williams, Esq., Rajkovic, Williams, Kilpatrick & True, PLLC, Lexington, KY, representing Bledsoe Coal Corporation. Billy R. Shelton, Esq., Jones, Walters, Turner & Shelton, PLLC, Lexington, KY, representing PICI.

Before: Judge L. Zane Gill

This matter is before me on an Application for Temporary Reinstatement filed on June 27, 2011, by the Secretary on behalf of Kenneth R. Wilder, pursuant to Section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c)(2). On May 24, 2011, Wilder filed a complaint with the Secretary's Mine Safety and Health Administration (MSHA) alleging that his termination was motivated by his protected activity.<sup>1</sup> The Secretary contends that Wilder's complaint was not frivolous, and seeks an order requiring the employing entities, Private Investigation and Counter Intelligence Services, Inc., ("PICI") and Bledsoe Coal Corporation ("Bledsoe") to reinstate Wilder to his former position as surface staffer at the Abner Branch Mine ("Abner Branch"), pending the completion of an investigation and final decision on the merits of

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<sup>1</sup> Under Section 105(c)(1) of the Federal Mine Safety and Health Act of 1977, a "protected activity" can include making a "complaint notifying the operator [. . .] of an alleged danger or safety or health violation in a coal or other mine."

his discrimination complaint. Bledsoe filed a Request for Hearing on July 5, 2011. An expedited hearing on the application was held in London, Kentucky, on July 15, 2011.

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

### **SUMMARY OF THE EVIDENCE**

Kenneth R. "Ronnie" Wilder ("Wilder") was employed by PICI and assigned to work at Bledsoe's Abner Branch Mine ("Abner Branch") in Leslie County, KY<sup>2</sup>. (Tr. 29:4-7) Wilder worked at Abner Branch from February 2010 (Tr. 28:1-3), until he was terminated on May 4, 2011. (Tr. 52:1-16) At the time relevant to this decision, Wilder worked as a "staffer" or surface laborer. (Tr. 29:20-30:6) Bledsoe and PICI have a contractual arrangement by which certain employees, including Wilder, are recruited and placed by PICI into jobs at Bledsoe. (Tr. 28:4-22) Wilder was supervised by Bledsoe management - Robert Peterson. (Tr. 31:1-5)

On May 3, 2011, Lawrence Lawson, Bledsoe's Chief Maintenance Manager at Abner Branch, instructed Wilder to remove vines that had attached themselves to a 480-volt quadraplex power line and guy wires supporting the quadraplex power pole.<sup>3</sup> (Tr. 33:21-34:9) This was a duty normally considered part of Wilder's general surface maintenance assignment. (Tr. 29:25-30:6) It rained heavily at Abner Branch on May 3, 2011. (Tr. 32:23-33:2) Wilder attempted to remove the vines as instructed, but became concerned that he might be electrocuted in the process, given the fact that the quadraplex line was energized (Tr. 44:21-24) and he would be working in water from the rain storm. (Tr. 47:19-48:1) Wilder attempted to get help or advice from other employees, (Tr. 47:1-15) but ultimately decided he could not safely proceed. (Tr. 50:7-20)

Wilder could not immediately tell Robert Peterson, his immediate Abner Branch supervisor, that he needed assistance. (Tr. 45:7-50:13) Peterson was busy with underground duties at the time. (Tr. 48:2-10) Wilder asked other employees, some of whom he knew to have electrician experience, for help. None was able to help him. (Tr. 46:14-15) Wilder attempted to remove the vines alone using a front-end loader and a rope, (Tr. 48:2-25) but ultimately decided he could not safely remove the vines, as instructed. (Tr. 49:18-24) Wilder then told Peterson near the end of his shift that he had stopped out of fear of electrocution. Peterson told Wilder his decision not to do the task would cause Wilder "trouble." (Tr. 50:7-20; 51:1-9)

The next day, May 4, 2011, Wilder received a phone call from Don Toy of PICI in which Toy told him that management from Abner Branch had contacted PICI to tell them that Wilder could not work there any more. (Tr. 52:1-19) Wilder attempted to learn from Abner Branch why

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<sup>2</sup> The Abner Branch mine and the Bledsoe Coal Corporation are controlled by James River Coal Company.

<sup>3</sup> Bledsoe had received a non-S&S MSHA citation during an earlier shift that same day relating to vines growing on these lines. (Tr. 44:5-20)

he had been fired, and was told generally that he was “not working out.”<sup>4</sup> (Tr. 53:21-55:10; 57:8-16)

All other facts arising from the evidence presented at the hearing on this matter, including the justification to terminate proffered by the Petitioners, relate to issues beyond the limited scope of this proceeding and are not discussed here.<sup>5</sup>

### **DISCUSSION OF RELEVANT LAW**

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

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<sup>4</sup> PICI and Bledsoe suggested at the hearing that Wilder had not been “terminated” because of a comment made by Don Toy to the effect that Wilder could apply (or re-apply) for placement at another mine. They argued that since Wilder did not pursue that option, he was somehow still employed by PICI. I decline to engage in a meaningless diversion into the semantic implications of Toy’s comment. Wilder was told that his employment at Bledsoe was terminated; for our purposes here, that is an adverse action irrespective of PICI’s version of the wording used.

<sup>5</sup> The following is a list of ancillary facts broached at the hearing which may be relevant for a trial on the merits, but are beyond the scope of this limited temporary reinstatement hearing:

- Whether Bledsoe / PICI had sufficient, non-discriminatory grounds to terminate Wilder.
- How the decision to terminate Wilder was reached.
- Whether Bledsoe’s / PICI’s proffered non-discriminatory termination grounds were pretextual, including whether Wilder knew or had reason to know that Bledsoe / PICI considered his performance to be substandard.
- How to assess damages, including mitigation of damages.
- Whether, judged by the relevant evidentiary standard, Wilder’s stated fear of electrocution was believable, reasonable, and motivated his refusal to complete the task.
- Whether PICI was aware of Bledsoe’s reasons to terminate Wilder, and what those reasons were.
- Whether, judged by the relevant evidentiary standard, Wilder’s refusal to perform the task constituted a protected activity.
- Whether Wilder’s failure to re-apply with PICI for placement at another mine is factually or legally significant.
- How to assess the credibility of various witnesses, including whether Wilder’s statement about fighting “dirty” with Bledsoe / PICI affects the credibility assessment.

When a person covered by the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c)(2) notifies the Secretary that he/she believes discrimination has occurred, the Secretary is obligated by Section 105(c)(2) of the Act, 30 U.S.C. § 815(c)(2) to investigate, “and if the Secretary finds that such complaint was not frivolously brought, the Commission, on an expedited basis [ . . . ], shall order the immediate reinstatement of the miner pending final order on the complaint.”

The Commission has established a procedure for making the reinstatement decision. Commission Rule 45(d), 29 C.F.R. § 2700.45(d) states:

The scope of a hearing on an application for temporary reinstatement is limited to a determination as to whether the complaint was frivolously brought. The burden of proof is upon the Secretary to establish that the complaint was not frivolously brought. In support for [her] application for temporary reinstatement, the Secretary may limit [her] presentation to the testimony of the complainant. The Respondent shall have an opportunity to examine any witness called by the Secretary and may present testimony and documentary evidence in support of its position that the complaint was frivolously brought.

29 C.F.R. § 2700.45(d)

As the above makes clear, and as I noted at the hearing on July 15, 2011, the scope of a temporary reinstatement hearing is narrow, being limited to a determination as to whether a miner’s complaint was frivolously brought. *Sec’y of Labor on behalf of Price v. Jim Walter Resources, Inc.*, 9 FMSHRC 1305, 1306 (August 1987); *aff’d sub nom, Jim Walter Resources, Inc., v. FMSHRC*, 920 F. 2d 738, (11<sup>th</sup> Cir. 1990). It is not the judge’s duty, nor is it the Commission’s, to resolve the conflict in testimony at this preliminary stage of the proceedings.” *Sec’y of Labor on behalf of Albu v. Chicopee Coal Co.*, 21 FMSHRC 717, 719 (July 1999). In reviewing a judge’s temporary reinstatement order, the Commission has applied the substantial evidence standard.<sup>6</sup> *See id.* at 719; *Sec’y of Labor on behalf of Peters v. Thunder Basin Coal Co.*, 15 FMSHRC 2425, 2426 (Dec. 1993).

The legislative history for section 105(c) reveals that Congress discussed the term “frivolous” with the understanding that a complaint is not frivolous if it “appears to have merit.” S. Rep. No. 181, 95<sup>th</sup> Cong. 1<sup>st</sup> Sess. 36-37 (1977), reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95<sup>th</sup> Cong. 2<sup>nd</sup> Sess., Legislative History of Federal Mine Safety and Health Act of 1977, at 6240625 (1978). The “not frivolously brought” standard has also been equated to the “reasonable cause to believe” standard applied in other contexts. *Jim Walter*

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<sup>6</sup> When reviewing an administrative law judge’s factual determinations, the Commission is bound by the terms of the Mine Act to apply the substantial evidence test. 30 U.S.C. § 823(d) (2) (A) (ii) (I). “Substantive evidence” means “such relevant evidence as a reliable mind might accept as adequate to support [the judge’s] conclusion.” *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2163 (Nov. 1989) (quoting *Consolidated Edison Co. V. NLRB*, 305 U.S. 197, 229 (1938)).

*Resources, Inc.*, 920 Fed 2d at 747; *Sec’y of Labor on behalf of Bussanich v. Centralia Mining Co.*, 22 FMSRHC 153, 157 (February 2000).

Under section 105(c) of the Act, the Secretary bears the burden of establishing: (1) that the miner engaged in protected activity; and (2) that the adverse action complained of was motivated in any part by that activity. *Sec’y of Labor on behalf of Paula v. Consolidation Coal*, 2 FMSRHC 2786 (October 1980), *rev’d on other grounds sub nom.; Consolidation Coal Co. v. Marshall*, 773 F.2d 1211 (3<sup>rd</sup> Cir. 1981); *Sec’y of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803 (April 1981); *Sec’y of Labor on behalf of Jenkins v. Hecla-Day Mines Corp.*, 6 FMSHRC 1842 (August 1984); *Sec’y of Labor on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSRHC 2508 (November 1981), *rev’d on other grounds sub nom.; Donovan v. Phelps Dodge Corp.*, 709 F.2d 86 (D.C. Cir. 1983).

Thus, an applicant for temporary reinstatement need not prove a *prima facie* case of discrimination with the attendant requirement of proving all necessary elements at a higher evidentiary standard, as would be required in a trial on the merits. But, the applicant must provide evidence of sufficient quality and quantity (substantial evidence) to allow the judge to find, by application of the “reasonable cause to believe” standard, that: (1) the applicant engaged in protected activity; and (2) that there is sufficient showing of a nexus between the protected activity and the alleged discrimination to support a conclusion that the complaint of discrimination is not frivolous.

Regarding the nexus requirement, other judges and the Commission have adopted elements of the full *prima facie* case to create an analytical framework that comports with the strictures of the limited evidentiary scope of the temporary reinstatement process yet is useful in bridging the sometimes difficult gap between alleged actions and the intentions behind them. In recognition of the fact that direct evidence of intent or motivation is rarely found, the Commission has identified several circumstantial indicia of discriminatory intent: (1) hostility or animus toward the protected activity; (2) knowledge of the protected activity; and (3) coincidence in time between the protected activity and the adverse action. *Secretary of Labor, Mine Safety and Health Administration (MSHA) on behalf of Lige Williamson v. CAM Mining, LLC*, 31 FMSHRC 1085, 1089, 2009 WL 3802726, (F.M.S.H.R.C.), October 22, 2009, KENT 2009-1428-D.

### **APPLICATION OF LAW TO THE EVIDENCE**

On its face, the evidence summarized above is reasonably consistent with Wilder’s claim to have been motivated by fear for his personal safety, which is a recognized “protected activity” under the Act. There is no dispute that within twenty-four hours of Wilder’s refusal to complete the assigned task, his employment at Abner Branch was terminated. There is likewise no dispute that Bledsoe was aware both that Wilder declined to perform the assigned task and that he claimed to do so out of fear of electrocution. There is also uncontradicted evidence, which if found sufficiently credible, could support a finding that Bledsoe management, i.e., Robert Peterson, acted with hostility towards Wilder’s claim of fear for his personal safety. Thus, the evidence is sufficient to create a “reasonable cause to believe” that Bledsoe Coal, the ultimate decision maker here, had knowledge of Wilder’s protected activity claim, that Bledsoe (Robert Peterson)

demonstrated animus toward Wilder, and that there was a temporal coincidence between Wilder's protected activity, the employer's animus, and his termination.

Petitioner's argument that they had a valid non-discriminatory reason to fire Wilder is an issue for a hearing on the merits of the entire discrimination case and is beyond the limited scope of this temporary reinstatement proceeding.

### **ORDER**

For these reasons, Bledsoe and PICI are **ORDERED** to reinstate Wilder to the position he held on May 3, 2011, or to an equivalent position, at the same rate of pay and with the same hours and benefits to which he was then entitled. Wilder's reinstatement is not open-ended. It will end upon a final order on Wilder's complaint. 30 U.S.C. § 815 (c)(2). Therefore, it is incumbent on the Secretary to determine promptly whether or not she will file a complaint with the Commission under section 105(c)(2) of the Act based on Wilder's complaint to MSHA. Accordingly, the Secretary is **ORDERED** to advise counsel for Bledsoe and PICI and the court of her decision by September 30, 2011, and, if a decision has not been made by that date, I will entertain a motion to terminate the reinstatement.

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

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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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July 27, 2011

MACH MINING, LLC.,	:	CONTEST PROCEEDING
Contestant,	:	
	:	Docket No. LAKE 2009-716-R
v.	:	Citation No. 8414529; 09/21/09
	:	
	:	Mine: Mach No. 1
SECRETARY OF LABOR,	:	Mine ID: 11-03141
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	
Respondent.	:	
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. LAKE 2010-190
Petitioner,	:	A.C. No. 11-03141-201809
	:	
v.	:	
	:	
MACH MINING, LLC.,	:	
Respondent	:	Mine: Mach No. 1 Mine

**AMENDED DECISION**<sup>1</sup>

Appearances: Edward Hartman, Office of the Solicitor, U.S. Dept. of Labor, Chicago, Illinois, for the Petitioner.  
Christopher Pence, Allen, Guthrie & Thomas, Charleston, West Virginia, for the Respondent.

Before: Judge Miller

This case is before me on a petition for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration, against Mach Mining, LLC, (“Mach”) at its Mach No. 1 Mine (the “mine”) near Johnston City, Illinois, pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820 (the “Mine Act:” or “Act”). The case includes one violation assessed a total penalty of

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<sup>1</sup> This decision is amended to correct minor clerical errors, including the penalty amount on the final page.



\$4,000.00. The parties presented testimony and documentary evidence at the hearing held in St. Louis, Missouri commencing on June 15, 2011.

## **I. FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Mach's No. 1 Mine, which began mining coal in 2005, is an underground coal mine near Johnston City, Illinois. Coal is mined using continuous miners that develop gate roads, and a longwall shearer to retreat-mine panels. (Tr. 7). The gate roads that contain the loader, power center, and other longwall infrastructure, are referred to as the "headgate entries," while the entries on the opposite side are referred to as the "tailgate entries." At the time the order in question was issued, Mach had completed mining longwall Panel No. 1, and was in the process of mining longwall Panel No. 2 and driving the headgate road for Panel No. 3. Mach had a base ventilation plan in place, as well as a site-specific plan for each of the panels being mined.

At hearing, the parties stipulated that Mach Mining is an operator of an underground coal mine, and that the mine is subject to the jurisdiction of the Act and the Commission. The parties further stipulated that Mach is a large operator and that the \$4,000.00 penalty proposed by the Secretary will not hinder its ability to continue in business. (Tr. 8, 16). A history of assessed violations was admitted as Sec'y Ex.12. (Tr. 107).

### **A. Citation No. 8414529**

#### **1. *The Violation***

The violation in this case is related to the ongoing negotiation of the ventilation plans for Panel Nos. 2 and 3, but is not a citation issued due to an impasse in plan negotiations. This citation is also related to a citation issued on March 13, 2009 by Inspector Bobby F. Jones, Order No. 8414238. Jones issued a 104(d)(1) order, after he discovered that Mach had mined past the projection point described in its ventilation plan. Mach had previously submitted, as part of its ventilation plan, a map showing three longwall panels, each of which were 18,000 feet in length. The ventilation plan, as submitted, was approved in March 2008. On March 13, 2009, Jones discovered that the Respondent, in violation of its approved ventilation plan, had mined 1,000 feet beyond the proposed set up room in Headgate No. 3. By mining 1,000 feet past its projected point, Mach created a stair-step effect and, thus, changed the design of its ventilation plan. After the order was issued by Jones, Mach filed a notice of contest and, in April, 2009, after a submission of the issue on the record, ALJ Manning issued an order in which he determined that the mine violated its ventilation plan when it mined beyond the proposed area and created the stair-step system not listed in the plan.<sup>2</sup>

Mach began working on an amended ventilation plan for longwall 3, and, after a number of meetings both in the district office and at the MSHA national office in Arlington, Mach

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<sup>2</sup> Subsequently, ALJ Manning set the remaining issues for hearing in September, 2009, but prior to the hearing and while the parties were negotiating a new plan, the Secretary terminated the citation.

submitted a revised plan, as well as information previously requested by MSHA on September 3, 2009. On September 9, 2009, Jones terminated Order No. 8414238 with a one sentence pronouncement, "MSHA hereby terminates this order." Shortly after the order was terminated, on September 20, 2009, Mach resumed mining in the Headgate No. 3 area, thereby resulting in Order No. 8414529, i.e., the order at issue in this case issued on September 21, 2009 by Inspector Philip Long. The parties continued to discuss the provisions of both the base ventilation plan and the plan specific to Headgate No. 3. Eventually, the parties reached an impasse. As a result, MSHA issued two technical citations and letters of deficiency on September 29, 2009. The Respondent filed a notice of contest to the two citations and a hearing was held to resolve the plan dispute on November 3, 2009. Following the hearing, I issued a decision in which I determined that the District Manager did not abuse his discretion in requiring certain portions of the plan.

The order that is the subject of this case was issued by Inspector Long after the parties began negotiations on the general ventilation plan and the plan specific to Headgate No.3, but before the parties reached an impasse. On September 20, 2009, Mach resumed production in Headgate No. 3 asserting that the termination of Order 8414238 not only terminated the violation, but that it also approved Mach's new ventilation plan. Inspector Phillip Long issued the subject order on September 21, 2009, for a violation of 30 C.F.R. § 75.370(d). The citation alleges the following:

The extraction of coal by the normal mining process had resumed on the No. 3 Headgate Unit, MMU 002, prior to the proposed ventilation plan being approved by the district manger. The mining process had started in No.3 Entry, inby the No. 176 crosscut. Approximately 10' of advanced had been made on the curtain side of the entry. This order is issued upon the direction of district manager.

Inspector Long testified regarding the issuance of Order No. 8414529 and the reasons therefore. Long, who is currently retired, was a MSHA Coal Mine Safety and Health Inspector for eleven years. Prior to becoming an inspector, Long worked in the coal industry for 28 years, primarily with Old Ben Coal Company. He held various positions and worked many years in the safety department. Long is a veteran of the United States Air Force, attended Southern Illinois University for a time, and has taken additional classes throughout his career. (Tr. 17-21).

Long was assigned to follow Jones in the rotation to inspect the Mach No. 1 Mine beginning in July, 2009. Prior to conducting his first inspection at Mach, he discussed the history of the mine with Jones, as well as the outstanding citations and orders. Jones explained that he had issued Order No. 8414238 for a ventilation violation in March, 2009, which remained in effect. Long understood that no ventilation plan for Headgate No. 3 had been approved, and that mining was not occurring on that panel. Long testified that he reviews the mine file each time he conducts an inspection. From the time he began inspecting the Mach No. 1 mine until the time he issued this order on September 21, 2009, Long did not see any approved ventilation plan in the mine file, nor was he notified that any ventilation plan had been approved. (Tr. 23-25). Long did not terminate the order issued by Jones, but was aware that Jones' supervisor,

Rennie, instructed Jones to terminate the order in September. Long had no further information about the issuance or the termination of Jones' order. (Tr. 25-26).

As Long began his inspection rotation at Mach, he had conversations about the ventilation plan with Anthony Webb, president of Mach, as well as with other managers at the mine. Long testified that, on several occasions, he discussed with Webb, Webb's concern with the ventilation plan, particularly after Jones had terminated the Order No. 8414238 on September 9, 2009. Long made several notes about the conversations, including Sec'y Ex. 9, Long's inspection notes for September 16, 2009. The notes demonstrate that Long spoke with Webb on that day and discussed that the mine was awaiting ventilation plan approval. Further, the notes reflect that Webb expressed his concern that it might take some time to win approval. (Tr. 26-27). Next, Long's notes from September 17, 2009, refer to a conversation with Webb while conducting an inspection on that date. Sec'y Ex. 10. Again, Long spoke with Webb and discussed the start up of the Headgate No. 3 unit. The two of them discussed the plan approval process and the fact that the mine continued to wait for MSHA approval. Additionally, on that date, Webb asked Long if "paper would be issued" if Mach started up without a plan. Long responded that it was "more than likely" that it would be issued. Long testified that he answered the inquiry based upon his understanding that no ventilation plan had yet been approved for the Headgate No. 3 area. If the plan had been approved, he would have told Webb to continue mining. (Tr. 30-33). I find Long to be a very credible and knowledgeable witness, who responded with thoughtful, candid, and detailed answers.

On September 21, 2009, Long issued the Order No. 8414529 to the mine, Sec'y Ex. 6, for operating without an approved plan. Long's notes underscore that, on September 21, 2009, he spoke first with Chris England. Sec'y Ex. 7. England told Long that the mine was very close to starting up in Headgate No. 3 and asked if Long was going to issue an order if they started up. Long responded "yes," that he would issue an order if the plan had not been approved. (Tr. 34-36). Long then learned from Webb that the mine had in fact started production in Headgate No. 3. Long told the Respondent that he would travel to the area to confirm that mining was taking place, and, if he discovered that mining was occurring, he would issue a 104(d)(2) order pursuant to 30 C.F.R. § 75. 370(d) for not having an approved ventilation plan in place. Long then traveled underground, observed mining in Headgate No. 3, and issued the order for mining without an approved plan. Upon observing the mining in Headgate No. 3, Long telephoned the district office and spoke with the District Manager before he issued the violation as an unwarrantable failure to comply. Long agreed that he was instructed to issue the violation, but he also indicated that, while he was instructed to issue the order as "reckless disregard," he instead issued it as "high" negligence, which is what he believed it should have been. At no time did Long understand that Webb, or any other person at the mine, was operating under the assumption that the termination of the order previously issued by Jones was tantamount to an approval of the ventilation plan. (Tr. 36-41).

Anthony Webb testified on behalf of Mach. It was his belief that a ventilation plan was approved when Order No. 8414238 was terminated by Jones and, therefore, no violation exists. (Tr. 89). Webb, the president of Mach mining, is responsible for all actions at the mine, both on the surface and underground. Part of his responsibility, both currently and in 2009, includes the development of ventilation plans. (Tr. 66-67). Webb explained the sequence of events leading

up to the citation issued by Long with little variance from the description provided by Long. He began with a meeting held on February of 2009. Webb asserted that Mach originally began negotiating the bleeder system of Panel No. 2 due to poor roof conditions and MSHA's concern about the airflow. Mach told MSHA of its intent to mine in by the Panel No. 2 bleeders in order to work around the bad roof it had encountered. (Tr. 70-72). Webb had several meetings with MSHA personnel and MSHA sought a map depicting the connection between Panel Nos. 2 and 3. On February 24, 2009, Mach representatives traveled to Arlington to meet at MSHA headquarters with a number of people, including the deputy administrator for coal. During that meeting, MSHA again asked for the map and Webb testified that he "forgot" to give District 8 the map. It was mailed the next day. Mach Ex. B. (Tr. 72). MSHA did not agree with the changes Mach sought to make and began further discussions about the ventilation of Panel No. 2. MSHA subsequently issued a "technical citation," Mach Ex. C, after the parties reached an impasse regarding the Headgate No. 2 area. Mach contested the citation and the case was assigned to ALJ Manning and set for hearing in April. (Tr. 75). Mach continued to work with MSHA and the parties resolved the matter prior to the hearing. Subsequently MSHA vacated the citation on April 15, 2009. The mine, with MSHA's acknowledgment, then reverted to the plan they had suggested. The mine did not receive a letter formally approving Panel No. 2, and no other actions were taken. (Tr. 76-78). It is important for purposes of the Mach defense to note that this citation was not terminated, and was, instead vacated, and the parties reverted back to an earlier plan.

Webb testified that, in the meantime, on March 13, 2009, Jones issued an order for an alleged ventilation violation at Headgate No. 3 for mining beyond the area depicted on the ventilation plan and creating, in effect, a stair-step ventilation system. This citation was not issued as a technical violation as a result of an impasse in the ventilation negotiation. Again, Mach contested the order issued by Jones and, again, the case was assigned to ALJ Manning. Mach requested a second meeting in Arlington and met with MSHA on March 18, 2009 concerning the Panel No. 3 plan. District 8 ventilation plan specialists attended by telephone. District 8 was instructed to lay out for Mach what it expected to see at Panel No. 3 and, subsequently, Mach met again with the District 8 office. Mach then submitted "what they felt . . . [MSHA] had requested." (Tr. 79-80). In late May, while negotiations continued, Mach came up for a regular six month review of its base ventilation plan at the mine. The base plan was submitted to MSHA on June 4, 2009. In response to its submission, Mach learned of a new regulation requiring a justification for the use of belt air in the intake. The justification submitted by Mach was rejected and the parties held another meeting to discuss that issue. (Tr. 82). After meeting with the district office, Mach once again sought and was granted the opportunity to meet with the coal supervisors in Arlington on July 7. At that meeting, the parties discussed a number of issues, including the belt air. MSHA asked Mach about Headgate No. 3, and Mach acknowledged that the district office had requested further information, which had not initially been provided, about the ventilation for that area. (Tr. 82-83).

Webb explained that, in the meantime, ALJ Manning decided, through written submissions, that Mach had indeed violated the mandatory standard by mining the stair-step system in Headgate No. 3 without prior approval. However, Manning did not immediately rule on the negligence or penalty associated with the violation. During this time, while negotiations were ongoing, MSHA refused to terminate the citation issued on Panel No. 3. On August 6,

Webb received a letter, Mach Ex. E, that set forth in writing the discussions already held with MSHA. According to Webb, the letter set forth a plan for submission by Mach to receive approval of a ventilation plan for Headgate No. 3. While Webb insists that the letter contained information about what Mach needed to do to “terminate the March 13th D order[,]” it really addresses requirements for a ventilation plan. Webb decided that he would ask ALJ Manning to decide if Mach had submitted an acceptable ventilation plan, which would then result in the order being terminated. On August 18, Manning agreed that he retained jurisdiction over the order assigned to him and set the matter for hearing in September. The issue was not heard by Manning because MSHA terminated the order prior to the hearing date. (Tr. 83-86)

Webb testified that, on September 3, 2009, he sent a letter to the District Manager for MSHA District 8 and included information previously requested by MSHA to support the ventilation plan being proposed by Mach for Headgate No. 3. Mach Ex. F. Webb asked that MSHA terminate the order issued by Jones in March, and provided information regarding the ventilation plan in Panel No. 3. (Tr. 86-87). Shortly thereafter, on September 9, 2009, and without any indication that the ventilation plan had been approved, Jones terminated the order. Webb opined that the termination of the order was the relief that Mach sought from ALJ Manning, and he believed the termination would allow them to continue mining in Headgate No. 3. At the time Jones issued the termination of the order, he advised Webb to speak with his supervisors in order to understand why it was terminated and what it would mean for the mine. Webb called Rennie, the supervisor of Jones, but Rennie could not provide an answer and referred Webb to the District Manager. Webb chose not to contact the District Manager, and, instead, chose to believe that the termination was tantamount to an approval of a ventilation plan. Webb next had a number of conversations, as detailed by Long and discussed above, wondering when the ventilation plan would be approved and asking Long if a citation would be issued if the mine continued mining activity in Headgate No. 3. In each instance, Long explained that a citation would issue if no plan were in place. (Tr. 88-89).

Webb testified that, on September 17, 2009, Mach’s attorney wrote a letter to the Secretary explaining why he believed the plan had been approved and notifying MSHA that mining would commence in Headgate No. 3. Mach Ex. G. In the meantime, as Webb described, he believed that he had an approved plan, by virtue of the termination, commencing on September 9, 2009. He prepared to mine Headgate No. 3. (Tr. 89-90).

Webb explained that he attended nearly every meeting with MSHA, both locally and at the national office, and was familiar with all of the information relevant to the ventilation plan for Headgate No. 3. Webb believed that he had made every effort to communicate with MSHA and let them know of his plan. He testified that he was never told he could not resume mining, and he believed that the plan had been approved when the order was terminated. He based his belief on the fact that he had recently submitted the information sought by MSHA and because he sought termination of the order from ALJ Manning. (Tr. 92-94).

I do not find Webb to be a credible witness, and find that his testimony was an after-the-fact attempt to make excuses for his actions. Webb acknowledges that he spoke with Long a number of times and told him the mine was awaiting MSHA approval of the ventilation plan, even after Order No. 8414238 had been terminated by Jones. (Tr. 96). On September 16,

Long spoke to both Webb and England, and one or both of the men told Long that the company was awaiting plan approval. Webb's testimony is contradictory in that he testified on the one hand the plan was approved on September 9, 2009 with the termination of the order and on the other hand when he spoke to Long on the 16<sup>th</sup> and the 17<sup>th</sup>, he told him that Mach continued to wait for plan approval. Webb acknowledged that he did ask Long if a citation would be issued if he continued mining, but he was only seeking to gain information from Long about the district's position. Webb further agreed that Rennie instructed him to speak to the district office of the termination of the order issued by Jones, yet Webb chose not to do so. (Tr. 99-100). Even though, it was important to Mach to begin operations in the Headgate No. 3 area, Webb did not feel he could call the district and speak to the only person who could approve the plan to clarify if it had been approved. Webb had been involved in the plan negotiation and had spoken a number of times to the district manager, as well as to supervisors in the Arlington headquarters and I find that he was aware that no ventilation plan had been approved. Webb did not receive any approval in writing, nor was he told by anyone at MSHA that he could continue to work in Headgate No. 3..

Mach argues that the termination of a cited condition means that the condition has been corrected. Mach cites *Wyoming Fuel Co.*, 14 FMSHRC 1282, 1288 (Aug. 1992), for the premise that "the purpose of a termination notice is to indicate to an operator that it has successfully abated a violative condition," and points out that MSHA's own interpretation was that "termination of a citation means that the cited condition no longer exists, since abatement has been accomplished . . . ." Mach Prehearing Br. 4. I don't find that argument persuasive given the negotiations necessary for plan approval and the breadth of a ventilation plan.

Termination of a prior citation does not constitute the proper procedure for approval and, here, the termination did not address the many facets of the ventilation plan required by the regulations. The ventilation plan is either approved in writing or disapproved by the District Manager. *Sewell Coal Co., v. Sec'y of Labor*, 2 FMSHRC 2210, 2117 (Aug. 1980) (ALJ). The Secretary's regulations require that the operator develop and follow a ventilation plan approved by the district manager. The plan must be designed to control methane and respirable dust and shall be suitable to the conditions and mining system at the mine. The ventilation plan must consist of two parts, i.e., the plan content as prescribed in section 75.371 and the ventilation map with information as prescribed in section 75.372. Only that portion of the map which contains information required under 75.371 will be subject to approval by the district manager. Among other things, ventilation plans are required to show the type and location of mechanical ventilation equipment installed and operated in the mine, as well as the quantity and velocity of air reaching the working face. Given these many plan requirements, an order terminating a violation, issued by an inspector, does not in any way substitute for plan approval. Further, an order is not a written approval by the district manager and to agree otherwise would open the door for mine operators to imagine many ways in which a plan could be created. The regulation is exceedingly clear; "[t]he district manager will notify the operator in writing of the approval or denial of approval of a proposed ventilation plan or proposed revision." 30 C.F.R. § 75.370(c)(1). There is no dispute that the District Manager did not provide a written approval of the plan for Headgate No. 3.

Mach argues that, when MSHA earlier issued a technical citation on Panel No. 2, the

parties negotiated the plan and MSHA subsequently vacated the citation without a new written plan. I can not agree with Mach that the “vacatur of citation 8414236 was the writing that approved Mach’s ventilation plan for panel 2.” Resp. Br. 4. However, even it were, there are several obvious differences. First, the order for Panel No. 2 was vacated, not terminated. Second, the order on Panel No. 2 contains specific language about the ventilation plan requirements in the document vacating the order. Finally, when vacating the order for Panel No. 2, MSHA made it clear that Mach could continue to use the plan that had been in place at the time the order was issued. The termination issued by Jones did not address the ventilation plan in any way. Given the obvious differences, and the requirements for plan approval, it is hard to imagine that a reasonable person with the experience of Mr. Webb could legitimately believe that a termination of the Order No. 8414238 amounted to a plan approval. Webb was involved in the lengthy discussion with MSHA about the various ventilation plans and, as such, I do not believe that Webb could, in good faith, understand that the negotiation process abruptly ended with the termination of an order.

Mach and MSHA had been involved in lengthy discussions about the base ventilation plan, as well as the specific plan for Headgate No. 3, at the time Long issued his Order No. 8414529. Yet, MSHA had not issued a “technical citation” as it does when an impasse is reached in a plan negotiation.

A corrected condition is not the same as approval of a new ventilation plan. The termination of Order No. 8414238 was not a de facto plan approval because, as the regulation makes clear, a proposed ventilation plan may not be implemented before the MSHA district manager approves it. 30 C.F.R. § 75.372(d). The district manager must “notify the operator in writing” of the approval or denial of a proposed ventilation plan.” 30 C.F.R. § 75.370(c)(1). Given the regulatory requirements for a ventilation plan, the fact that only the district manager may approve the plan, and that the approval must be in writing, I find that the mine violated the mandatory standard as alleged.

## 2. *Significant and Substantial Violation*

Inspector Long determined that it was unlikely that the cited condition would result in the injury of a miner and that the violation was not significant and substantial. However, given the fact that the mine had mined a “stair-step” type of configuration in the bleeder system without seeking approval, and had resumed mining with no clear direction or specifically written, thought-out plan for the ventilation of the working area, I find the violation to be serious.

## 3. *Unwarrantable Failure*

Inspector Long determined that the operator’s negligence was high and designated the order as an unwarrantable failure. The term “unwarrantable failure” is defined as aggravated conduct constituting more than ordinary negligence. *Emery Mining Corp.*, 9 FMSHRC 1997, 2004 (Dec. 1987). Unwarrantable failure is characterized by such conduct as “reckless disregard,” “intentional misconduct,” “indifference,” or the “serious lack of reasonable care.” *Id.* at 2004-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189,193-94 (Feb. 1991).

Aggravating factors include the length of time that the violation has existed, the extent of the violative condition, whether the operator has been placed on notice that greater efforts were necessary for compliance, the operator's efforts in abating the violative condition, whether the violation was obvious or posed a high degree of danger and the operator's knowledge of the existence of the violation. *See Consolidation Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2000); *Mullins & Sons Coal Co.*, 16 FMSHRC 192, 195 (Feb. 1994); *Windsor Coal Co.*, 21 FMSHRC 997, 1000 (Sept. 1999); *Consolidation Coal Co.*, 23 FMSHRC 588, 593 (June 2001). All of the relevant facts and circumstances of each case must be examined to determine if an actor's conduct is aggravated, or whether mitigating circumstances exist. *Consol*, 22 FMSHRC at 353.

Long issued the order as an unwarrantable failure based upon the conversations he had with the mine prior to the issuance of the order. He spoke with Webb a number of times about the plan and discussed that the mine was waiting for approval. Long was directed to issue the order and the District Manager suggested that it be marked as reckless disregard. However, since Long was not privy to the many conversations and negotiations between Mach and the district, he issued the order as he believed appropriate, with a high negligence designation. Long indicated that Webb knew he had no ventilation plan in place and was placed on notice that he could not mine the Headgate No. 3 area without an approved plan. Still, Webb moved forward and began mining. As noted above, I do not agree that Webb had a good faith belief that there was a plan in place based upon the termination of the order. Jones terminated the original order, and Webb testified that he believed immediately, on September 9, 2009, that his plan had been approved. Still Webb questioned Jones and his supervisor about the effect of the order, but still failed to contact the one person who could provide a definitive answer, the District Manager. Webb told Long multiple times that the mine continued to wait for plan approval after September 9, 2011, and Long advised Webb multiple times that he could not begin mining without that plan. The violation was obvious and was done with full knowledge of the operator, as the mine intentionally began mining without a plan in place. While the violative condition may not have existed for an extended period of time, I agree with the Secretary's argument that, for purpose of this unwarrantable failure analysis, "the violative act itself outweighs the short period of time between action and discovery." Sec'y Br. 12.

Mach argues that there was a good faith disagreement over the meaning of the termination of Order 8414238. Mach avers that Long testified that he was confused as to the terminations' meaning. Moreover, Mach alleges that no MSHA representative ever told Mach that a citation would be issued if mining resumed in Headgate No. 3. However, Long did advise Mach that a citation would be issued if mining resumed, and he continued to discuss the matter for the entire time from September 9, 2009, when the termination order was issued by Jones, until September 21, 2009, when Long issued the order discussed herein. I agree with Long and find that, at best, the mine demonstrated a serious lack of reasonable care. I am not persuaded by Webb's arguments and find them disingenuous given his background and his involvement in the plan approval process. I find that the violation was the result of an unwarrantable failure to comply and consequently assess a penalty of \$5,000.00 for the violation.



## II. PENALTY

The principles governing the authority of Commission administrative law judge 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 [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).

I accept the parties' stipulation that the penalty proposed is appropriate to this operator's size and will not effect its ability to continue in business. The mine is a large operator and has an unusually large number of ventilation plan violations given its short operating time. I agree with Long that Mach demonstrated high negligence, and I find that the mine demonstrated a serious lack of reasonable care that bordered on intentional misconduct. Although the inspector designated the violation as non-S&S, I find that operating without an approved ventilation plan is a serious violation. I assess a penalty of \$5,000.00 for Order No. 8414529.

## III. ORDER

Based on the criteria in section 110(I) of the Mine Act, 30 U.S.C. § 820(I), I assess the \$5,000.00 penalty listed above for the subject order. Mach Mining, LLC, is hereby **ORDERED** to pay the Secretary of Labor the sum of \$5,000.00 within 30 days of the date of this decision. The Notice of Contest is **DISMISSED**.

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

Distribution: (U.S. Certified Mail)

Edward V. Hartman, U.S. Department of Labor, 230 S. Dearborn St., Room 844, Chicago, IL 60604

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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

721 19th STREET, SUITE 443  
DENVER, CO 80202-2500  
303-844-5267/FAX 303-844-5268

July 27, 2011

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 2008-814
Petitioner,	:	A.C. No. 05-04591-144842
	:	
v.	:	
	:	Bowie No. 2 Mine
BOWIE RESOURCES LLC,	:	
Respondent.	:	

**DECISION**

Appearances: Matthew B. Finnigan, Esq, Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner;  
R. Henry Moore, Esq., Jackson Kelly, PLLC, Pittsburgh, Pennsylvania, for Respondent.

Before: Judge Manning

This case is before me on a petition for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration (“MSHA”), against Bowie Resources LLC, (“Bowie”) pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820 (the “Mine Act”). The parties introduced testimony and documentary evidence at a hearing held in Grand Junction, Colorado, and filed post-hearing briefs.

Bowie operates a large underground coal mine in Delta County, Colorado. The case involves one section 104(d)(2) order of withdrawal alleging a violation of 30 C.F.R. § 75.400. The Secretary contends that the order should be assessed as a flagrant violation under section 110(b)(2) of the Mine Act and she proposes a penalty of \$220,000.

**I. BACKGROUND**

On September 24, 2007, Inspector Brad Allen (“Allen”) issued Order No. 6684382 under section 104(d)(2) of the Mine Act, alleging a violation of 30 C.F.R. § 75.400 as follows:

Combustible materials in the form of very dry, loose coal, coal fines, float coal dust and bug dust were permitted to accumulate in the 1st East Mains active mining section #3 entry, crosscut 15 to 16. An area approximately sixty-six feet long by eighteen to twenty feet wide (the entire width of the entry) was observed where combustible materials had been allowed to accumulate on the mine floor ranging from approximately one inch to twelve inches deep. The area began approximately seventeen feet in by the centerline of crosscut number 15 and

extended toward crosscut #16, #3 entry. Samples were collected to substantiate this violation.

The dry float coal dust was easily suspended in the mine air when liberated. The accumulations provided substantial fuel to propagate a mine fire or explosion should one occur and such propagation would be reasonably likely to result in death or serious injury. This condition was extensive and obvious to anyone concerned with safety. Date, time and initials were present in the #3 to #4 entry, crosscut 15 at the energized power center located in close proximity that showed: 09/24/07 SLM 3:20 a.m., and the on-shift record at the same location indicated 09/24/07 SS 7:30 a.m. This condition creates a fire/explosion hazard. This mine liberated an average of 1,204,543 cubic feet per day of methane gas during the last year (and this number does not include methane liberated through de-gas boreholes used at this mine site.) Miners are required to frequently work or travel in the area throughout the shift.

The mine operator has been cited for 75.400 sixty-one times since 10/18/2005 (fifteen of which were issued to a contractor working for the mine operator). The mine operator was put on notice that greater efforts need to be made to address coal and other combustible material accumulations on 1/31/06. This notice was reiterated on 8/28/07 in the condition/practice portion of two citations issued on that day. There was no work observed to correct the accumulations of combustible materials. The section foreman was standing in the #3 area. The mine operator displayed a serious lack of reasonable care by continuing to mine coal while an accumulation of combustible material hazard existed. This violation is an unwarrantable failure to comply with a mandatory standard.

The inspector determined that an injury was reasonably likely and that a fatal accident could occur. He further determined that the violation was of a significant and substantial nature (“S&S”) and the operator’s negligence was high. (Ex. G-2). Section 75.400, entitled “Accumulation of combustible materials” provides:

Coal dust, including float coal dust deposited on rock-dusted surfaces, loose coal, and other combustible materials, shall be cleaned up and not be permitted to accumulate in active workings, or on diesel-powered and electric equipment therein.

30 C.F.R. § 75.400. The Secretary designated the alleged violation as “flagrant” and proposed a penalty of \$220,000.

## II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

### A. Brief Summary of Testimony

Inspector Allen testified that during his inspection on September 24, 2007, Earnal Shaw ("Shaw"), the safety manager, accompanied him. (Tr. 20). While conducting the inspection Allen observed "a lot of accumulation on the mine floor," consisting of a windrow of black coal, coal dust, and bug dust that was "very dry."<sup>1</sup> (Tr. 27). According to Allen, the ribs and roof, were adequately rock-dusted. (Tr. 28, 74). The inspector observed the accumulations between crosscuts 15 and 16 at the Bowie No. 2 Mine, 1<sup>st</sup> East Mains Section, Number 3 Entry. (Tr. 23, 26; Ex. GX-6). Allen testified he took measurements of the accumulations as referenced within the order. (Tr. 29; Ex. GX-2). Allen also collected samples of the accumulations for testing, which determined that roughly between 69-77% of the material was highly combustible. (Tr. 31; Ex. GX-7). While collecting samples Allen visually observed that coal dust was easily suspended in the air when disturbed. (Tr. 31). Allen noted that no Bowie employees had been in the process of shoveling up the conditions while he was in the area. (Tr. 41). Based on the above information, Allen issued Order No. 6684382. Allen additionally testified that if he had seen employees rock-dusting the entry without cleaning up the accumulations, the order might have still been issued.

In September of 2007, Bowie No. 2 Mine was on a five-day spot inspection cycle because the mine liberated an average of 1.2 million cubic feet of methane per day; liberation of 1 million is the threshold for enhanced inspections. (Tr. 17-18). According to Allen, at the time of inspection, the record books showed a trace amount, two-tenths of one percent, of methane measured at the face, about 600 feet from the accumulations. (Tr. 21, 32, 35-36). Specifically, Allen testified that methane becomes combustible in the range of around 5 to 15 percent, but this percentage may be lower with the presence of float coal dust. (Tr. 21, 44). Allen noted several ignition sources in the area. A power center, without any visible defects, was located right around the corner, roughly 30 feet from the accumulation. (Tr. 35, 37, 50). There was a shuttle car nearby that had energized trailing cables, also without any visual defects. (Tr. 35, 37). Allen, however, testified that defects in trailing cables arise frequently. (Tr. 37). In addition, at the face of the mine, a continuous miner and roof bolter were in operation. (Tr. 36). Allen further testified that for an explosion to occur, a fuel source, either methane or coal dust, oxygen, and an ignition source must be present. (Tr. 40). At the time of the order, Allen testified that eight people were in the section, a few were operating the roof bolter at the face, Steve Shelton ("Shelton") was at the power center, and a few others were performing other work. (Tr. 58).

Allen also testified that he issued a termination order for the alleged violation the same day. (Tr. 66). He stated that it took around two hours and eight minutes for five to six miners to clean up the accumulations and rock-dust the mine floor, though he did not observe the clean up. (Tr. 66). Additionally, Allen testified that the miners applied about a pallet of rock dust, which is about 40-50 bags weighing 50 pounds each. (Tr. 68). Allen testified that he believed that a

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<sup>1</sup> "Bug dust" is a form of coal dust that is larger than coal fines but smaller than loose coal. (Tr. 34).

significant amount of material had to be cleaned up and it was one of the longer termination times that he had personally observed. (Tr. 69-70).

Allen determined that the violation was reasonably likely to result in a fatal injury due to the significant amount of accumulations in the crosscut. (Tr. 42). He reasoned that a fire could occur causing a significant amount of smoke, disorienting and trapping miners, or an explosion could occur causing a concussion, resulting in blunt force trauma to miners. (Tr. 42-43). Additionally, Allen designated the violation to be a result of the operator's high negligence because Shelton, the section supervisor, was standing around the corner of an open and obvious safety condition. (Tr. 49).

Allen further determined that the violation was S&S due to the likelihood for a serious injury to result from the condition. (Tr. 58). He reasoned that the "accumulations provided substantial fuel to cause a serious injury." (Tr. 59). The violation was also determined to be an unwarrantable failure by Allen because of the operator's negligent conduct. (Tr. 59). Allen reasoned that negligent conduct was present due to Shelton's standing at the "obvious" hazard location with no perceived effort to eliminate the condition. (Tr. 59-60). Additionally, Bowie continued to mine coal instead of correcting the hazard. (Tr. 59). Moreover, Allen testified that Bowie had a history of violations and was put on notice for heightened awareness. (Tr. 59). Finally, Allen also determined, after he left the mine, that the order should also be appropriately classified as a flagrant violation. (Tr. 63, 66). Allen reasoned that Bowie had previously been issued 61 citations and orders and had been put on notice to address the repeated section 75.400 violations. (Tr. 64). Furthermore, Allen testified that the severity levels of the citations were increasing in the months preceding the order at issue. (Tr. 64).

Allen, on cross-examination, stated that he personally has never investigated a face ignition or shuttle car trailing cable fire at Bowie No. 2 mine and has not studied reports on face ignitions. (Tr. 75, 98). Allen additionally agreed that section 75.400 is a broad standard that includes accumulations of a wide range of materials. (Tr. 78). Allen testified, that section 75.400 is the most frequently cited underground coal mine standard. (Tr. 82).

Shelton, a section supervisor for Bowie, testified that he had observed the crosscut referenced in the citation and determined it needed to be rock-dusted. (Tr. 125). Before going underground, Shelton was told that a new stopping was built by the prior shift in the Number 3 Entry of the 1<sup>st</sup> East Mains. (Tr. 113-14). Shelton stated that during his onshift exam he found methane, up to four-tenths of one percent, located at various high spots along the 1<sup>st</sup> East Mains. (Tr. 119-20; Ex. GX-12). Additionally, Shelton noticed during his onshift that the Number 3 Entry needed rock-dusting between crosscuts 15 and 16 and spoke with Blake Kinser ("Kinser") about bringing a pallet of rock dust after restocking the roof bolter. (Tr. 121, 125-26; Ex. G-11). Shelton then went back to the power center to prevent any miners from entering the affected area. He was at the power center when Inspector Allen and Shaw approached the area. (Tr. 127). Shelton testified that the area was not dangerous, reasoning that there were no ignition sources in the area and nobody was traveling in the area. (Tr. 123). On cross-examination, Shelton testified that the termination order took two hours and eight minutes because the crew had to shut down and back out the mining equipment at the face, gather shovels and bring water down to the area, unload the bolting materials that were in the bucket of the loader, shovel and

haul the accumulations out of the area, and finally spread rock dust. (Tr. 147). The bucket, measuring eight to ten feet wide by two feet high and four feet deep was full but not “heaped over” with the accumulations that were removed, according to Shelton. (Tr. 152-53, 155).

Kinser, a utility person for Bowie, testified that before the order was issued, Shelton had asked him to get a pallet of rock dust after he restocked the roof bolter. (Tr. 160). Kinser stated that he saw “some” material on the floor and “rib sloughage.” (Tr. 158, 161). Kinser also testified that it took two hours and eight minutes to completely abate the order. (Tr. 157). This work included notification of the issuance of the order, emptying bolter supplies from the scoop bucket, watering down the area, shoveling the accumulations, and rock-dusting by hand. (Tr. 162-63, 167).

Shaw testified that float dust has to be suspended in air for it to be considered an explosive concentration and the quantity needs to be around 2.4 pounds per cubic yard. (Tr. 180). Such a concentration is so thick that there would be limited visibility and the air would be unbreathable. (Tr. 180). Shaw stated that miners did not finish cleaning up after installing the stopping during the previous shift. (Tr. 182). He reasoned that most of the material on the floor came from the construction of the stopping. (Tr. 182). Additionally, Shaw testified that the potential for a face ignition to propagate back to the crosscut was “completely unlikely,” due to the fact that everything in between was well rock-dusted. (Tr. 182-83). Shaw also stated that the power center was not reasonably likely to catch on fire. (Tr. 188). Regarding the termination order, Shaw testified that the quantity of accumulations cleaned up were more than he would like to see, but “not extreme” in nature. (Tr. 190).

## **B. Violation of § 75.400**

The parties present opposing views of the evidence in this case. Bowie first argues that no violation of section 75.400 occurred. Bowie reasons that some spillage is permissible because of mining’s inherent nature and the record establishes that the stopping line was built during the previous shift and materials from this construction were still in the entry. Additionally, Bowie argues that some of the material was located along the rib and should be considered rib sloughage; therefore, removal is not required because the rib may be destabilized and rock-dusting is permitted in lieu of cleaning up the coal.

The Secretary responds that Allen properly issued the order to Bowie because the evidence presented at trial established that combustible materials were permitted to accumulate, in violation of section 75.400. The Secretary reasons Bowie did not produce any evidence to refute this proof. Bowie’s employees confirmed the violation by admitting to the accumulations and testifying that a 64-cubic-foot scoop bucket was filled with the accumulations.

It is important to understand that Kennedy stoppings were recently installed across the entries of the 1<sup>st</sup> East Mains because Bowie was developing rooms to be connected to the 2nd East Mains for the next set of longwall panels. (Ex. G-5). Thus, the continuous miner was developing what essentially were entries to the left of the 1<sup>st</sup> East Mains. (Ex. G-6). These “entries” had been developed a distance of about 600 feet from the No. 3 entry of the 1<sup>st</sup> East Mains at the time Inspector Allen issued the order. The intake air made a 90-degree left turn to

ventilate the working face. Thus, the part of the No. 3 entry between Crosscuts 15 and 16 containing the accumulation functioned as a crosscut in relation to the area of active mining. (Ex. G-6).

I credit the testimony of Bowie's witnesses that the stopping across the No. 3 Entry had been built during the previous shift. The stopping was installed in the entry just outby crosscut 16. Thus, a miner could no longer pass through the No. 3 Entry between the Nos. 15 and 16 crosscuts because the stopping blocked such passage. Before the subject stopping was installed, the cited area of the entry was used as a roadway for shuttle cars and other vehicles.

When a Kennedy stopping is installed, the ribs, roof, and floor of the mine are cleaned up where the stopping will be installed to make the area as smooth as possible so that the seal around the stopping will be tight and there will not be any gaps after the foam sealant is applied. Accumulations of coal and coal dust are created in the process. Once the stopping is installed, the crew typically cleans up the area, removes any leftover supplies, and applies rock dust. I credit the testimony of Bowie's witnesses that the previous shift ended before the crew could perform these cleaning activities. As a consequence, when Shelton arrived at the beginning of his shift he saw the accumulations that had been created between the Nos. 15 and 16 crosscuts in the No. 3 Entry when the stopping was installed, he observed supplies that had been left in the entry near the stopping, and he saw that the floor of the entry had not been rock-dusted.

For the reasons set forth below, I find that the Secretary established a violation of section 75.400. Section 75.400 states that "combustible materials shall be cleaned up and not be permitted to accumulate in active workings." "[T]he language of the standard makes accumulations impermissible." *Old Ben Coal Co.*, 1 FMSHRC 1954, 1957 (Dec. 1979). The Commission held that "a violation of . . . 30 C.F.R. § 75.400 occurs when an accumulation of combustible materials *exists*." *Id.* at 1958 (emphasis added). The Commission recognized that "some spillage of combustible materials may be inevitable in mining operations;" however, the size and amount of spillage determines whether spillage will constitute accumulations. *Id.* Accumulations were further defined by the Commission to "exist where the quantity of combustible materials is such that, in the judgment of the authorized representative of the Secretary, it likely could cause or propagate a fire or explosion if an ignition source were present." *Old Ben Coal Co.*, 2 FMSHRC 2806, 2808 (Oct. 1980). "There is no bright line between acceptable accumulations of combustible materials and accumulations that violate section 75.400." *Mountain Coal Company*, 26 FMSHRC 853, 861 (Nov. 2004). The issue is "whether a reasonably prudent person, familiar with the mining industry and the protective purpose of the standard, would have recognized the hazardous condition that the safety standard seeks to prevent." *Id.*

I credit the evidence presented by Inspector Allen as to the accumulations he observed. Allen measured the accumulations to be about 66 feet long, around 18 feet wide, and between 8 and 12 inches deep in some places, which Bowie did not refute. (Tr. 29, 123). I also credit the testimony of Shelton and Kinser, who testified that the accumulations filled a scoop bucket approximately 8 to 10 feet wide, 2 feet high, and 4 feet deep, though the accumulations did not "heave over" or "overflow" the bucket. (Tr. 139, 152-153, 161). I find that the volume of material cleaned up from the hazard is significant. The accumulations that were cleaned up included rib sloughage. Furthermore, testing of the accumulations revealed that the samples



were above the allowable limit of 60% combustible material. (Tr. 154). I find that a reasonably prudent person, familiar with the mining industry and the protective purpose of the standard, would have recognized the hazardous condition that the safety standard seeks to prevent. On that basis, I find that the Secretary established a violation of section 75.400.

### **C. Significant and Substantial**

Bowie further argues that the S&S designation was improper because there was no reasonable likelihood of injury resulting from the violation. Specifically, Bowie is challenging the third element of the *Mathies* test, which states “a reasonable likelihood that the hazard contributed to will result in an injury.” (Bowie Br. 10). Bowie relies on the facts that the condition was about to be corrected that morning, the propagation of an explosion was unlikely, and Shaw was standing in the area restricting access to miners. Bowie contends that finding a fire or explosion “could occur” is not sufficient for finding that such a result is reasonably likely to occur.

The Secretary argues that Allen, using his 14-year experience, properly considered both the mine’s characteristics and Bowie’s conduct when designating the violation as S&S. The Secretary reasons that underground mining is inherently dangerous and Allen properly detailed a variety of hazards that were reasonably likely to occur.

Bowie first attacks the Secretary’s conclusion that a fire or explosion at the face was reasonably likely to occur. On September 24, 2007, there were no elevated methane levels at the face. (Bowie Br. 10). Furthermore, there have been no face ignitions at Bowie because of good mining practices and the presence of a coal floor within the mine, rather than a floor containing quartz-bearing rock. (Bowie Br. 11). Bowie reasons that an ignition at the face is unlikely due to these conditions. Bowie argues that even if a face ignition of methane were to occur, it would not propagate back to the accumulations 600 feet from the mine face because the entries between were properly rock-dusted. (Bowie Br. 13). On the other hand, the Secretary contends that Bowie No. 2 is a “gassy mine” in which methane is capable of accumulating quickly. (Sec’y Br. 20). Bowie was actively mining at the face, and face ignitions are an inherent danger in coal mining. (Sec’y Br. 21-22). With methane able to accumulate quickly and the possibility of a face ignition, the Secretary argues that the possible resulting explosion would result in placing the float coal dust into suspension further propagating the explosion. (Sec’y Br. 20-21). Additionally, the Secretary notes that Bowie has had to cease production eight or nine times due to dangerous methane levels, though this occurred in a different coal seam. (Sec’y Br. 21).

Bowie additionally attacks the Secretary’s conclusions that other ignition sources, separate from the face, existed and were reasonably likely to cause an explosion. Bowie notes that there is no evidence that the power center was defective or that the trailing cables attached to the power center were defective. The cables were encased in thick insulation. (Bowie Br. 12). The Secretary argues that electrical equipment can serve as an ignition source without any apparent defects. (Sec’y Br. 21). Trailing cables, additionally, are prone to defects that arise quickly because of the nature of shuttle car driving. (Sec’y Br. 23). Bowie also refutes the Secretary’s claim that bumps or bounces could serve as an ignition source. Bowie notes that Shaw testified that no bounces had occurred at the mine prior to the contested order and, if the

roof does fail in a bounce, it is unlikely to ignite methane. (Bowie Br. 13). The Secretary contends that bounces can disrupt ventilation and production, increasing the likelihood of an explosion. (Sec’y Br. 23-24).

An S&S violation is described in section 104(d)(1) of the Act as a violation “of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard.” 30 U.S.C. § 814(d)(1). A violation is properly designated S&S “if, based upon the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury of illness or a reasonably serious nature.” *Cement Div., Nat’l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981). The Commission has explained that:

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

*Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984) (footnote omitted); *see also*, *Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 135 (7th Cir. 1999); *Austin Power, Inc. v. Secretary*, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff’g Austin Power, Inc.*, 9 FMSHRC 2015, 2021 (Dec. 1987) (approving Mathies criteria).

In *U.S. Steel Mining Co., Inc.*, 7 FMSHRC 1125, 1129 (Aug. 1985), the Commission provided additional guidance:

We have explained further that the third element of the Mathies formula “requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury.” *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1834, 1836 (August 1984). We have emphasized that, in accordance with the language of section 104(d)(1), it is the contribution of a violation to the cause and effect of a hazard that must be significant and substantial. *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1866, 1868 (Aug. 1984); *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574-75 (July 1984).

This evaluation is made in terms of “continued normal mining operations.” *U.S. Steel*, 6 FMSHRC at 1574. The question of whether a particular violation is S&S must be based on the particular facts surrounding the violation. *Texasgulf, Inc.*, 10 FMSHRC 498 (Apr. 1988); *Youghioghenny & Ohio Coal Co.*, 9 FMSHRC 2007 (Dec. 1987).

I find that the Secretary did not establish that the violation was S&S. The Secretary established the first, second, and fourth element of the *Mathies* test. I find, however, that it was not reasonably likely that the cited accumulations contributed to a hazard that would result in an injury, the third element of the *Mathies* test. Oxygen and a fuel source were present in the cited

entry. Inspector Allen testified that a fire or explosion with resulting injuries, including fatal injuries, could occur due to several possible ignition sources within the area of the accumulations. I agree that such an accident could occur, but it was not established that it was reasonably likely to occur. I credit the testimony of Bowie's witnesses that Shelton recognized the potential hazard when he arrived on the section, took steps to have rock dust delivered to the entry, and remained in the area to keep miners out of the entry.

The Commission provided the following guidance for accumulation violations:

When evaluating the reasonable likelihood of a fire, ignition, or explosion, the Commission has examined whether a "confluence of factors" was present based on the particular facts surrounding the violation. *Texasgulf, Inc.*, 10 FMSHRC 498, 501 (April 1988). Some of the factors include the extent of the accumulations, possible ignition sources, the presence of methane, and the type of equipment in the area. *Utah Power & Light Co.*, 12 FMSHRC 965, 970-71 (May 1990).

*Enlow Fork Mining Co.*, 19 FMSHRC 5, 9 (Jan. 1997).

Although about a full scoop of accumulations was removed, the accumulations were confined to one area between two crosscuts. Some of the accumulations were rib sloughage and some were from the construction of the stopping during the previous shift. The area had been a roadway prior to the construction of the stopping so accumulations in the area may well have been ground down by the traffic and pushed to the side in windrows. As stated above, I find that it was unlikely that the accumulations would have been ignited by any of the potential ignition sources identified by Inspector Allen. The mine does not have a history of face ignitions because, in part, the mine floor is made of coal. While a face ignition was possible, it was unlikely that such an ignition would propagate an explosion of the cited accumulations because the areas between the face and the accumulations were fully rock-dusted. The power center located near the accumulations showed no signs of defects and there is no evidence that it was no longer in permissible condition. There was no evidence that the trailing cables attached to the power center were defective. Assuming continued mining operations, the accumulations would have been fully rock-dusted and rendered incombustible within a few hours. It is unlikely that any of these potential ignition sources could spark a fire or propagate an explosion.

I credit the inspector's testimony noting that active mining at the face of a gassy mine along with bumps and bounces can serve as an ignition source that suspends accumulations further outby. I find that such an event was unlikely given the history of this mine and the remedial actions being taken by the operator. Although methane can develop quickly in a gassy mine, this mine has no history of methane rapidly accumulating over a large area. I find that there was not a confluence of factors present that made a fire or ignition reasonably likely.

I contrast the facts of this case with the facts set forth in my decision in *Twentymile Coal Co.*, 32 FMSHRC 1431 (Oct. 2010) (Pet. for disc. rev. granted by Comm., Nov. 24, 2011). In that case, float coal dust had been allowed to accumulate along a belt line for a distance of about 3,400 feet. Float coal dust was present along the belt entry, on the ribs, roof, and floor, on the

belt structure, pipes and hoses, and electrical control boxes. *Id.* at 1439. No action had been initiated to rock-dust the area and I determined that the float coal dust had accumulated over several shifts. *Id.* at 1447. The Secretary cites that case to support the inspector's S&S determination in the present case. Under the facts of the present case, however, the accumulations were a combination of rib sloughage and coal material that had been left in the area at the end of the previous shift following the installation of a stopping. Moreover, Bowie was in the process of mitigating the hazard. Although the Secretary presents a number of catastrophic events that could occur at the Bowie Mine, invoking the disasters at the Sago and Upper Big Branch Mines, I find that the facts presented at the hearing demonstrate that such catastrophic events were highly unlikely and that this case has little in common with the facts that led to those disasters or with the facts presented in *Twentymile*.

I recognize that the Commission has held that the opinion of an experienced MSHA inspector that a violation is S&S is entitled to substantial weight. *Harlan Cumberland Coal Co.*, 20 FMSHRC 175, 178-79 (Dec. 1998); *see also Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 135-36 (7<sup>th</sup> Cir. 1995). I reach my conclusion that the violation was not S&S after careful consideration of the evidence of record and continuing mining operations.

#### **D. Unwarrantable Failure**

Additionally, Bowie argues that the violation was not the result of an unwarrantable failure because no aggravated conduct was present. Bowie contends that Allen failed to take into consideration Shelton's actions to address the accumulations. (Bowie Br. 17). Moreover, the condition had only existed for a short period of time. (Bowie Br. 17). Bowie also contests the finding of unwarrantable failure based on prior section 75.400 violations the mine had received. Bowie argues that for it to be on notice based on past violations, the past violations must be similar to the current violation. (Bowie Br. 18). Furthermore, Bowie argues that it had taken steps to address section 75.400 violations. (Bowie Br. 19-20). Both Shelton and Shaw testified that they had discussed accumulations with miners during preshift and safety meetings.

The Secretary contends that the violation of section 75.400 was an unwarrantable failure because Bowie's conduct is considered aggravated as defined by *Lopke Quarries*. (Sec'y Br. 27-28). First, the Secretary argues that the accumulations existed for at least a shift and Bowie had previously received repeated warnings regarding accumulations of combustible materials. (Sec'y Br. 28). Second, the accumulations were extensive because of the volume cleaned up and the time it took to finish the termination order. (Sec'y Br. 28-29). Third, the accumulations were "open and obvious" according to Allen. (Sec'y Br. 29). The Secretary argues that while accumulations are not uncommon in underground coal mining, accumulations are dangerous, but easily remedied, and Bowie favored coal production, ignoring the accumulations. (Sec'y Br. 29). Fourth, prior section 75.400 violations, 46 citations and orders with 15 designated S&S in the two years prior, put Bowie on notice for greater efforts to comply. (Sec'y Br. 30). Allen personally discussed his concerns about accumulations with Shaw prior to the issuance of the subject order. (Sec'y Br. 30-31). Additionally, in the weeks preceding Order No. 6684382 Bowie was issued two unwarrantable failure orders. Finally, the Secretary argues that Bowie made no effort to abate the accumulations, the accumulations posed a high danger, and Bowie was aware of the accumulations. (Sec'y Br. 32-33).

In *Lopke Quarries, Inc.*, 23 FMSHRC 705, 711 (July 2001), the Commission restated the law applicable to determining whether a violation is the result of an unwarrantable failure:

The unwarrantable failure terminology is taken from section 104(d) of the Act, 30 U.S.C. § 814(d), and refers to more serious conduct by an operator in connection with a violation. In *Emery Mining Corp.*, 9 FMSHRC 1997 (Dec. 1987), the Commission determined that unwarrantable failure is aggravated conduct constituting more than ordinary negligence. *Id.* at 2001. Unwarrantable failure is characterized by such conduct as “reckless disregard,” “intentional misconduct,” “indifference,” or a “serious lack of reasonable care.” *Id.* at 2003-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194 (Feb. 1991); *see also Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d 133, 136 (7th Cir. 1995) (approving Commission’s unwarrantable failure test).

Whether conduct is “aggravated” in the context of an unwarrantable failure analysis is determined by looking at all the facts and circumstances of each case to see if any aggravating factors exist, such as the length of time that the violation has existed, the extent of the violative condition, whether the operator has been placed on notice that greater efforts are necessary for compliance, the operator’s efforts in abating the violative condition, whether the violation is obvious or poses a high degree of danger, and the operator’s knowledge of the existence of the violation. *See Consolidation Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2000); *Cyprus Emerald Res. Corp.*, 20 FMSHRC 790, 813 (Aug. 1998), *rev’d on other grounds*, 195 F.3d 42 (D.C. Cir. 1999); *Midwest Material Co.*, 19 FMSHRC 30, 34 (Jan. 1997); *Mullins & Sons Coal Co.*, 16 FMSHRC 192, 195 (Feb. 1994); *Peabody Coal Co.*, 14 FMSHRC 1258, 1261 (Aug. 1992); *BethEnergy Mines, Inc.*, 14 FMSHRC 1232, 1243-44 (Aug. 1992); *Quinland Coals, Inc.*, 10 FMSHRC 705, 709 (June 1988). All of the relevant facts and circumstances of each case must be examined to determine if an actor’s conduct is aggravated, or whether mitigating circumstances exist. *Consol.*, 22 FMSHRC at 353. Because supervisors are held to a high standard of care, another important factor supporting an unwarrantable failure determination is the involvement of a supervisor in the violation. *REB Enters., Inc.*, 20 FMSHRC 203, 225 (Mar. 1998).

I find that the Secretary did not establish that the violation was the result of Bowie’s unwarrantable failure to comply with the safety standard. Its conduct was not aggravated. I credit testimony from both Shelton and Kinser that Shelton was aware of the condition and was taking steps to remedy the situation before Inspector Allen arrived. The accumulations cited in the violation were primarily from the construction of a stopping during the previous shift and from rib sloughage. Shelton noticed the accumulations during his onshift examination and asked Kinser to bring a pallet of rock dust to the entry. It is not entirely clear how long the accumulations had been present. The accumulations created by the installation of the stopping had existed only since the end of the previous shift. The rib sloughage may have been present longer but there is no reliable evidence on that issue. The accumulations were present in a discrete area between Crosscuts 15 and 16.

Bowie was on notice that greater efforts were necessary to comply with the safety standard; however, Shelton demonstrated his efforts to address this particular violation. Shelton requested another miner's assistance and stood outside the accumulations to ensure no one would enter before the accumulations were addressed. Bowie's employees did not disregard the accumulations and Shelton was taking the actions he believed to be reasonable. Given the volume of accumulations present, a better course of action may have been for Shelton to bring in the scoop to remove at least some of the accumulations from the mine. Nevertheless, Bowie was in the process of making reasonable efforts to address the hazard. The accumulations would not have remained in the same state for much longer. In sum, the record establishes that Bowie was aware of the condition and was taking steps to neutralize the hazard. The company's conduct did not amount to "reckless disregard," "intentional misconduct," "indifference," or even a "serious lack of reasonable care." I find that Bowie's actions did not amount to aggravated conduct and the order is modified to a section 104(a) citation.

#### **E. Flagrant**

Finally, Bowie argues that the Secretary failed to establish that the violation should be deemed to be flagrant. Section 110(b)(2) of the Mine Act sets forth the parameters for concluding that a violation is flagrant and provides for the assessment of enhanced civil penalties:

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

30 U.S.C. § 820(b)(2).

In *Stillhouse Mining, LLC*, 33 FMSHRC 778 (Mar. 2011), Commission Judge Alan Paez addressed the issue of flagrant violations. He held that section 110(b)(2) is ambiguous because neither the statutory language nor the legislative history set forth a clear statement of Congressional intent. *Id.* at 801. I agree with the analysis of Judge Paez on this issue and incorporate his discussion in section III A. through III C. by reference. 33 FMSHRC 798-802. As a consequence, under *Chevron, U.S.A. v. Natural Res. Def. Council*, 467 U.S. 837, 843 (1984), interpretation of the statute is reserved for the courts. In *Stillhouse Mining*, Judge Paez held that to establish a flagrant violation, the Secretary must prove four elements: (1) reckless or repeated failure to make reasonable efforts to eliminate, (2) a known violation of a mandatory health or safety standard, (3) that substantially and proximately cause or reasonably could have been expected to cause, (4) death or serious bodily injury. I agree with Judge Paez's analysis.

One of Bowie's principal arguments in the present case was not presented to Judge Paez in *Stillhouse Mining*. Bowie maintains that a penalty for a flagrant violation may only be assessed when an operator fails to correct a previously cited violation. (Bowie Br. 22). Bowie contends that the phrase in section 110(b)(2), "[v]iolations under this section," refers specifically

to section 110(b)(1). Therefore, “a violation cannot be deemed to be flagrant until a citation has been issued and the operator has failed, either recklessly or repeatedly, to make reasonable efforts to eliminate the violation for which the citation was issued.” (Bowie Br. 23). Thus, flagrant violations are limited to situations in which an operator fails to abate a condition for which a citation has already been issued under section 104(a) of the Mine Act. Bowie further reasons that the language of the statute is clear and the court should apply the plain meaning of the statutory language. (Bowie Br. 23). Its argument is based in large part on the placement of the flagrant violation provision within section 110(b) of the Mine Act.

Because Bowie’s position was described in detail for the first time in its brief, the Secretary did not directly address this precise issue in her simultaneously filed brief. The Secretary maintains that she is not required to demonstrate that the operator repeatedly failed to eliminate a violation that occurred in the same location. (Sec’y Br. 10-11). She argues that nothing in section 110(b)(2) establishes such a limitation and that, if adopted, such a limitation would severely limit the application of the statutory provision.

I reject Bowie’s argument on this issue. The language of section 110(b) is not an example of the clearest legislative drafting. However, it cannot be reasonably interpreted to mean that the failure to correct a cited condition within the time limits set forth in a citation is a prerequisite to a finding that the violation is flagrant. Congress passed the Mine Improvement and New Emergency Response Act of 2006 (“MINER Act”) amending the Mine Act as a response to the high number of mining fatalities that occurred in the early part of 2006. S. Rep. No. 109-365, at 2 (2006). The broad purpose of the MINER Act was stated as “further[ing] the goals set out in the [Mine Act] and to enhance worker safety.” *Id.* at 1. To accomplish this purpose Congress intended to “improve safety-related procedures and protocols and increase enforcement and compliance to improve mine safety.” *Id.* Congress, by adding a flagrant designation, is increasing civil penalties for safety violations to serve as a deterrent for habitually neglecting worker safety. Limiting the scope of section 110(b)(2), as proposed by Bowie, would frustrate the main purpose expressed by Congress to enhance worker safety. Section 110(b)(1) already provides an incentive for operators to abate citations within the time permitted by the MSHA inspector. It currently mandates a penalty of \$7,500 each day that an operator fails to correct a violation for which a citation has been issued under section 104(a) of the Mine Act. There is a built-in incentive for an operator to rapidly abate a withdrawal order because mining operations cannot resume until the cited condition is abated. There is no indication in the statute or the legislative history that Congress intended to add a second financial incentive for operators to rapidly abate cited conditions. I conclude that operator’s failure to correct a violation under subsection 110(b)(1) is not a prerequisite to the establishment of a flagrant violation.<sup>2</sup>

Bowie argues that, even if the court rejects its argument that section 110(b)(2) only covers a failure to correct cited conditions, the company’s actions do not otherwise meet the requirements necessary to establish a flagrant violation. (Bowie Br. 29). Bowie reasons that Shelton was already in the process of addressing the condition before the order was issued and,

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<sup>2</sup> Judge Paez reached the same conclusion on a related issue raised in *Stillhouse*. He concluded that the “known violation” at issue in a flagrant case need not have been previously cited by MSHA. 33 FMSHRC at 807.

because the condition resulted from the construction of a stopping during the previous shift, his actions were neither reckless nor repeated. (Bowie Br. 30).

The Secretary contends that Bowie violated each of the five elements contained in the statutory definition of flagrant. (Sec’y Br. 4). First, Bowie repeatedly failed to comply with section 75.400 with 46 violations in the previous fifteen months leading up to Order No. 6684382. (Sec’y Br. 5-6). Second, Bowie did not make reasonable efforts to eliminate coal accumulations because of the continued disregard for accumulations after numerous violations. (Sec’y Br. 7). Third, Bowie knew of the accumulations cited because coal accumulations are inherent to mining and the safety director would address accumulations on “almost a daily” basis. (Sec’y Br. 8). Fourth, section 75.400 is a mandatory health or safety standard. *Id.* Finally, the violation of section 75.400 could have reasonably been expected to cause death or serious bodily injury. *Id.* The Secretary reasons that the accumulations were significant enough to cause an explosion or fire leading to serious miner injuries. (Sec’y Br. 8-9).

In *Stillhouse Mining*, the parties agreed that the alleged violations were isolated incidents, as opposed to repeated occurrences of similar past conduct. 33 FMSHRC at 802-03. In the present case, the issue is whether Bowie repeatedly failed to make reasonable efforts to eliminate a known violation of a safety standard. Nevertheless, the discussion in *Stillhouse Mining* is helpful. Judge Paez found that “‘reckless or repeated failure to make reasonable efforts to eliminate a known violation of a mandatory health or safety standard’ occurs when, in light of all the facts and circumstances surrounding the violation, the operator does not take the steps a reasonably prudent operator would have taken to eliminate the known violation of a mandatory health or safety standard and consciously or deliberately disregards an unjustifiable, reasonably likely risk of death or serious bodily injury.” *Id.* at 805. Judge Paez, however, did not address how the phrase “repeated failure” should be interpreted in this context.

The Secretary argues that the evidence demonstrates that Bowie has repeatedly violated section 75.400. She argues that, using the plain meaning of the term “repeated,” there can be no dispute that Bowie’s 46 violations of section 75.400 constitutes a repeated failure to comply with the standard. The Secretary maintains that loose coal, coal dust, and float coal dust cited in this case are the most common form of accumulations prohibited by section 75.400. Although other combustible materials may accumulate in a mine, the approach to cleaning them up does not vary. “Given the substantial similarity between the violation detailed in Order No. 6684382 and the forty-six violations of section 75.400 in the prior fifteen months . . . , Bowie’s failure to comply with section 75.400 was unquestionably a ‘repeated failure.’ ” (Sec’y Br. 6).

Bowie approaches the question from a different perspective. It maintains that the court must look at the conduct of the operator with respect to the violation at issue when determining whether there was a repeated failure to correct a condition. It asserts that the facts in this case establish that Shelton, when he arrived on the section, “made the determination, supported by MSHA policy, to rock-dust the rib sloughage crosscut 15 to 16 in the Number 3 Entry.” (Bowie Br. 30). He was in the process of addressing this before Inspector Allen arrived. “For that very reason, there was no reckless or repeated failure to correct a known violation.” *Id.* The accumulation resulted, in part, from the building of a stopping during the previous shift. Bowie’s



conduct did not rise to a repeated failure to make reasonable efforts to eliminate a known violation of a mandatory safety standard.

The difficulty in grappling with this issue in the manner suggested by the Secretary is that section 75.400 is the most frequently cited safety standard in underground coal mines. It can be stated that every underground coal mine has repeatedly been issued citations and orders for violations of section 75.400. As a large underground coal mine, it is not surprising that the Bowie Mine had been issued many citations and orders for such violations in the 15 months before September 27, 2007. In addition, section 75.400 covers a wide range of situations including, but not limited to, accumulations of trash on a section, accumulations of hydraulic oil on equipment, accumulations of coal debris on equipment, as well as the accumulations of coal, coal dust, and float coal dust along an entry or in a crosscut. I believe that the Secretary cannot establish the “repeated failure” element in section 110(b)(2) by simply introducing a computer printout showing that there have been multiple violations of the cited safety standard at the mine. Such statistics do not establish that the mine operator has repeatedly failed to make reasonable efforts to eliminate a known violation.

The Secretary also relies on the fact that Bowie received two 104(d) orders for violating section 75.400 in the seven weeks before September 24, 2007.<sup>3</sup> (Exs. G-15, G-16). Order No. 6684367, August 29, 2007, was issued for allowing hydraulic oil mixed with coal to accumulate on a roof bolting machine. (Ex. G-15). Order No. 6684274, August 8, 2007, was issued for float coal dust on the floor, roof, ribs, and belt structure along a belt line and for other conditions. (Ex. G-16). The Secretary contends that the seriousness of section 75.400 violations had been increasing in the months prior to September 2007. Shelton testified that Bowie had taken steps to address these problems. He said that he regularly discussed citations and orders issued for violations of section 75.400 with his crew and he regularly told his crew that it is important to avoid accumulations of combustible materials. (Tr. 142-43, 186-87).

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<sup>3</sup> The parties stipulated that the Secretary based her flagrant designation “on the policy set forth in Procedure Instruction Letters I06-III-04 and I08-III-02.” (Stip. 7). The stipulation goes on to state that such “designation is based on such policy as it relates to ‘repeated’ unwarrantable failure violations of the same standard.” In pertinent part, the letters provide that, for violations that are the result of “repeated failure” to make reasonable efforts to eliminate a known violation, the Secretary may rely on the fact that “[a]t least two prior ‘unwarrantable failure’ violations of the same safety or health standard have been cited within the past 15 months.” The stipulation provides that Bowie “is not stipulating to the validity of such designation as flagrant or the validity of using such Procedure Instruction Letters as a basis of a flagrant designation.” For the reasons set forth below, I have not relied on these letters in this decision.

Although there may be circumstances in which an increasing history of S&S and unwarrantable violations of section 74.400 would be sufficient to establish a “repeated failure to make reasonable efforts to eliminate a known violation” of the safety standard, resolving this issue is not necessary to determine whether a flagrant penalty should be assessed in this case.<sup>4</sup>

I find that the Secretary did not establish that the violation at issue in this case reasonably could have been expected to cause death or serious bodily injury. Judge Paez framed the issue as follows: “Based on the plain meaning of the statute’s terms, for the purpose of establishing a flagrant violation, an operator’s conduct ‘reasonably could have been expected to cause death or serious bodily injury’ when, based on all of the facts and circumstances surrounding the operator’s reckless failure to make reasonable efforts to eliminate a known violation of a mandatory health or safety standard, the operator’s conduct was likely to bring about death or serious bodily injury.” 33 FMSHRC 808. I find that the operator’s conduct in this case was not likely to bring about death or serious bodily injury to miners working at the mine. My analysis on this issue is similar to, but not necessarily the same as, the S&S analysis. I agree with Judge Paez that the risk of death or injury need not be immediate or imminent. *Id.* at 815-16.<sup>5</sup> The issue is whether the cited condition created an environment that made death or serious injury likely. *Id.* For the reasons discussed above, I find that Bowie’s conduct was unlikely to bring about death or serious bodily injury. As a consequence, the Secretary’s flagrant determination is vacated.

## **F. Gravity and Negligence**

I find that the evidence establishes that the conditions cited in the order created a serious violation of section 75.400. Although an injury or illness was not reasonably likely, if an accident were to occur, serious injuries or fatalities could result. The eight miners on the section could have been affected.

I find that Bowie’s negligence was moderate. Although Bowie was taking steps to address the hazard, it could have done more. For example, Shelton could have assigned several crew members to remove and/or rock-dust the accumulations before other mining operations commenced.

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<sup>4</sup> Indeed, any conclusion of law that I might reach on this rather complex issue of first impression would be *obiter dictum*. If this case is reviewed by the Commission and this issue is remanded to me for decision, I would then have the benefit of the Commission’s ruling on the myriad legal issues that are lurking in section 110(b)(2), which will help direct a resolution.

<sup>5</sup> In *Stillhouse*, Judge Paez determined that citation and orders at issue in that case were S&S.

### III. APPROPRIATE CIVIL PENALTY

Section 110(i) of the Mine Act sets forth the criteria to be considered in determining an appropriate civil penalty. I have reviewed the Assessed Violation History Reports. (Ex. G-1). Bowie had about 382 paid violations at the Bowie No. 2 Mine during the 24 months preceding September 24, 2007. It was issued about 132 S&S violations during this same period. Bowie is a large mine operator. The violation was abated in good faith. The penalties assessed in this decision will not have an adverse effect on Bowie's ability to continue in business. The gravity and negligence findings are discussed above. Based on the criteria in section 110(i) of the Mine Act, I find that a penalty of \$10,000.00 is appropriate for this violation.

### IV. ORDER

For the reasons set forth above, Order No. 6684382 is **MODIFIED** to a section 104(a) non-significant and substantial citation with moderate negligence. The flagrant penalty allegation brought by the Secretary under section 110(b)(2) of the Mine Act is **VACATED**. Bowie Resources, LLC, is **ORDERED TO PAY** the Secretary of Labor the sum of \$10,000 within 40 days of the date of this decision.<sup>6</sup>

/s/ Richard W. Manning\_\_\_\_\_

Richard W. Manning  
Administrative Law Judge

Distribution:

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RWM

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<sup>6</sup> 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

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

OFFICE OF ADMINISTRATIVE LAW JUDGES  
601 NEW JERSEY AVENUE, NW, SUITE 9500  
WASHINGTON, DC 20001

July 28, 2011

SECRETARY OF LABOR,	:	PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 2008-1533
Petitioner,	:	A.C. No. 15-18854-160414
	:	
	:	Mine: Liggett No. 3
v.	:	
	:	Docket No. KENT 2008-1534
	:	A.C. No. 15-19080-160415
LIGGETT MINING, LLC,	:	
Respondent.	:	Mine: Liggett No. 5

**DECISION**

Appearances: Matt S. Shepherd, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, on behalf of the Secretary of Labor;  
James F. Bowman & George R. Bowman, Midway, West Virginia, on behalf of Liggett Mining, LLC.

Before: Judge Paez

The above-captioned proceedings are before me upon petitions for the assessment of civil penalties filed by the Secretary of Labor pursuant to section 105 of the Federal Mine Safety and Health Act of 1977 (“Mine Act”), 30 U.S.C. § 815. The Secretary charges Liggett Mining, LLC (“Liggett Mining”) with three violations of mandatory standards and proposes civil penalties of \$7,174 for these violations.

**I. Statement of the Case**

The Commission received the Secretary’s petitions for the assessment of civil penalties pertaining to the citations at issue on October 21, 2008. Liggett Mining timely contested the citations. These consolidated cases – Docket Nos. KENT 2008-1533 and KENT 2008-1534 – were assigned to me on August 13, 2009. I approved the partial settlement of seven of the ten violations comprising these dockets on October 6, 2010. Thereafter, I held a hearing in Lexington, Kentucky, on December 2, 2010, on the three remaining citations at issue. The Secretary presented the testimony of three officials from the Mine Safety and Health Administration (“MSHA”) who were the issuing inspectors of the citations in question: Wendil Fuson (Tr. 16:10-24, 22:2-6), Roger A. Wilhoit (Tr. 93:11-20, 94:8-14), and George M. Jackson, Jr. (Tr. 123:6-18, 126:1-8). Liggett Mining called witnesses Jack Calloway, Superintendant at Liggett No. 3 mine (Tr. 171:17-19), and Roger Baker, Maintenance Foreman

for Virginia Fuels, which serves the Liggett No. 5 mine. (Tr. 198:21-25.) The Secretary's post-hearing brief was received on February 1, 2011. Respondent's post-hearing brief was received on February 10, 2011.

Citation No. 8317048 charges Liggett Mining with violating 30 C.F.R. § 72.630(b) for its failure to maintain in operating condition the dust collection system on a roof bolting machine by allowing excessive dust to accumulate on the clean air side of the system. Citation No. 8317164 charges Liggett Mining with violating 30 C.F.R. § 72.630(b) for its failure to maintain the dust collection system on a roof bolting machine in permissible condition by allowing the vacuum pressure at the drill head to fall below minimum standards. Citation No. 8329466 charges Liggett Mining with violating 30 C.F.R. § 75.903 by failing to have a disconnecting device installed on the power supply cable of a welder. The Secretary submits that all three alleged violations should be evaluated as significant and substantial ("S&S").<sup>1</sup> The Secretary originally recommended that all three violations be assessed as moderately negligent, with proposed civil monetary penalties of \$3,689 for Citation No. 8317048, \$1,203 for Citation No. 8317164 and \$2,282 for Citation No. 8329466. In her post-hearing brief, the Secretary now contends that findings of high negligence are warranted for Citation Nos. 8317048 and 8329466. Accordingly, the Secretary is seeking an increase in civil monetary penalties for these two violations above their originally proposed assessments.

## **II. Issues**

Liggett Mining denies the alleged violations in this matter. Specifically, Liggett Mining contends that the cited conditions do not constitute violations of the Secretary's mandatory health or safety standards. Accordingly, the issues before me are: (1) whether the conditions cited violated the health or safety standards as they have been set forth by the Secretary; (2) whether the Secretary's designations of these violations as S&S are supported by the record; (3) whether the Secretary's designations regarding the level of Liggett Mining's negligence in committing these alleged violations are supported by the record; (4) whether Liggett Mining received fair notice of the requirements under 30 C.F.R. § 72.630(b) as they pertain to Citation No. 8317164; and (5) whether the proposed civil penalties are appropriate.

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

### **III. Background and Findings of Fact**

#### **A. Operations of Liggett Mining**

Liggett Mining operates both strip and underground mines in Tennessee, Kentucky, and Virginia. (Tr. 21:2-3.) The Liggett No. 3 and No. 5 mines are operations of Liggett Mining located in Harlan county in the town of Liggett, Kentucky. (Tr. 19:21-20:9, 95:22-96:6.) The mines run two production shifts and one maintenance shift per day. (Tr. 20:17-20, 96:16-17.)

The Liggett No. 3 mine has one working section. (Tr. 20:10-12.) In 2008, there were five headings in the section where active mining took place, also known as the face. (Tr. 24:5-6.) The working section at Liggett No. 3 is a mechanized mining unit (“MMU”) that operates a continuous miner, shuttle cars, and a roof bolting machine. (Tr. 20:13-16.) The ventilation plan in effect for Liggett No. 3 in July 2008 stipulated that air flow must be maintained at the rate of 3,000 cubic feet per minute for 5 feet behind the roof bolter. (Tr. 43:18-44:25.) The air is supposed to flow away from the entry and towards the working face where coal is extracted. (Tr. 44:15-45:5.) The entry at heading #2 in the mine was five-and-a-half to six-feet tall and twenty-feet wide. (Tr. 179:22-25.) Thus, at the minimum air flow, dust particles in the air of entry #2 would move at a rate of 30 to 34 feet per minute. (Tr. 181:3-8.)

#### **B. Mechanics of the Lee Norse Roof Bolter**

The Lee Norse twin-head roof bolting machine has two large rock drills, one on each of its sides at the front end of the machine. (Tr. 28:24-25; Ex. G-4.) Hydraulic booms press the drill into the roof of the mine. (Tr. 29:1-2.) At the end of each drill head is a drill steel piece with a component containing two holes, which are used for dust collection. (Tr. 29:2-5.)

When the dust collection system is in operation, vacuum pressure pulls the dust generated from drilling through the two holes at the drill head. (Tr. 29:6-8.) The dust travels through the drill steel and the drill head, and then through a dust hose that brings it to the dust collection system. (Tr. 29:8-12.) On each side of the machine, contaminated air travels through filters, and clean air exits the machine as exhaust through the mufflers to relieve pressure from the vacuum pumps. (Tr. 29:12-17, 33:11-13.) The filtered dust is collected in the dust boxes of the dust collection system. (Tr. 30:4-7.) These boxes are periodically emptied. (Tr. 30:6-10.) The top of the dust collection box marks the beginning of the “clean air” side of the dust collection system. (Tr. 32:24-33:1.) A hose connects the top of the dust box to a blower motor. (Tr. 189:21-24.) The blower motor is connected to the muffler by a second hose. (Tr. 189:21-24.) No dust should be in the hose between the filter and the muffler. (Tr. 32: 22-24.) The clean air side of the system runs from the top of the dust collection box to the exhaust, and includes the muffler. (Tr. 32:24 – Tr. 33:1.)

Respirable dust should not exit through the exhaust system of the roof bolter. (Tr. 30:1-3, 33:3-13.) Dust in the clean air side of the system indicates that the filter is being bypassed. (Tr. 42:16-20.) Such bypass of the filter is the result of a malfunction within the roof bolter, such as a torn filter or inadequate seal. (Tr. 42:16-20.) Respirable dust is briefly emitted into the

air when the roof bolter is first put into operation before the vacuum pressure can travel to the drill head, but it dissipates in a matter of seconds. (Tr. 33:25-34:4.)

One purpose of the vacuuming system on a roof bolter is to prevent the operator from inhaling dust as the drill penetrates the mine roof. (Tr. 104:2-22.) A qualified person designated by the operator is required to perform a dust parameter check on the roof bolter at the beginning of every shift. (Tr. 48:5-49:3.) A small amount of dust may pass through the filter, but during the dust parameter check any dust accumulation in the dust collection system should be detected and eliminated. (Tr. 48:14-18, 81:17-82:12.) Additionally, a vacuum pressure reading should be done as part of the dust parameter check. (Tr. 109:14-16.)

C. The Roof Bolter Dust Collection Citations

1. Citation No. 8317048 at Liggett No. 3 Mine

Citation No. 8317048 was issued by Inspector Fuson on July 24, 2008 at 7:35 a.m. (Tr. 22:5-6), during a shift at the Liggett No. 3 mine that began at 6:00 a.m. (Tr. 176:12). The citation resulted from a regular quarterly E01 MSHA inspection. (Tr. 22:14-23:1.) On the date of the inspection, Fuson traveled with mine superintendent Jack Calloway to the working section. (Tr. 23:23-24:8.) The inspection began with an imminent danger run, which is a visual inspection of each working area for hazards. (Tr. 24:1- 4.) Fuson and Calloway began at heading #5 and progressed along the headings in descending order. (Tr. 24:15-20.) Fuson did not observe any violations prior to reaching heading #2. (Tr. 24:15-20.) However, as Fuson and Calloway traveled from entry #3 to entry #2, they observed dust blowing out of entry #2. (Tr. 24:18-20). The dust rolling out of the entry indicated there was negative pressure from airflow. (Tr. 45:15-17.) Fuson testified that if the airflow was being maintained in accordance with the mine's ventilation plan, then 3,000 cubic feet of air per minute would be creating positive pressure, blowing the dust towards the coal face and not out the entry. (Tr. 44: 15-20.)

Fuson observed a haze of dust when he shined his helmet light into the entry. (Tr. 43:1-7.) The dust in the air appeared to have the thickness of fog. (Tr. 43:1-7.) When the inspection party reached the entry, Calloway flagged the men operating the Lee Norse twin-head roof bolting machine in the heading to turn it off. (Tr. 24:21-23, 26:10-12.) When the inspection party came to heading #2, there were three miners in the entry.<sup>2</sup> (Tr. 26:2-3.) These men were not wearing any breathing protection. (Tr. 28:4-7.) The roof bolter was de-energized by one of the men hitting the panic bar on the machine. (Tr. 37:8-11.)

At the time of the inspection, heading #2 was approximately 50 to 70 feet deep. (Tr. 26:13-24.) The roof bolter was located at the far end of the entry, directly at the coal face, putting the back of the machine at 40 to 50 feet away from the last open crosscut where Fuson and Calloway had entered the heading. (Tr. 27:15-28:3.) Upon inspecting the roof bolter, Fuson

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<sup>2</sup> Respondent's witness, Calloway, testified there were two men working on the roof bolter. (Tr. 177:24-25.) However, it is unclear from his testimony whether those were the only men in the entry. Additionally, Fuson noted in the citation that three people were affected by the violation. (Ex. G-1.) Liggett has not disputed this determination by the inspector.

found that the filters had been changed on both sides of the machine. (Tr. 37:24-38:8.) Also, the lids of the dust box were wet and clean, indicating that they had been washed. (Tr. 38:19-22.) However, the clean air side of the dust collection system was lined with dust accumulation from the lid of the dust box, through the dust hose, and exiting out of the muffler. (Tr. 39:2-15.) The inspector determined that the amount of dust in the roof bolter indicated that the hazardous accumulation had been developing for at least one shift of eight hours with the roof bolter in operation, exposing miners to dust for that duration. (Tr. 49:9-18, Tr. 81:1-8.) *See discussion infra* Part V.A.1. After inspecting the roof bolter, Fuson issued the citation at 7:35 a.m., and gave the operator one hour to abate the condition. (Tr. 22:5-6, 39:19-21.) The citation was terminated over an hour later at 9:20 a.m. because Fuson was engaged in other inspection activities. (Tr. 39:23-40:5.) At the time the citation was terminated, dust was no longer blowing from the muffler. (Tr. 40:6-10.) The citation had been abated by pouring two to three gallons of water down the drill head on each side of the bolter, and letting the water run through dust collection system. (Tr. 184:10-16.)

## 2. Citation No. 8317164 at Liggett No. 5

Inspector Wilhoit issued Citation No. 8317164 at the Liggett No. 5 mine on June 23, 2008, as the result of a regular inspection. (Tr. 96:23-97:14.) When Wilhoit examined the roof bolting machine in question, it was on the section face and most likely in use. (Tr. 98:15-21.) As is standard, the Lee Norse roof bolter had an approval plate on it that specified the minimum required vacuum pressure for the drill. (Tr. 99:2-17.) The plate had “MSHA” printed on it. (Tr. 99:18-19.) The approval plate stated that the minimum pressure for the cited drill was 15 inches mercury (“Hg”). (Tr. 99:10-14.) A clean roof bolter is supposed to pull this amount of pressure at its drill head. (Tr. 215:15-18.)

To take the vacuum pressure reading, Wilhoit asked the mine operator to back the roof bolter out of the coal face. (Tr. 100:5-11.) The drill was left running. (Tr. 100:5-11.) Wilhoit used a vacuum gauge to take the reading. (Tr. 100:5-16.) He inserted the vacuum gauge in the drill pot, which is the part of the roof bolter where the drill steel is used to pierce the roof surface. (Tr. 100:5-16.) Taking these readings at the drill pot is in accordance with MSHA issued guidelines. (Tr. 102:13-103:18.) The vacuum gauge has a rubber gasket at its bottom that seals the gauge to the drill in such a manner that no pressure escapes. (Tr. 100:22-101:5.) Wilhoit did not observe any visual signs that the vacuum pressure was performing below the 15 Hg minimum standard. (Tr. 120:3-6.) However, after conducting a vacuum gauge reading on the left side of the drill head, Wilhoit obtained a reading of 11.5 Hg. (Tr. 101:12-13.) When Wilhoit terminated the citation, the vacuum pressure reading had risen to 19.5 Hg. (Tr. 106:4-7.) The citation was issued at 11:55 a.m., and terminated at 1:40 p.m. (Ex. G-6.)

Wilhoit has previously allowed operators to empty the dust box on the roof bolter prior to taking vacuum gauge readings if they requested to do so. (Tr. 112:10-13.) In preparing the roof bolter for a vacuum pressure test, the manufacturer recommends emptying the dust box. (Tr. 200:16-19.) A full dust box will decrease the vacuum pressure on the roof bolter. (Tr. 205:20-24.)



#### D. The Use of Disconnecting Devices

The power center of a section is an area where high voltage electricity comes into the mine and goes through a transformer that distributes power to equipment on the section. (Tr. 128:14-19.) A welder is a piece of equipment that receives power from the power center (Tr. 128:16-19) and is used to make miscellaneous repairs on equipment. (Tr. 138:8-13.) It is most frequently utilized during the maintenance shift but can be used at any time. (Tr. 138:8-13.) A welder has the form of a box, approximately 2 feet in length, 18 inches in height, and 1 foot in width. (Tr. 129:10-19.) A power cable extends from one end of the welder and connects it to the power source. (Tr. 129:20-24.) The welder at issue utilized a No. 10 power cable. (Tr. 130:3-6.) This cable is also referred to as a “10/5” cable. (Tr. 128:3-7.) It contains five lead wires (three phase leads, a ground lead, and a monitor lead) that are No. 10 in size. If a disconnecting device is used, it will be attached at the end of this power cable. (Tr. 130:7-10.) A cathead acts as the disconnecting device on the welder. (Tr. 127:15-17.) It has a two-pronged “male end” that connects to a receptacle “female” counterpart on the power source. (Tr. 131:7-10.)

It is also possible to use the welder without a disconnecting device. (Tr. 131:5-12.) The welder’s wires can be jerry-rigged by folding the phase lead wires that conduct power in the cable to make them fit directly into the receptacle on the power source. (Tr. 131:10-18.) Thus, when the “phase leads” on a welder are not connected to a cathead, the welder can be powered by inserting these leads into an electrical component of a piece of machinery anywhere in the mine that is producing the requisite amount of voltage, such as a shuttle car, roof bolter, or head drive. (Tr. 134:22-135:5.) This practice allows miners to power equipment, such as a welder, when they are far from the power center without having to run as much as 500 feet of cable between the equipment and the power center. (Tr. 142:3-14.) Using equipment without a cathead further saves miners time because they avoid having to change the cathead on their equipment to match the size of the receptacle on the power center they are working near. (Tr. 142:23-143:3.) Although using equipment without a cathead is faster, doing so creates a risk of electrocution if power is running through the electrical source at the time the welder is connected to it. (Tr. 135:6-15.)

In general, operating electrical equipment without a cathead creates a hazard because cables can easily be pulled out or fall out from the power source, resulting in a flash of electricity or the electrocution of a miner upon accidental contact. (Tr. 132:14-17.) The cathead contains a locking mechanism that decreases the risk of the power cable being pulled out by locking the cathead to the receptacle. (Tr. 139:1-5.) If the cable is pulled out, then the monitor wire will break and the breaker will go into effect. (Tr. 139:10-15.) As a result, the power will go off and an arc will be prevented when using a cathead. (Tr. 139:16-18.) Indeed, in the absence of a cathead, if bare phase leads were pulled out of a power source, an arc would be created that resembles a small explosion. (Tr. 140:13-18, 141:14-19.) The accidental disconnection of a power cable is of concern in the tight mining environment, where people can stumble and trip on the cable. (Tr. 139:5-8.)

In addition to containing three phase leads, the power cable contains a ground lead and a monitor lead. (Tr. 131:15-132:1.) The ground and monitor leads provide protection from electrocution when equipment is plugged into a power center using a cathead. (Tr. 132:1-134:3.) The monitor lead is needed for the breaker to be responsive to a failing ground connection. (Tr. 132:3-5, 133:22-134:1.) The monitor lead, ground lead, and breaker all function in such a manner that allows the breaker to cut off power if the ground connection is lost or malfunctioning. (Tr. 133:22-134:1.)

However, if the power cable is being used without a cathead, then the ground monitor system can be bypassed and made ineffective. (Tr. 132:9-133:14.) This is done by splitting the ground lead and inserting one end into the ground receptacle and the other into the monitor. (Tr. 132:9-133:14.) When the monitor is bypassed, the breaker will not take effect if a miner bumps the phase lead, touches it, or even grabs it. (Tr. 134:4-10.) Power will continue to flow through the phase lead, creating the risk of an electric flash should the lead be pulled out. (Tr. 134:11-12.) Alternatively, a ground wire may also be split to facilitate the use of a wireless ground monitor system by eliminating the need for a jumper cable between the ground and the monitor. (Tr. 223:11-22.)

E. Citation No. 8329466 at Liggett No. 5

Inspector Jackson issued Citation No. 8329466 at the Liggett No. 5 mine on August 2, 2008, while inspecting the mine due to an unrelated hazard complaint. (Tr. 126:6-19.) The inspection took place during the second of two production shifts that last nine hours. (Tr. 152:7-11.) The second shift ran from 3:00 p.m. to midnight. (Tr. 152:7-11.) Jackson issued the citation in question at 10:05 p.m. (Tr. 152:1-4.) During the inspection, Jackson walked to the section power center. (Tr. 128:10-11.) While inspecting conditions at the coal face, Jackson observed a 480-volt welder without a disconnecting device attached to its power cable. (Tr. 128:21-25, 129:4-5, 143:19-20.) The exposed end of the power cable was 5 feet from the receptacle of the power center for an active section. (Tr. 137:5-8, 137:18-21.) The phase leads on the welder's power cable were loose with approximately 1 inch of bare copper exposed. (Tr. 130:13-15, 131:15.) These wires were also folded over and mashed in such a manner that would permit them to be inserted into a power source without a cathead. (Tr. 130:17-131:15.) The ground lead was split. (Tr. 131:21-23.) The monitor lead was cut approximately seven inches. (Tr. 132:5-6.) The welder was not tagged out, and was laying in open view. (Tr. 137:8.) Additionally, conditions in the section were wet. (Tr. 146:19-22.) Jackson issued the citation at 10:05 p.m., which was abated within 25 minutes when a cathead was spliced to the welder's power cable. (Tr. 158:1-15.)

F. Citations at Issue in this Proceeding

1. Citation No. 8317048 – Failure to maintain a dust collector in operating condition

Fuson issued Citation No. 8317048 under section 104(a) of the Mine Act for a violation of 30 C.F.R. § 72.630(b). (Ex. G-1.) The citation's narrative states:

On the MMU-003 working section, the dust collecting system on the co [sic] #20914 Lee Norris [sic] twin-head return side bolting machine is not being maintained in permissible and operating condition. Upon entering the #2 heading, the roof bolting machine was barely visible from the float rock dust coming out of the exhaust mufflers, there were 3 miners in this area, not wearing any breathing protection. The operator Jack Callaway [sic] stop [sic] the machine and ordered the machines dust collection system to be flushed with water to remove the float dust from the system. New bags had been installed but the excessive dust build in the system was massively being disbursed into the atmosphere.

Fuson asserts that three people were affected by this condition and that permanently disabling injuries were reasonably likely. (*Id.*) Fuson charged Liggett with moderate negligence and assessed the violation as significant and substantial (“S&S”). (*Id.*)

2. Citation No. 8317164 – Failure to maintain a dust collector in operating condition

Wilhoit issued Citation No. 8317048 under section 104(a) of the Mine Act for a violation of 30 C.F.R. § 72.630(b). (Ex. G-6.) The citation’s narrative states:

The dust collection system on the Lee Norse twin-head drill (return side), S/N 21981, being operated on the 001/MMU is not being maintained in permissible condition. When checked with a vacuum ga[u]ge a reading of 11.5 in. HG. was obtained on the left side drill head. A vacuum ga[u]ge reading of 15 in. HG. is required. This condition would cause the left side drill operator to breathe an excess amount of dust while drilling the mine roof. Two miners operate the left side of the drill daily on the 001/MMU.

Wilhoit asserts that one person was affected by this condition and that permanently disabling injuries were reasonably likely. (*Id.*) Wilhoit charged Liggett with moderate negligence and assessed the violation as S&S. (*Id.*)

3. Citation No. 8329466 – Failure to install a disconnecting device on a welder power cable

Jackson issued citation No. 8329466 under section 104(a) of the Mine Act for a violation of 30 C.F.R. § 75.903. (Ex. G-9.) The citation’s narrative states:

There is no disconnecting device installed in the cable supplying 480 volts to the Miller Maxstar welder located on the 002 MMU. The three phase leads have approximately 1” of bare copper exposed at the power supply end, and give the appearance that they have been jammed in a power source. The ground wire also has bare copper exposed. The condition poses a hazard to miners in that it subjects them to electrocution when coming in contact with bare open copper wires used to supply 480 volts to this welder.

Jackson asserts that one person was affected by this condition and that fatal injuries were reasonably likely. (*Id.*) Jackson charged Liggett with moderate negligence and assessed the violation as S&S. (*Id.*)

G. Credibility of the Secretary's Witnesses

1. Wendil Fuson, Health Specialist, MSHA

Wendil Fuson is employed by MSHA as a federal mine inspector in Barbourville, Kentucky. (Tr. 15:5-14.) At the time of the July 24, 2008 inspection of Liggett Mine No. 3, Fuson held the title of Coal Mine Inspector. (Tr. 16:23-24.) He has subsequently obtained the title of Health Specialist since May of 2009. (Tr. 16:25-17:1.) Fuson has been employed by MSHA since April of 2007. (Tr. 17:2-3.) Before joining MSHA, Fuson had been employed in the mining industry since 1980, with close to 20 years of experience in the industry. (Tr. 17:4-10.) He has spent the majority of his career, eight to twelve years, operating a roof bolter. (Tr. 17:18:24.) Fuson has exclusively worked at underground mines. (Tr. 17:25-18:1-2.) Fuson was certified by the state of Kentucky as a foreman, a position he held for ten years. (Tr. 18:8-16.) Upon joining MSHA, Fuson underwent a 25-week training program at the Beckley Mine Academy, in addition to 18 to 24 months of on-the-job training. (Tr. 18:19-25, 19:1-2.) His training at the Beckley Mine Academy included instruction on how to inspect underground mines, and specific instruction on how to inspect a dust collection system on a roof bolter. (Tr. 19:6-17.) Additionally, prior to the date of inspection, Fuson had been to Liggett No. 3 on multiple occasions, including during his time as a trainee. (Tr. 23:14-17.)

At the time Fuson inspected Mine No. 3 in 2008, he had limited experience as an inspector. However, his frank testimony and his significant years of experience in the mining industry as a roof bolter operator give him great credibility. Accordingly, I afford great weight to his testimony.

2. Roger A. Wilhoit, Special Investigator, MSHA

Roger A. Wilhoit has worked in the mining industry since 1973. (Tr. 93:22-24.) He has held several positions in underground mining operations including roof bolter and foreman. (Tr. 94:2-15.) Wilhoit has been employed by MSHA since 2002. (Tr. 93:16-17.) He has held the title of Special Investigator for two years. (Tr. 93:14-15.) Wilhoit had the title of Coal Mine Inspector at the time Wilhoit inspected Liggett No. 5 in 2008. (Tr. 93:18-20.) Upon starting at MSHA, he underwent approximately 25 weeks of training at the Beckley Mine Academy. (Tr. 95:1.) He received additional on-the-job training in inspection of roof bolter dust control systems. (Tr. 95:15-18.) Prior to June 2008, Wilhoit had previously taken vacuum pressure readings on roof bolters. (Tr. 102:2-5.) Due to Wilhoit's extensive experience in the mining industry and relevant experience at MSHA, I give substantial weight to his testimony.

3. George M. Jackson, Coal Mine Inspector, MSHA District 7 Field Office

George M. Jackson has ten years of experience in the underground coal mining industry. (Tr. 124:23-125:3.) During his career he had been employed by Liggett Mining. (Tr. 164:8-9.) Jackson worked as a section electrician for two years. (Tr. 124:1-2.) Jackson is currently a certified electrician and obtained this certification prior to the 2008 inspection in question. (Tr. 124:3-22.) Additionally, after he joined MSHA in 2007, he received additional training on electricity and electrical examinations at the Beckley Mine Academy and through on-the-job training. Based on Jackson's familiarity with Liggett Mining and his specialized experience in the electrical field, I give significant weight to his testimony.

H. Credibility of Respondent's Witnesses

1. Jack Calloway, Superintendant, Liggett No. 3 Mine

Jack Calloway is the superintendant of the Liggett No. 3 mine and has held this position for three years. (Tr. 171:17-22.) Calloway has approximately 30 years of experience in the mining industry. (Tr. 171:9-11.) He holds several certifications, including Kentucky foreman certification and dust sampler certification. (Tr. 171:12-16.) Calloway is an experienced miner and demonstrates substantial knowledge on the general operation of Liggett No. 3. However, Calloway declined to give specific assessments on the condition of entry #2 and the cited roof bolter at issue. (Tr. 194:20-196:3.) I found this aspect of his testimony to be vague and guarded. As such, I give significant weight to Calloway's testimony on the general operating procedures at Liggett No. 3, but I do not give significant weight to his testimony on the specific conditions in the mine on the date of inspection.

2. Roger Baker, Maintenance Foreman, Virginia Fuels

Roger Baker is a Maintenance Foreman at Virginia Fuels, which provides maintenance services for Liggett Mining. (Tr. 197:18-19, 198:23-25.) Baker has approximately 33 years of experience in the mining industry and has held the position of Maintenance Foreman for 20 years. (Tr. 198:7-9, 198:18-20.) Liggett Mining was under his authority in 2008. (Tr. 198:23-25.) However, Baker was not present at the inspections in question at Liggett No. 5. (Tr. 214:11-21, 221:6-9.) Due to the candor and precision of his technical accounts, I give great weight to his testimony on the operation at Liggett No. 5, as well as the mechanics of the equipment in question. However, because Baker was not present at either inspection at Liggett No. 5, I give very little weight to his testimony regarding the conditions and events surrounding the specific citations at issue.

#### **IV. Principles of Law**

A. Strict Liability under the Mine Act

Under the Mine Act, operators are held to a strict standard of liability for violation of mandatory safety standards. *Spartan Mining Co.*, 30 FMSHRC 699, 706 (Aug. 2008) (citing *Asarco, Inc.*, 8 FMSHRC 1632, 1634-36 (Nov. 1986), *aff'd*, 868 F.2d 1195 (10th Cir. 1989)).

Thus, a mine operator is liable for violations under the Mine Act, regardless of its level of fault. *Id.*

B. Significant and Substantial

A violation is considered S&S “if, based on the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or an illness of a reasonably serious nature.” *Nat’l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981). However, the S&S designation does not require the violation to “be so grave as to constitute imminent danger” or “a condition that could reasonably be expected to cause death or serious physical harm before the condition is abated.” *Id.* at 828. To establish a violation is S&S, the Secretary must prove:

- (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard – that is, a measure of danger to safety – contributed to by the violation;
- (3) a reasonable likelihood that the hazard contributed to will result in an injury;
- and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

*Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984) (citing *Nat’l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981)); accord *Buck Creek Coal v. MSHA*, 52 F. 3d 133, 135 (7th Cir. 1995); see also *Austin Power, Inc. v. Sec’y of Labor*, 861 F.2d 99, 103 (5th Cir. 1988) (approving the *Mathies* criteria). The Commission has clarified its position on the third element of the *Mathies* test in that,

the third element of the *Mathies* formula “requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury.” *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1834, 1836 (Aug. 1984). We have emphasized that, in accordance with the language of section 104(d)(1), it is the *contribution* of a violation to the cause and effect of a hazard that must be significant and substantial. *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1866, 1868 (Aug. 1984) (emphasis in original).

*U.S. Steel Mining Co.*, 7 FMSHRC 1125, 1129 (Aug. 1985). Further, a determination that a violation is S&S must be made assuming normal mining operations. *Id.* at 1130.

C. Negligence

Under section 110(i) of the Mine Act, an Administrative Law Judge is required to consider the operator’s negligence in assessing a civil penalty. 30 U.S.C. § 820(i). Each of the Secretary’s mandatory standards carries with it an accompanying duty of care to avoid violations of the standard, and an operator’s failure to meet the appropriate duty if a violation occurs constitutes negligence. *A.H. Stone Co.*, 5 FMSHRC 13 (Jan. 1983).

#### D. Fair Notice

The Commission has stated that in civil penalty proceedings, considerations of due process prevent the enforcement of regulatory interpretations where such enforcement would validate an application of the regulation that fails to give fair notice of its requirements. *Wolf Run Mining Co.*, 32 FMSHRC 1669, 1682 (Dec. 2010). The Commission has further summarized the standard for fair notice as follows:

The Commission's test for notice under the Mine Act is "whether a reasonably prudent person familiar with the mining industry and the protective purposes of the standard would have recognized the specific prohibition or requirement of the standard." *Ideal Cement Co.*, 12 FMSHRC 2409, 2416 (Nov. 1990). In deciding whether a party had adequate notice of regulatory requirements, a wide variety of factors is relevant, including the text of a regulation, its placement in the overall regulatory scheme, its regulatory history, the consistency of the agency's enforcement, and whether MSHA has published notices informing the regulated community with ascertainable certainty of its interpretation of the standard in question.

*Id.* at 1682 (citations omitted).

#### E. Regulatory Interpretation

Substantial and broad deference is given to the Secretary's interpretation of her own regulations. *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994) (citations omitted). The Commission has explained the standard for deference to the Secretary's interpretation of her regulations as follows:

Where the language of a regulatory provision is clear, the terms of that provision must be enforced as they are written unless the regulator clearly intended the words to have a different meaning or unless such a meaning would lead to absurd results. *See Dyer v. United States*, 832 F.2d 1062, 1066 (9th Cir. 1987); *Utah Power & Light Co.*, 11 FMSHRC 1926, 1930 (Oct. 1989); *Consolidation Coal Co.*, 15 FMSHRC 1555, 1557 (Aug. 1993). If, however, a standard is ambiguous, courts have deferred to the Secretary's reasonable interpretation of the regulation. *See Energy West Mining Co. v. FMSHRC*, 40 F.3d 457, 463 (D.C. Cir. 1994); *accord Sec'y of Labor v. Western Fuels-Utah, Inc.*, 900 F.2d 318, 321 (D.C. Cir. 1990) ("agency's interpretation of its own regulation is 'of controlling weight unless it is plainly erroneous or inconsistent with the regulation'" (quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945))) (other citations omitted). The Secretary's interpretation of her regulations is reasonable where it is "logically consistent with the language of the regulation[s] and . . . serves a permissible regulatory function." *General Elec. Co. v. EPA*, 53 F.3d 1324, 1327 (D.C. Cir. 1995) (citations omitted). . . . Additionally, "a regulation must be interpreted so as to harmonize with and further and not to conflict with the

objective of the statute it implements.” *Emery Mining Corp. v. Sec’y of Labor*, 744 F.2d 1411, 1414 (10th Cir. 1984) (citation omitted).

*Lodestar Energy, Inc.*, 24 FMSHRC 689, 692 (July 2002).

## **V. Legal Analysis, Further Findings of Fact, and Conclusions of Law**

### **A. Citation No. 8317048**

#### **1. Violation**

The pertinent language in 30 C.F.R. § 72.630(b) sets forth the requirement that “dust collectors shall be maintained in permissible and operating condition.” The text of Citation No. 8317048 states that the Lee Norse twin-head return side bolting machine was not being maintained in either a permissible or operating condition. (Ex. G-1.) However, in presenting her case, the Secretary limits her allegations of violation to the operating condition of the machine and not to its permissible state. (Sec’y Br. 5.) Accordingly, my analysis shall only focus on whether the dust collection system on the Lee Norse twin-head return side bolting machine was in operating condition.

The plain use of the word “operating” is synonymous with “functional”, a word defined as “performing or able to perform its regular function.” *Webster’s Third New Int’l Dictionary* (Unabridged) 921, 1581 (2002). The regular function of the dust collection system is to absorb air contaminated with dust at the drill head, filter and contain the dust before it reaches the clean side of the system, and produce clean air on the return side of the machine. (Tr. 29-32.) The roof bolter in question was not able to perform these regular functions on the day of Fuson’s inspection. The machine emitted a visible dust cloud as Fuson approached heading #2 where it was located. (Tr. 24:18-20.) Furthermore, dust lined the entirety of the “clean side” of the system, from the lid of the dust box to the muffler from which air exited the system. (Tr. 39:2-15.) The presence of dust on the clean side of the machine indicated that the filter was being bypassed. (Tr. 42:16-20.) The weight of the evidence establishes that the dust collection system was not performing its regular function.

Respondent argues that despite these conditions it did not violate the Secretary’s mandatory safety standard because the cited machine was not engaged in production at the time of inspection; rather, the machine was undergoing maintenance to correct the problem. (Resp’t Br. 9.) No roof bolting had occurred in heading #2 that morning. (Tr. 173: 9-10.) However, this argument holds little weight given Fuson’s testimony that the amount of dust accumulated on the clean side of the machine indicated the roof bolter had been running for at least one full eight-hour shift or longer with a faulty dust collection system, exposing miners to the resulting hazard for the duration of the machine’s period of operation. (Tr. 49:9-18, 81:1-8.) Despite Calloway’s speculation as to the possible immediate sources of dust accumulation, I give great weight to the consistent and certain testimony of Inspector Fuson that the hazard existed for a minimum of one shift, particularly given that Respondent’s witness, Calloway, was unable to assess the duration of the condition or provide any persuasive indication that Fuson’s assessment was not accurate.



(Tr. 195:19-196:3.) Accordingly, I reject Respondent's argument, and determine that a violation of 30 C.F.R. § 72.630(b) did occur.

## 2. Gravity and S&S

As discussed above, the Secretary has established that a violation of a mandatory safety standard has occurred, satisfying the first element of the *Mathies* test. As to the remaining elements, both Fuson and Calloway testified that a haze of dust was present in the entry where the roof bolter was located. (Tr. 43:1-7, 177:13-16.) Fuson testified that he believed injury was likely to occur if the violation was allowed to persist. (Tr. 83:5-11). In testimony on a subsequent respirable dust citation in this matter, Wilhoit testified that injuries most commonly associated with excessive respirable dust exposure are permanently disabling conditions, such as silicosis and black lung disease. (Tr. 118:22-25.) These conditions deteriorate a miner's ability to breathe over a period of time. (Tr. 118:22-119:2.)

The testimony of Inspector Wilhoit is consistent with the Secretary's statements in the preamble to 30 C.F.R. § 72.630 as cited in *White Buck Coal Co.*, 30 FMSHRC 535, 542 (June 2008) (ALJ). (Sec'y Br. 6-7.) In explaining the need to protect miners from harmful respirable dust, the Secretary's preamble notes that, "the development of silicosis and pneumoconiosis among underground coal miners has been well documented, particularly among roof bolters." *Air Quality Standards for Abrasive Blasting and Drill Dust Control*, 59 Fed. Reg. 8318, 8322 (Feb. 18, 1994). In the same document, the Secretary provides a detailed description of the serious nature of such respiratory illness as follows:

Exposure to silica is a significant health hazard in abrasive blasting and in drilling. When workers inhale silica, the lungs react by developing fibrotic nodules and scarring around the trapped silica particles. This condition is known as silicosis and can result in respiratory difficulty and eventually death. Symptoms associated with silicosis include shortness of breath, fever, and cyanosis. Severe fungal or mycobacterial infections, such as tuberculosis, often cause complications and may be fatal. Dust-impaired macrophages can no longer function effectively in fighting disease by killing mycobacteria and other organisms.

*Id.* at 8319. Here, the violation exposed miners to the risk of increased dust inhalation. This hazard could result in respiratory illness of a serious nature. Accordingly, the second and fourth elements of the *Mathies* test are satisfied.

The third *Mathies* element remains at issue. Injury must be reasonably likely to occur due to the emitted dust for the violation to be S&S. Respondent argues that the violation cannot be S&S because evidence presented at trial demonstrates that visible dust was present for less than two minutes. (Resp't Br. 10.) However, I do not find ample evidence supporting this proposition or that it would be dispositive here. The extent of the hazard in question is not limited to the visible dust cloud observed by Fuson. Rather, it includes the build-up of dust in the clean air side of the roof bolting machine during previous shifts when air was flowing through that build-up of dust and out into the mine. As previously discussed, I find that the

evidence indicates the machine in question had been running for at least one full eight-hour shift, if not more, with a faulty dust collection system. (Tr. 49:9-18, 81:1-8.) Employees would have been exposed to the dust hazard for the duration that the machine was in operation. (Tr. 81:1-8.) For these reasons, I reject Respondent's assertion that the hazardous condition only existed two minutes.

Further, the Secretary's preamble to the final rule on air quality explains, "[d]uring abrasive blasting and drilling, there is the potential for extremely high exposures [to dust] in short periods of time to both the miners doing the abrasive blasting or drilling and to other miners in the immediate area." 59 Fed. Reg. at 8318. (See Sec'y Br. 6-7.) Even brief exposure can lead to injury. In this instance, the miners in the vicinity of the hazard were not wearing breathing protection. (Tr. 28:4-7.) Additionally, in the months prior to the inspection the roof bolting machine in question had been put on "designated area" status by MSHA as a protective health measure due to high levels of quartz in its dust samples. (Tr. 72:1-15.) Given the totality of the circumstances, injury was reasonably likely to occur as a result of the dust hazard. I determine that the third *Mathies* element is satisfied.

### 3. Negligence

The operator is required to perform a dust parameter check on the roof bolter before production begins if the section had been idle in the prior shift. 30 C.F.R. § 75.362(a)(2). During this check, the problems with the dust collection system should be detected and eliminated. (Tr. 48:14-18.) The shift began at 6:00 a.m. (Tr. 48:8-11.) The citation was issued at 7:30 a.m. (Tr. 48:12-13.) However, no production was yet underway in heading #2. (Tr. 178:13-16.) Respondent argues that because the morning shift had been preceded by an idle shift, the operator had not breached its duty to inspect yet. (Resp't Br. 4.) Nevertheless, the pre-shift examination is a minimum requirement, and the operator is required to make further inspection when necessary. 30 C.F.R. § 75.362(a)(2). Given the extent of the dust accumulation and its visible emission from the roof bolter, the operator should have been on notice of the condition well before the pre-shift examination.

Further, even if this maintenance was being performed as part of a pre-shift exam, the operator was still under a duty per its ventilation plan to conduct this maintenance downwind from miners in an area with good airflow. (Tr. 87:21-88:8.) The amount of dust in entry #2 upon Fuson's arrival indicates that the ventilation was inappropriate for this maintenance activity. (Tr. 88:4-6.) As these requirements for safe maintenance were in Liggett's ventilation plan, both the operator and its employees should have been on notice. Indeed, the manner of undertaking the machine's maintenance was in itself negligent.

The Secretary initially assessed that Liggett mining was moderately negligent, but in her post-hearing brief she asserts that Liggett is liable for high negligence. By the Secretary's definition, moderate negligence occurs when the operator knew or should have known of the violative condition or practice, but there are mitigating circumstances. 30 C.F.R. § 100.3(d) (Table X) (2008). High negligence is distinguished by the Secretary in that there are no mitigating circumstances. *Id.*

Here, the violation was discovered while the operator was acting to remedy the situation. Moreover, the filters on the roof bolter had been changed, and the lid of the dust box had been washed. (Tr. 37:24-38:8.) The operator's attempt to remedy the condition, albeit rather late, is a mitigating factor. Consequently, I conclude that Liggett Mining was moderately negligent in committing this violation.

#### 4. Civil Penalties

Section 110(i) of the Mine Act requires the Administrative Law Judge to consider six criteria in the assessment of a civil penalty: the operator's history of previous violations, the appropriateness of the penalty to the size of the operator's business, the operator's degree of negligence, the penalty's effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation. 30 U.S.C. § 820(i).

The Secretary originally proposed a penalty of \$3,689 for this violation. The parties have stipulated that Liggett Mining is a moderate sized operator. (Ex. J-1.) They have further stipulated that Liggett Mining's ability to remain in business will not be affected by the proposed penalty. (*Id.*) The operator was issued 16 citations for violations of 30 C.F.R. § 72.630(b) in the last 24 months. (Ex. G-11.) This history was properly weighted in the Secretary's original proposal, in accordance with 30 C.F.R. § 100.3(c). My determinations on negligence and gravity are consistent with the Secretary's originally proposed assessment. Additionally, the operator's swift abatement demonstrates a good faith effort to comply with the standard. In considering all the relevant factors, I hereby assess a civil penalty of \$3,689.

#### B. Citation No. 8317164

##### 1. The Violation

The pertinent language of 30 C.F.R. § 72.630(b) states,

[d]ust collectors shall be maintained in permissible and operating condition. Dust collectors approved under Part 33—Dust Collectors for use in Connection with Rock Drilling in Coal Mines of this title . . . are permissible dust collectors for the purpose of this section.

Under 30 C.F.R. § 33.11, dust collectors are required to bear an approval plate to indicate their permissible status. Additional precautions necessary for maintaining the unit in an approved condition may be added to the plate at MSHA's direction. 30 C.F.R. § 33.11(a).

The dust collection unit in question bore an approval plate that indicated MSHA required a minimum vacuum pressure of 15 Hg on the machine. (Tr. 99:2-19.) Wilhoit took a vacuum gauge reading at the drill pot on the left side of the drill head, which measured 11.5 Hg. (Tr. 100:17-101:13.) He subsequently issued a citation because the pressure at the drill pot was below 15 Hg. (Ex. G-6.)

Respondent argues it did not have fair notice that the vacuum pressure requirement was intended for the drill pot and not the relief valve.<sup>3</sup> (Resp't Br. 14.) The standard for fair notice is not actual notice, but rather whether a reasonably prudent person would have known the requirement of the standard. *Wolf Run*, 32 FMSHRC at 1682. As established during Wilhoit's testimony, the MSHA *Coal Mine Health Inspection Procedures Handbook*, Appendix E, clearly states that pressure readings can be taken at the drill pot. (Tr. 102:13-103:18; Ex. G-8.) No mention is made of the relief valve in the relevant section. This document is publicly accessible. A reasonably prudent operator would know and understand the enforcement procedures of MSHA to the extent they were disseminated in the public domain.

Respondent also argues that the standard only requires 15 Hg to be maintained under controlled conditions, emphasizing that the requirement only pertains to a dust collection unit when its dust box has been cleaned. (See Tr. 12:24-13:24.) Yet, no MSHA materials support this interpretation. Further, by Respondent's own admission, Liggett was aware this standard was not enforced under controlled conditions. (Tr. 13:14-24.) I do not find Respondent's interpretation of the standard persuasive.<sup>4</sup> Moreover, emptying the dust box is not a regular practice for MSHA inspectors taking vacuum pressure readings, and Respondent does not dispute that. (Tr. 13:14-24.) Therefore, I determine that Respondent had fair notice of the requirements of the standard under the Secretary's interpretation.

Liggett Mining was required to maintain 15 Hg at the drill pot at all times. It failed to do so in violation of 30 C.F.R. § 72.630(b).

## 2. Gravity and S&S

Liggett Mining has violated 30 C.F.R. § 72.630(b), satisfying the first *Mathies* element. Analysis of the second and fourth *Mathies* elements for this violation is the same as for the violation of this standard at the Liggett No. 3 mine. See analysis *supra* Part V.A.2. Failure to maintain the dust collection system on a roof bolter in accordance with the standard creates a discrete safety hazard in increasing miners' exposure to respirable dust. (Tr. 106:21-107:3.) If injury does occur as result of this exposure, it is reasonably likely to take the form of a serious respiratory condition, such as silicosis or black lung disease, both of which are likely to have permanently disabling effects. (Tr. 107:10-25.) Thus, I determine that the violation contributed to a discrete safety hazard, and that there is a reasonable likelihood that injury resulting from that hazard would be of a serious nature, satisfying the second and fourth *Mathies* elements.

In order for the third *Mathies* element to be satisfied, injury must be reasonably likely to occur as a result of a hazard contributed to by the violation. The roof bolter operator stands

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<sup>3</sup> The minimum relief valve pressure is 15 Hg, per the manufacturer's specifications. (Ex. R-2.)

<sup>4</sup> Respondent essentially argues that the standard should be changed so it only applies under controlled conditions. I decline Respondent's invitation to do so, as this issue is outside the scope of my authority.

directly beside the drill pot during the course of normal mining operations. (Tr. 104:13-19.) As he stands there, dust is generated when the drill pierces the mine roof. (Tr. 104:20-22.) If the vacuum pressure continues to operate at 11.5 Hg, the operator will inhale an excess amount of dust. (Tr. 105:18-22.) This exposure to the excess dust can lead to permanently disabling respiratory illness. (Tr. 105:20-24.) I do not find persuasive Respondent's argument that, in the absence of visual dust, this violation cannot satisfy the *Mathies* test. (Resp't Br. 19.) As Inspector Wilhoit testified, when the vacuum pressure on the roof bolting machine is not maintained at the appropriate level, less dust will go through the dust collection system. (Tr. 105:1-6.) As a result, more dust will remain suspended in the air. (Tr. 105:4-6.) Given the vacuum pressure was functioning at almost 25 percent below the minimum standard, and the operator's close proximity to the origin of the dust, I determine it is reasonably likely that the operator would be exposed to excess dust for at least a brief amount of time during the course of normal mining operation. See *Genwal Res. Inc.*, 27 FMSHRC 580, 589 (Aug. 2005) (ALJ) (persuasive authority finding that the presumption of exposure to respirable dust without a dust sample was reasonable under the facts). As previously discussed, even brief exposure to excess respirable dust can reasonably lead to injury. The third *Mathies* element is satisfied. Consequently, I determine that this violation of 30 C.F.R. § 72.630(b) was S&S.

### 3. Negligence

Respondent was aware that not routinely maintaining a clean dust box would decrease the vacuum pressure on the roof bolter. (Tr. 205:20-24.) The 15 Hg requirement is a minimum standard. The pressure on the unit after the condition was abated rose to 19.5 Hg. (Ex. G-6.) Given the important function of the dust collection system in maintaining a safe work environment, the operator should have provided for adequate cleaning of the dust collection system as needed to prevent the pressure from falling below minimum standards. However, because there was no easily visible dust cloud or direct testimony of the operator's knowledge of this condition, the operator's actions do not rise to the level of high negligence in these circumstances. Therefore, I determine that Liggett Mining acted with moderate negligence.

### 4. Civil Penalty

The Secretary has proposed a civil penalty of \$1,203. The parties have stipulated that Liggett Mining is a moderate sized operator and that its ability to remain in business will not be affected by the proposed penalty. (Ex. J-1.) My determination of moderate negligence is consistent with the Secretary's original proposal. I also find that injury was reasonably likely to occur as a result of this violation. The operator's abatement demonstrates a good faith effort to comply with the standard. Accordingly, I hereby assess a civil penalty of \$1,203.

## C. Citation No. 8329466

### 1. The Violation

The Secretary alleges that Liggett mining violated 30 C.F.R. § 75.903 by failing to have a disconnecting device attached to the power cable on a welder that was visibly disconnected from

the power source. The standard requires that, “[d]isconnecting devices shall be installed in conjunction with the circuit breaker to provide visual evidence that the power is disconnected.” 30 C.F.R. § 75.903. Under this standard, a disconnecting device should be attached to the welder. (Tr. 130:7-10.) The operator was aware that the Secretary enforces the standard to apply to idle welders not connected to a power source. (Tr. 212:19-213:2.) Therefore, I do not find that a novel issue of regulatory interpretation arises under these facts.<sup>5</sup>

Further, the testimony of Respondent’s witness on the previous enforcement of this standard indicates Respondent had fair notice of the requirements under the Secretary’s interpretation.

Respondent admits no cathead was attached to the welder in question. Given these facts, I determine this constitutes a violation of 30 C.F.R. § 75.903.

## 2. Gravity and S&S

An established violation of 30 C.F.R. § 75.903 satisfies the first *Mathies* element. The absence of a cathead contributes to a discrete safety hazard in creating an increased risk of electrocution. (Tr. 132-134.) Electrocution by the 480-volt welder in question is reasonably likely to lead to cardiac arrest, if not death. (Tr. 144:24-145:22.) Thus, the second and fourth *Mathies* elements are satisfied. However, injury as a result of this violation is predicated on electricity being conducted through the welder and its lead wires. When Jackson found the welder, it was not connected to a power source. The end of the power cable was 5 feet away from the power center. (Tr. 137:5-8.) The condition of the welder cables could have resulted from the machine being used without a cathead. (Tr. 130:17-131:12.) However, equally credible testimony was given by Baker that the condition of the leads can be explained by the

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<sup>5</sup> Yet, if there were an issue of regulatory ambiguity, the Secretary’s interpretation would nonetheless meet the standard for deference set forth in *Lodestar Energy*. The inquiry is whether the Secretary’s interpretation is consistent with the regulation and not clearly erroneous or impermissible. I find no indication that the Secretary’s interpretation is clearly erroneous or impermissible. Further, the Secretary’s interpretation is not inconsistent with the language of the regulation; rather, it advances the regulation’s objective. The consequence of the Secretary’s interpretation is that catheads would be required on welders at all times. Interestingly, this is already the dominant policy at Liggett Mining. (Tr. 211:6-11.) Additionally, the relevant section of MSHA’s *Program Policy Manual* (“PPM”) states that, “[d]isconnecting devices shall be plainly marked for identification to reduce the chance of energizing a cable while repairs are being made on the cable.” V MSHA, U.S. Dep’t of Labor, *Program Policy Manual*, Part 75, at 85 (2003). Respondent argues the standard was not violated because there was visual evidence the power was disconnected. (Resp’t Br. 16.) However, the language of the PPM indicates the purpose of the standard is also to prevent miners from accidentally energizing a cable by clearly marking points of contact where power would be conducted. The unraveled state of the power lead and other leads of the welder cited would not put a miner on specific notice of this. Thus, I reject Respondent’s argument that the standard is satisfied by providing any form of visual evidence that the power is disconnected.

process of fitting the leads to go into an incorrectly sized cathead. (Tr. 221:23-223:6.) Additionally, the ground wires may have legitimately been split to facilitate the use of a wireless ground monitor system. (Tr. 223:13-22.) Thus, I do not find sufficient evidence to establish that the welder was in use without a cathead. Further, the welder is not an item continuously needed during the production shift, as it is only utilized to make miscellaneous repairs. (Tr. 138:8-13.) It is more frequently utilized during the maintenance shift which followed directly after the shift of the inspection. (Tr. 138:6-10, 152:7-13.) Two hours remained in the production shift at the time of the citation. (Tr. 152:2-13.) Under normal mining conditions, there is no indication that the welder in question would have been needed for immediate use or that it would have been used in the condition it was found, i.e., without a cathead. Nor was there any evidence this was the only welder available. I determine it is unlikely that this welder would have been used in the course of normal mining operations, and I determine that injury as a result of the violation was unlikely to occur. Therefore, I conclude this violation does not meet the third *Mathies* element, and is not S&S.

### 3. Negligence

The welder in question was lying in a wet area of the mine with exposed cables, and without a disconnecting device. (Tr. 146:19-22, 130:14-15, 129:4-5.) Use of the welder in this violative condition could have led to fatal injury. (Tr. 144:24-145:22.) Historically, the welder has been used in this dangerous manner. (Tr. 164:6-11.) Employees have some interest in continuing this practice, as it saves time and facilitates use of equipment that is far from the power center. (Tr. 142.) Given these factors, a reasonably prudent operator charged with the safety of his employees should have trained and supervised the miners to tag out a welder if its cathead had been removed. However, the welder was not tagged out. (Tr. 137:2-8.) It remained in a busy area of the mine, available for use. (Tr. 137:8-138:5.) Yet no persuasive testimony was given that the miners were using the welder at the time of the inspection. Accordingly, I find the operator acted with moderate negligence.

### 4. Civil Penalty

The Secretary originally proposed a civil penalty of \$2,282. The parties have stipulated that Liggett Mining's ability to remain in business will not be affected by the proposed penalty. (Ex. J-1.) The operator has been cited twice in the last 24 months for violation of the same standard. (Ex. G-11.) This history was properly considered in the Secretary's original proposal in accordance with 30 C.F.R. § 100.3(c). Although my finding of moderate negligence is consistent with the Secretary's original proposal, I have determined that injury is unlikely to occur, so a reduction in the Secretary's proposed penalty is merited. Furthermore, the operator's subsequent actions demonstrate a good faith effort to comply with the standard. Accordingly, I hereby assess a civil penalty of \$700.

## **VI. ORDER**

In light of the foregoing, it is hereby **ORDERED** that Citation Nos. 8317048 and 8317164 are **AFFIRMED**.

Within 40 days of this decision, the Secretary is **ORDERED** to **MODIFY** Citation No. 8329466 by marking that injury is “unlikely” and striking its designation as S&S.

Also within 40 days of this decision, Liggett Mining is **ORDERED** to pay a civil penalty of \$5,592.

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



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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**  
601 NEW JERSEY AVENUE N. W., SUITE 9500  
WASHINGTON, D.C. 20001

July 28, 2011

AMERICAN COAL COMPANY, Contestant	:	CONTEST PROCEEDINGS
	:	
	:	Docket No. LAKE 2008-172-R
v.	:	Order No. 6673874; 01/24/2008
	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION, (MSHA), Respondent	:	Docket No. LAKE 2008-173-R
	:	Order No. 6673876; 01/24/2008
	:	
	:	Galatia Mine 11-02752
	:	
	:	
	:	CIVIL PENALTY PROCEEDINGS
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION, (MSHA), Petitioner	:	Docket No. LAKE 2009-6
	:	A.C. No. 11-02752-162890-01
	:	
	:	Docket No. LAKE 2009-54
v.	:	A.C. No. 11-02752-165816-01
	:	
	:	Docket No. LAKE 2009-55
AMERICAN COAL COMPANY, Respondent	:	A.C. No. 11-02752-165816-02
	:	
	:	Docket No. LAKE 2009-56
	:	A.C. No. 11-02752-165816-03
	:	
	:	Mine: Galatia Mine

Appearances: Karen Wilczynski, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado on behalf of the Petitioner;  
Jason W. Hardin, Esq., and Mark Kittrell, Esq., Fabian & Clendenin, Salt Lake City, Utah on behalf of the Respondent

**DECISION**

Before: Judge Melick

These cases are before me upon petitions for assessment of civil penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977 (the Act). During hearings on April 12, 2011 and April 13, 2011 in Evansville, Indiana, the parties reached a settlement agreement as to all pending charging documents. The agreement was supplemented post-hearing. The Secretary's rationale set forth in the supplemental motion is incorporated herein by reference. The Respondent has agreed to pay a reduced overall penalty of \$163,516.00. In explaining the reduced penalties the Secretary has indicated that, in essence, upon further evaluation, she finds that there is insufficient evidence to sustain her original charges. The Secretary has also vacated Citation Number 6617943. I have considered the representations and documentation submitted in

these cases, and I conclude that the proffered settlement is acceptable under the criteria set forth in section 110(i) of the Act.

### ORDER

**WHEREFORE**, the motion for approval of settlement is **GRANTED**, and it is **ORDERED** that Respondent pay a penalty of \$163,516.00, within 40 days of this order.<sup>1</sup> Contest Proceedings Docket Nos. LAKE 2008-172-R and LAKE 2008-173-R are now moot and are therefore dismissed.

/s/ Gary Melick  
Gary Melick  
Administrative Law Judge  
202-434-9977

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/to

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<sup>1</sup> 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  
601 New Jersey Avenue, N.W., Suite 9500  
Washington, D.C. 20001

July 8, 2011

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 2008-562
Petitioner	:	A.C. No. 15-18861-137278
v.	:	
	:	Docket No. KENT 2008-782
CONSHOR MINING, LLC,	:	A.C. No. 15-18861-143281
Respondent	:	
	:	Mine No. 1

## **ORDER**

The captioned civil penalty proceedings concern 104(d)(2) Order Nos. 7502867 and 7502879 in Docket No. KENT 2008-562 issued in May 2007, and 104(d)(2) Order No. 7503222 in Docket No. KENT 2008-782 issued in June 2007. All three of the subject orders allege violations of the mandatory standard in section 75.220(a)(1) that requires a mine operator to follow its approved roof control plan. 30 C.F.R. § 75.220(a)(1). However, all three of the cited violative conditions concern different provisions of Conshor Mining, LLC's ("Conshor's") roof control plan.

### **I. Background**

Section 110(b)(2) of the Mine Improvement and New Emergency Response Act of 2006 ("New Miner Act") provides for enhanced penalties for flagrant violations. 30 U.S.C. § 820(b)(2). The Secretary alleges the subject roof control violations are "repeated" flagrant violations as contemplated by section 110(b)(2) of the New Miner Act. Section 110(b)(2) provides:

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

30 U.S.C. § 820(b)(2). (Emphasis added).

The Secretary seeks to impose civil penalties of \$94,900 for Order No. 7502867; \$110,900 for Order No. 7502879; and, \$122,200 for Order No. 7503222 pursuant to section 100.5(e) of the Secretary's rules governing her procedures for assessment of proposed penalties. 30 C.F.R. § 100.5(e). The language of section 100.5(e), adopted as initially proposed through a notice and comment rulemaking, essentially repeats the statutory provisions of section 110(b)(2) of the New Miner Act. 72 Fed. Reg. 13592 (Mar. 22, 2007). Specifically, newly adopted section 100.5(e) states:

Violations that are deemed to be flagrant under section 110(b)(2) of the Mine Act may be assessed a civil penalty of not more than \$220,000. For purposes of this section, a flagrant 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."

72 Fed. Reg. at 13646. (Emphasis added).

As a matter of policy, the Secretary relies on two prior unwarrantable violations of the same mandatory standard within 15 months as the basis for a repeated flagrant violation. This criteria for a repeated flagrant violation was initially adopted by the Mine Safety and Health Administration (MSHA) in Procedure Instruction Letter ("PIL") No. 106-111-04 (Oct. 26, 2006). However, this "repeated violation" criteria may not have been promulgated in accordance with section 553 of the Administrative Procedure Act ("APA") as the PIL criteria was not explicitly delineated in the proposed provisions of the new rule. 5 U.S.C. § 553.

Consistent with MSHA's PIL criteria, the subject violations are alleged to be repeated flagrant violations based on two final unwarrantable violations of different roof control provisions that occurred within 15 months of the subject orders in these proceedings. Order No. 6663986 was issued on March 19, 2007, and Order No. 7551844 was issued on April 10, 2007. Predicate 104(d) Order Nos. 6663986 and 7551844 cited violations of the mandatory standard for roof control plans in section 75.220. While Order No. 7551844 cited a violation of 75.220(a)(1) that requires a mine operator to follow its approved roof control plan, Order No. 6663986 cited a generic violation of 75.220 without citing a subsection of the mandatory standard. Conshor stipulated that Order No. 6663986 should be construed as citing a violation of 75.220(a)(1).<sup>1</sup>

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<sup>1</sup> Although Order Nos. 6663986 and 7551844 cite violations of different provisions of Conshor's roof control plan, the Secretary asserts that Conshor's general failure to adhere to its roof control plan as required by 75.220(a)(1) constitutes violations of the same mandatory standard.



## II. Procedural History

MSHA issued a notice seeking public comment on its proposed rule in section 100.5(e) that would serve as the basis for proposing enhanced civil penalties under the “flagrant” violation provisions of section 110(b)(2) of the New Miner Act. 71 Fed. Reg. 53054 (Sept. 2006).

The comment period closed on November 9, 2006. 71 Fed. Reg. 62572 (Oct. 2006). However, as previously noted, the proposed section 100.5(e) merely repeated section 110(b)(2) of the New Miner Act and did not articulate MSHA’s interpretation of the statutory provision with respect to a repeated failure to eliminate a known violation.

On October 26, 2006, MSHA issued Procedure Instruction Letter (“PIL”) No. 106-111-04 setting forth its procedures for evaluating flagrant violations.<sup>2</sup> The PIL noted its purpose was to:

establish uniform procedures for Coal and Metal and Nonmetal Mine Safety and Health enforcement personnel to properly evaluate flagrant violations of mandatory safety and health standards as provided in the Mine Improvement and New Emergency Response Act of 2006 (MINER Act).

The PIL outlines the requirements for a violation to be designated as flagrant based on a mine operator’s “repeated failure to make reasonable efforts to eliminate a known violation.” The requirements are:

1. Citation or order is evaluated as significant and substantial,
2. Injury or illness is evaluated as at least permanently disabling,
3. Type of action is evaluated as an unwarrantable failure, and
4. *At least two prior “unwarrantable failure” violations of the same safety or health standard have been cited within the past 15 months.*

PIL No. 106-111-04 (emphasis added).<sup>3</sup>

On March 22, 2007, MSHA issued a final rulemaking regarding the criteria and procedures for its proposed assessment of civil penalties in 30 C.F.R. Part 100. 72 Fed. Reg. 13592. Consistent with the prior notice seeking public comment, the final provisions of section 100.5(e) retained the statutory language in section 110(b)(2) of the New Miner Act without any reference to prior violations within a 15 month period, as the basis for a “repeated” flagrant violation. *Id.* at 13622.

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<sup>2</sup> PIL No. 106-111-04 apparently was issued prior to the close of the November 9, 2006, comment period for proposed rule 100.5(e).

<sup>3</sup> PIL No. 106-111-04 was followed by PIL No. 108-111-02 issued on May 29, 2008, which repeated the same criteria initially established by MSHA for a “repeated” flagrant violation.

At issue is the validity of the flagrant violation criteria adopted in MSHA's PILs. Generally, MSHA's enforcement guidelines and policy memoranda are not binding on the Commission. *Sec'y of Labor v. D. H. Blattner & Sons*, 18 FMSHRC 1580, 1586 (Sept. 1996) citing *King Knob Coal Company*, 3 FMSHRC 1417, 1420 (June 1981). Rather, the Commission possesses subject matter jurisdiction under the Act and Commission precedent to consider the validity of MSHA policy memoranda in civil penalty contests. *Drummond Company, Inc.*, 14 FMSHRC 661, 677-78 (May 1992).

In *Drummond*, the Commission declined to accord legal weight to Program Policy Letter ("PPL") No. P90-III-4 (May 1990) that applied the Secretary's civil penalty regulations in 30 C.F.R. Part 100 to an interim "excessive history" program. *Id.* at 661. The PPL was not given effect because it was not promulgated in accordance with the notice and comment provisions of section 553 of the APA. *Id.* at 682; *see also King Knob* at 3 FMSHRC at 1420-21.

### III. Issues

#### A. APA Compliance

In view of the Commission's subject matter jurisdiction, articulated in *Drummond*, the parties should address the following:

"A rule which is subject to the APA's procedural requirements, but was adopted without them, is invalid." *United States v. Picciotto*, 875 F.2d 345, 346 (D.C. Cir. 1989) citing *Chamber of Commerce v. OSHA*, 636 F.2d 464, 470-71 (D.C. Cir. 1980). Section 553 of the APA requires agencies to provide a notice of proposed rulemaking and an opportunity for public comment prior to the rule's promulgation. Section 553(b)(3)(A) provides that the notice and comment requirements do not apply to "interpretive rules, general statements of policy, or rules of agency organization, procedure or practice." Specifically, the parties should address:

- (1) Whether the standard for a "repeated" flagrant violation, articulated in MSHA's PIL Nos. 106-111-04 and 108-111-02 is an interpretive rule, or, a substantive rule that must be adopted in accordance with section 553 of the APA.
- (2) Assuming MSHA's PIL standard is a substantive rule, the parties should address whether the criteria was adopted in accordance with the provisions of section 553 of the APA. The parties should also address the significance of the absence of MSHA's PIL standard for a "repeated" flagrant violation in proposed rule 100.5(e) in light of section 553 of the APA.

(3) The Mine Act authorizes the Secretary to promulgate rules in accordance with section 553 of the APA, unless there are other permissible means of promulgating rules, as manifest by congressional intent. 30 U.S.C. § 811(a); *U.S. v. Mead*, 533 U.S. 218, 225 (2001). The parties should address whether the legislative history of the New Miner Act authorizes the Secretary to promulgate criteria for implementing the flagrant provisions of 110(b)(2) without regard to the notice and comment provisions of section 553 of the APA.

#### B. Deference

Assuming adoption of the PIL criteria does not contravene the notice and comment provisions of section 553 of the APA, the parties should address:

(1) Given the vagueness of the term “repeated failure” in section 110(b)(2), the parties should analyze whether the PIL criteria is a reasonable interpretation of the flagrant violation provisions. Specifically, the parties should address the apparently arbitrary choice of two unwarrantable violations of the same safety or health standard during the previous 15 month period on the issue of deference. The parties should address whether the *Chevron* “step two” reasonable interpretation test articulated in *Chevron, U.S.A., Inc., v. Natural Res. Def. Council*, 467 U.S. 837 (1984), or, the lesser *Mead* “respect according to its persuasiveness” deference standard for agency policy pronouncements should apply.

(2) The parties should address whether the “repeated failure” provision in section 110(b)(2) refers to a history of similar violations, or, a failure to correct a known violation over a significant period of time, such as an uncorrected violative condition repeatedly noted in examination books.

(3) The parties should address the significance, if any, of the absence of a specific statutory timeline to support enhanced civil penalties for a repeated flagrant violation in 110(b)(2), as compared to the specific timeline for unwarrantable withdrawal orders provided in 30 U.S.C. § 814(d) on the questions of reasonable interpretation and legislative intent.

(4) Assuming the reasonableness of *two prior unwarrantable violations of the same mandatory standard within the past 15 months* as the basis for a repeated flagrant violation, is it reasonable to consider violations of different provisions of a roof control plan to be “violations of the same safety or health standard?”

## **ORDER**

**IT IS ORDERED** that the parties should file their responses within 30 days from the date of this Order. The parties should provide case law, regulatory provisions, and legislative history to support their positions. The parties may provide any relevant additional arguments outside the parameters of the above questions, as they deem necessary. **IT IS FURTHER ORDERED** that the parties shall have 14 days for replies.

/s/ Jerold Feldman  
Jerold Feldman  
Administrative Law Judge

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July 18, 2011

ROAD FORK DEVELOPMENT COMPANY, INC.,	:	CONTEST PROCEEDINGS
Contestant	:	
v.	:	Docket No. KENT 2009-1523-R
	:	Citation No. 8226728; 08/26/2009
SECRETARY OF LABOR	:	
MINE SAFETY AND HEALTH	:	Docket No. KENT 2009-1524-R
ADMINISTRATION (MSHA),	:	Citation No. 8226729; 08/26/2009
Respondent	:	
SECRETARY OF LABOR	:	
MINE SAFETY AND HEALTH	:	CIVIL PENALTY PROCEEDINGS
ADMINISTRATION (MSHA),	:	
Petitioner	:	Docket No. KENT 2010-69 (settled)
v.	:	A.C. No. 15-09830-197537
	:	
	:	Docket No. KENT 2010-196 (settled)
	:	A.C. No. 15-19269-200650
ROAD FORK DEVELOPMENT	:	
COMPANY, INC.,	:	Docket No. KENT 2010-384
Respondent	:	A.C. No. 15-19270-205018
	:	
	:	Docket No. KENT 2010-577
	:	A.C. No. 15-19270-209618
	:	
	:	Mine: Love Branch South

**ORDER DENYING SECRETARY'S MOTION FOR EXTENSION OF TIME TO FILE  
ASSESSMENT FOR CIVIL PENALTY PETITION FOR ALLEGED VIOLATIONS OF  
SECTION 110(c) RELATED TO DOCKET NO. KENT 2010-577**

**ORDER DENYING RESPONDENT'S MOTION FOR RECONSIDERATION OF  
CONTINUANCE OF HEARING SET FOR AUGUST 2, 2011 AND CONTINUING  
DATES THEREAFTER**

**ORDER EXPRESSLY LIFTING PRIOR STAYS**

The above-captioned dockets concern events that occurred back *in August 2009*. These dockets were originally set for Calendar Call on April 18, 2011.

On February 18, 2011, the parties in Docket No. KENT 2010-577 filed a joint motion requesting a 90-day stay of the proceedings in that docket based on the fact that there was a pending 110(c) investigation related to the 104(d)(1) unwarrantable failure Order in that docket. I convened a conference call to discuss the matter and requested that the Secretary's counsel in Docket No. KENT 2010-577, Ms. Jennifer Booth, provide a status update as to the 110(c)

investigation by April 18, 2011. Thereafter, by Order dated March 9, 2011, I granted a 90-day stay in Docket No. KENT 2010-577 until May 19, 2011.

On March 30, 2011, Ms. Booth wrote my clerk the following e-mail, with copy to Respondent's counsel, Ms. Sarah Korwan and Ms. Carol Marunich, and counsel for the alleged agent in the pending 110(c) investigation, Mr. David Hardy:

"This is to confirm that Road Fork Kent 1010-577 docket will not be handled in the conference call scheduled for 4-18 at 1pm est. This docket has an 110c investigation pending. I will let you know when the 110c investigation is coming to an end and the conference call will be rescheduled."

Thereafter, my clerk informed Ms. Booth that Docket No. KENT 2010-577 would indeed be discussed in the Calendar Call conference scheduled for April 18, 2011. Thus, on April 18, 2011, the Calendar Call conference was held on the above-captioned dockets. Ms. Booth, the Secretary's counsel in Docket No. KENT 2010-577, indicated that the 110(c) investigation *had been dropped*. Ms. Motsenbocker, the Secretary's counsel in the remaining dockets, informed the Court that Docket No. KENT 2010-69 and Docket No. KENT 2010-196 were close to settling. The Court was informed that the parties were still negotiating Dockets No. KENT 2010-384 and Docket No. KENT 2010-577, which were somewhat related based on overlapping electrical issues. Depositions were scheduled for early May 2011.

*On April 19, 2011, Ms. Booth confirmed in an email to the Court with copy to counsel for the Respondent and counsel for the alleged 110(c) agent that MSHA was no longer pursuing any 110(c) violations in Docket No. KENT 2010-577.* On April 20, 2011, I issued a Notice of Hearing setting all of the above-captioned matters for hearing on May 24, 2011 in Pikeville, Kentucky. On April 22, 2011, another conference call was held to discuss issues involving the upcoming hearing scheduled for May 24, 2011.

On May 2, 2011, counsel for Respondent, requested a conference call and a continuance of the hearing scheduled for May 24, 2011, after being informed by the Secretary that new information had come to light and that *MSHA had now decided to reverse course and once again pursue the 110(c) investigation related to Docket No. KENT 2010-577*. Counsel for Respondent also requested that the depositions be postponed in light of this new development. I convened a conference call on May 2, 2011 and included counsel for Mr. Smith, the alleged agent in the pending 110(c) investigation.

During the May 2, 2001 conference call, I discussed with the parties the fact that I was inclined to issue an Order to Show Cause why the Section 110(c) proceeding should not be dismissed for failure to prosecute in a timely manner. I was eventually persuaded by counsel for the Secretary's argument that such action would be premature as no Petition for Assessment of Civil Penalty had yet issued in the 110(c) matter. I expressed my concern, however, that the events being investigated occurred in August 2009 and that MSHA has had ample time in my view to complete its investigation and issue its Petition consistent with the liberal 18-month guideline in the Program Policy Manual. I further expressed my opinion that MSHA's routine requests for stays during dilatory investigations of 110(c) cases stymies the expeditious processing of related cases that would otherwise not become part of the Commission's backlog.

At the conclusion of the call, however, I was persuaded by the Secretary's arguments that given the current status of the case, the most prudent course of conduct would be to continue the

stay until May 23, 2011, the date that the Secretary indicated would be sufficient to permit issuance of the Petition. Depositions scheduled for early May were postponed by the parties. Consistent with Commission Rule 10, the Solicitor made an oral motion to extend the stay of Docket No. KENT 2010-577 until May 23, 2011 in order to allow MSHA time to issue its 110(c) Petition. During the call, Mr. Hardy, as counsel for the 110(c) agent, indicated that he would contest any proposed penalty assessment against his client and file an appropriate pleading once the Petition in the 110(c) case issued, and he requested that the Court order MSHA to issue its Petition by May 23, 2001. The parties discussed a new hearing date for these consolidated matters and a new hearing was scheduled for August 2, 2011 and consecutive days thereafter in Pikeville, Kentucky.

On May 6, 2011, I issued an Order Granting [second] Stay and Notice of Hearing until May 23, 2011, the Secretary's self-imposed deadline for issuing the Petition. Having duly considered the arguments raised by the parties during the conference call, I determined that I was without authority to Order MSHA to issue its petition in the 110(c) matter by May 23, 2011, but indicated that I would not look kindly on any Petition filed after said date. Accordingly, I ordered that Docket No. KENT 2010-577 be stayed a second time *until May 23, 2011*. *My order further indicated that no further requests for stay would be granted.* Further, in accordance with Section 105(d) of the Federal Mine Safety and Health Act of 1977, the "Act," 30 U.S.C. §801, *et seq.*, I ordered that the above-captioned matters and any 110(c) Petition, if viable, would be heard on **Tuesday, August 2, 2011**, and continuing dates after until completed at 8:30 a.m. E.S.T. in Pikeville, Kentucky.

Road Fork and the Secretary filed pre-hearing statements in Docket No. KENT 2010-384 on May 10, 2011. Docket No. KENT 2010-69 and Docket No. KENT 2010-196 settled and my Decisions Approving Settlement issued on or about June 1, 2011 and have become final Orders of the Commission.

On May 23, 2011, notwithstanding my May 6, 2011 Order granting a second and final stay in Docket No. KENT 2010-577, Ms. Booth, on behalf of the Secretary, filed a Motion for Extension of Time to File Assessment for Civil Penalty Petition in the 110(c) matter related to Docket No. KENT 2010-577. The Secretary alleged that Mr. Smith, the intended recipient of the 110(c) petition, was unavailable to accept attempted service of the assessment of civil money penalty by Federal Express package on May 17 and 18, 2011; that Mr. Smith has 30 days to contest the proposed penalty assessment under Commission Rule 25; and that until Mr. Smith contests the proposed penalty assessment, a petition is untimely. The Secretary's motion acknowledged, however, that during the May 2 conference call, counsel Hardy stated that Mr. Smith would contest the proposed penalty assessment, and therefore the Secretary assumed that Mr. Smith would contest the proposed penalty assessment before the 30-day deadline provided for in the Commission's rules. Accordingly, the Secretary's motion sought some unspecified amount of "more time to file the petition" based on the argument that "Mr. Smith's case has not been prejudiced by the small time delay and there is no reason that the case could not be heard on August 2<sup>nd</sup> as per the May 6, 2011 Notice of Hearing and Order to File Pre-Hearing Report."

On July 11, 2011, the Secretary finally filed its 110(c) petition, nearly two years after the events in August 2009.

A conference call was held with all parties on July 14, 2011. During the conference call, the Court denied the Secretary's Motion for Extension of Time to File Assessment for Civil Penalty Petition in the 110(c) matter, and accordingly deemed the 110(c) petition to be untimely. The Secretary indicated that she intended to appeal such Order to the Commission and the Court

indicated that its written order would follow. In addition, counsel for Respondent Road Fork made an oral motion for a continuance of the August 2 hearing claiming that it had insufficient time to develop its case for hearing since the prior stay. The Court denied Road Fork's motion for continuance of the hearing and indicated that the hearing would take place as originally scheduled on August 2, 2011.

On July 14, 2011, Road Fork filed separate Pre-hearing Statements, with attached exhibits, for Docket No. KENT 2010-384 and Docket No. KENT 2010-577.

On July 15, 2011, counsel for Road Fork filed a Motion for Reconsideration of Continuance of Hearing. In its motion for reconsideration, counsel argues that because the Secretary failed to timely file its Petition, counsel was under the opinion that this case was still under the prior stay. Counsel further argues that the "operator is without fault on any delay in the filing of the special investigation and in fact, was duped by the Secretary when she indicated in April that she was not going to pursue the special investigation and surprised by the Secretary's decision in May that they were going to pursue the special investigation." Counsel requests "reconsideration of this Court's denial of a continuance of the hearing inasmuch as its client, Road Fork, will be materially prejudiced since it has not had sufficient time to develop its case pending the prior stay of the case, as the parties had been waiting for MSHA to proceed on its 110(c) petition, actions all outside the control of the operator but which now materially prejudices the presentation of the company case." In addition, counsel asserts that Road Fork is unable to fully prepare its case in this matter without the testimony of Mr. Smith, the subject of the 110(c) Petition, and requests that this Court postpone the hearing until the time has run on the Secretary's appeal of the decision to dismiss the 110(c) case decided on July 14, 2011. Counsel for Road Fork further asserts that "[i]f the Secretary fails to appeal or if the Commission denies any such appeal, then Mr. Smith can testify for the company and that prejudice is gone." Additionally, Road Fork requested a written Order from the Court so it can fully exercise its option of filing an interlocutory appeal of this matter.

On July 18, 2011, Road Fork filed a new Pre-Hearing Statement for Docket Nos. KENT 2010-384 and KENT 2010-577. Although the Secretary has already filed a Pre-Hearing Statement in Docket No. KENT 2010-384, the Secretary apparently has not yet filed a Pre-Hearing Statement in Docket No. KENT 2010-577 and should do so forthwith.

Having duly considered the positions of the parties, this Court reaffirms its July 14, 2011 oral Order during conference call denying the Secretary's Motion for Extension of Time to File Assessment for Civil Penalty Petition in the 110(c) matter related to Docket No. KENT 2010-577. The Secretary, in her Motion, does not adequately explain why Mr. Smith, the intended recipient of the 110(c) petition, was unavailable to accept attempted service of the assessment of civil money penalty and why he purportedly had made himself unavailable for service of the proposed penalty assessment back in May. More importantly, the Secretary was fully aware that Mr. Hardy, counsel for Mr. Smith, with whom the Secretary had been dealing, had entered an appearance representing Mr. Smith during the May 2, 2011 conference call and the Secretary could have and should have, if it did not, timely serve Mr. Hardy as representative of Mr. Smith, with the proposed penalty assessment under Commission Rule 7(d) providing for service upon representative. Moreover, the Secretary did not file her Motion for Extension of Time to File Assessment for Civil Penalty Petition until May 23, 2011, the date of the Secretary's self-imposed deadline for filing the actual Petition and the date for lifting of the final stay in this matter. Nor have any exigent circumstances been alleged that would permit the motion for extension. Cf. Commission Rule 9, dealing with motions for extensions of time. In addition, the Secretary's Motion sought some unspecified amount of additional time to file the petition based



on the speculative argument that “Mr. Smith’s case has not been prejudiced by the small time delay and there is no reason that the case could not be heard on August 2, 2011, as set forth in the Court’s May 6, 2011 Notice of Hearing and Order to File Pre-Hearing Report.” That is not the case, however, as the Secretary did not file her 110(c) Petition until July 11, 2011, depriving Mr. Smith of his 30 days to answer the Petition under Commission Rule 29, and again permitting the Secretary to attempt to postpone the August 2 hearing, which was originally set for May.

Suffice it to say that in management of its docket of nearly 500 cases, the Court will not countenance the Secretary’s “on-again, off- again” litigation strategy and extensive delay in investigating and filing its 110(c) case based on facts nearly two years old. The Secretary’s Motion for Extension of Time to File Assessment for Civil Penalty Petition in the 110(c) matter related to Docket No. KENT 2010-577 is **DENIED, ALL PRIOR STAYS ARE HEREBY EXPRESSLY LIFTED**, and Dockets No. KENT 2010-384 and Docket No. KENT 2010-577 will be heard on August 2, 2011. If the Secretary prevails before the Commission in any appeal of the dismissal of the 110(c) matter for failure to timely prosecute, that matter can be heard at a later date.

Road Fork’s Motion for Reconsideration of Continuance of Hearing is also **DENIED**. The terms of my May 6, 2011 Order Granting Stay and Notice of Hearing until May 23, 2011 clearly stated that *no further requests for stay would be granted*. Further, in accordance with Section 105(d) of the Federal Mine Safety and Health Act of 1977, the “Act,” 30 U.S.C. §801, *et seq.*, I ordered that the above-captioned matters and any 110(c) Petition, if viable, would be heard on **Tuesday, August 2, 2011**, and continuing dates after until completed at 8:30 a.m. E.S.T. in Pikeville, Kentucky. Therefore, there is no basis for Road Fork’s failure to prepare its case in Docket No. KENT 2010-577, now nearly two years old, and no basis for counsel to be laboring under the opinion that this case was still under the prior stay. Road Fork’s extensive pre-hearing statements have already been filed in Docket Nos. KENT 2010-384 and KENT 2010-577. Road Fork indicates in its July 18, 2011 Pre-Hearing Statement that the parties have entered into formal stipulations, which will be submitted on the first day of trial, and Road Fork has added several witnesses to its earlier Pre-hearing Statements, which include a Mr. Smith, line crew foreman.<sup>1</sup> Furthermore, there is no basis presented why Mr. Smith cannot be present to testify about the unwarrantable failure issue in Docket No. KENT 2010-577 and therefore no basis for the material prejudice issue raised by Road Fork, as Mr. Smith is its agent. Furthermore, the issue of whether Mr. Smith knowingly authorized, ordered, or carried out the alleged violations in Docket No. KENT 2010-577 may be relevant to the issue of Respondent’s knowledge of an obvious and grave danger as a factor in the unwarrantable failure analysis and Respondent has known or should have known that Mr. Smith would or might be a material witness in that matter. Finally, trial of Docket No. KENT 2010-577 may prompt settlement of the 110(c) matter should I be reversed on any appeal. Accordingly, Road Fork’s Motion for Reconsideration of Continuance of Hearing is **DENIED**.

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

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<sup>1</sup> The Court has confirmed this date by e-mail from the Secretary, with copy to the parties, that line foreman Melvin Keith Smith is the 110(c) agent.

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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**  
601 NEW JERSEY AVENUE N. W., SUITE 9500  
WASHINGTON, D.C. 20001  
July 28, 2011

SECRETARY OF LABOR, MSHA,	:	TEMPORARY REINSTATEMENT
on behalf of THURMAN WAYNE	:	PROCEEDING
PRUITT,	:	
	:	
Complainant	:	Docket No. KENT 2011-1152-D
	:	MADI-CD-2011-08
v.	:	
	:	
	:	
GRAND EAGLE MINING, INC.,	:	Grand Eagle Prep Plant
Respondent	:	Mine ID 15-19011

**AMENDED ORDER GRANTING APPLICATION FOR**  
**TEMPORARY REINSTATEMENT**

Appearances: Jennifer Booth Thomas, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, on behalf of the Secretary;  
Jeffrey K. Phillips, Esq., Steptoe & Johnson, PLLC, Lexington, Kentucky, on behalf of the Respondent.

Before: Judge Melick

On July 13, 2011, the undersigned issued a decision and order granting the Secretary's application for temporary reinstatement in the captioned case directing Grand Eagle Mining Inc., ("Grand Eagle") to immediately reinstate Thurman Wayne Pruitt on a temporary basis "to the same or equivalent job at the Grand Eagle Prep Plant at the same rate of pay and with the same benefits he had at the time of his discharge on March 31, 2011". Respondent has now filed a motion to amend the order for temporary reinstatement to permit it to economically reinstate Mr. Pruitt pending a decision on the merits of his complaint rather than have Mr. Pruitt return to its property. The Secretary, on behalf of Mr. Pruitt, opposes the motion for economic reinstatement and demands that he be physically returned to his former job at the mine premises.

Grand Eagle cites as grounds for its motion that the undisputed evidence at the temporary reinstatement hearing demonstrates that Pruitt has established that he is a danger to himself and others at Grand Eagle Prep Plant and would continue to be such a danger if allowed to return. Grand Eagle notes that Pruitt, by his own admission, backed a 988-caterpillar loader into the tail roller of a stacker in January 2011 thereby causing \$30,000.00 in property damage. It further notes that on March 31, 2011, Pruitt violated company's rules and Federal safety regulations by working on an elevated beltline without locking and tagging it out and at the same time was working at least 20 feet above the ground while not wearing fall protection. Grand Eagle notes that Pruitt's conduct could have caused serious injuries or death to him and subjected Grand Eagle to a closure order. It further claims that as a result of these admitted activities, Pruitt was fired on March 31, 2011. Grand Eagle further argues that the return of Pruitt to mine property would be disruptive and affect the morale of the remaining work force.

I find that in the light of the admitted activities by Mr. Pruitt at the Grand Eagle facility, it may reasonably be inferred that he indeed, represents a safety hazard to himself and others and

present a potential financial liability to Grand Eagle if he were to be returned to his former job through temporary reinstatement<sup>1</sup>. In addition, while no evidence was presented at hearings regarding the potentially disruptive nature of Mr. Pruitt's return to the job site, it may reasonably be inferred that the forced temporary reinstatement of Mr. Pruitt would likely have a negative impact on the remaining work force. Under the circumstances, I find that temporary economic reinstatement is the appropriate remedy and in compliance with section 105 (c)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. ("the Act"). Clearly, providing a miner with economic reinstatement by paying full salary and benefits fulfills the policy justifications of the Act by protecting the miners' financial well-being while he awaits trial on the merits.

The Secretary argues that a Commission Administrative Law Judge does not have the authority to award temporary economic reinstatement in lieu of actual physical reinstatement. However Section 105(c)(2) of the Act grants the Commission broad authority in discrimination proceedings "to take such affirmative action to abate the violation as the Commission deems appropriate including, but not limited to, the rehiring or reinstatement of the miner to his former position with back pays and interest." Indeed, Commission Judges have regularly ordered economic reinstatement in lieu of physical reinstatement in discrimination proceedings. See *Secretary on behalf of Gatlan v. Ken American Resources Inc.*, 31 FMSHRC 1050, 1051 (2009); *North fork v. Mine Safety and Health Administration* 33 FMSHRC 589 (2011).

I find from this language that the commission and its judges therefore have the authority to award economic reinstatement in lieu of actual physical reinstatement of the miner pending final hearings on the merits.

#### ORDER

The decision and order granting the Secretary's application for temporary reinstatement is hereby modified to permit the miner operator to provide Thurman Wayne Pruitt with economic reinstatement to include all the pay and benefits Mr. Pruitt was receiving prior to his discharge on March 31, 2011.

/s/ Gary Melick  
Gary Melick  
Administrative Law Judge  
(202) 434-9977

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<sup>1</sup> In light of the undisputed evidence at hearings that Pruitt also violated mandatory safety standards, Grand Eagle could also force mine closure orders and significant civil penalties.

Distribution:(By Certified Mail, and Email)

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