

June 2013

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Review was granted in the following cases during the month of June 2013:

Secretary of Labor, MSHA v. Emerald Coal Resources, LP., Docket Nos. PENN 2010-445-R, PENN 2010-446-R, PENN 2010-647. (Judge Harner, April 29, 2013)

Secretary of Labor, MSHA v. Manalapan Mining Company, Inc., Docket No. KENT 2008-737. (Judge Feldman, May 14, 2013)

No petition was filed in which Review was denied during the month of June 2013.

COMMISSION DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1331 PENNSYLVANIA AVENUE, NW, SUITE 520N

WASHINGTON, D.C. 20004-1710

June 4, 2013

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	Docket Nos. LAKE 2009-377
	:	LAKE 2009-274-R
v.	:	LAKE 2009-276-R
	:	LAKE 2009-277-R
BIG RIDGE, INC.	:	LAKE 2009-278-R
	:	LAKE 2009-279-R
	:	LAKE 2009-280-R
	:	LAKE 2009-310-R
	:	LAKE 2009-311-R
	:	LAKE 2009-312-R

BEFORE: Jordan, Chairman; Young and Nakamura, Commissioners

DECISION

BY: Jordan, Chairman; and Nakamura, Commissioner

This civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) (“Mine Act” or “Act”). As relevant to this appeal, Big Ridge, Inc. (“Big Ridge”) contested four orders issued by an inspector from the Department of Labor’s Mine Safety and Health Administration (“MSHA”), pursuant to section 104(d)(2) of the Mine Act, 30 U.S.C. § 814(d)(2), after he observed accumulations of combustible materials in Big Ridge’s coal mine. Administrative Law Judge Gary Melick affirmed allegations in the orders that the operator violated 30 C.F.R. § 75.400,¹ and that the violations were significant and substantial and caused by the operator’s unwarrantable failure to comply with the standard.²

¹ 30 C.F.R. § 75.400 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.

² The S&S and unwarrantable failure terminology is taken from section 104(d)(1) of the (continued...)

32 FMSHRC 1020 (Aug. 2010) (ALJ). Big Ridge filed a petition for discretionary review, challenging various of those determinations by the Judge. The Commission granted the petition and heard oral argument. For the reasons that follow, we affirm in part and reverse in part and remand for the reassessment of a civil penalty.

I.

Order No. 6683824

A. Factual and Procedural Background

On December 10, 2008, MSHA Supervisor Michael Rennie inspected Big Ridge's Willow Lake Portal coal mine in Equality, Illinois. Rennie testified that at approximately 8:15 a.m., he observed accumulations of coal along the 4E conveyor belt: (1) at the head roller and inby to the No. 8 crosscut in intermittent piles of up to 5 inches in depth; and (2) at the tail piece in an accumulation approximately 18 feet in length by two feet in depth. *Id.* at 1022; Tr. 35-40. Rennie observed that the bottom belt and tail roller were turning in the accumulations around the belt tail. 32 FMSHRC at 1022. The belt was also misaligned and had cut into the belt structure almost an inch. *Id.* Bart Schiff, the operator's safety manager who accompanied Rennie, testified that there were accumulations under the rollers in several sections of the belt and on both sides of the bottom belt. *Id.* Schiff stated that the bottom belt was turning in coal. *Id.*

Monty Applin, Big Ridge's mine examiner, testified that he had performed an examination of the 4E tail at approximately 3:15 a.m. on December 10. *Id.* He noted a condition in the examination book that the belt had a dirty takeup and that the head roller needed rockdusting. Tr. 83-84. He observed no accumulations at the tail at the time of his examination. Tr. 85.

James Holmes, Big Ridge's section foreman, testified that he checked the tail piece at approximately 7:00 a.m. and 9:00 a.m. on the day of the inspection and found it to be clean. 32 FMSHRC at 1022. He testified that at 9:15 a.m., however, the 4E tail was "gobbed out," or full of coal fines. Tr. 107-08. He explained that the belt's skirt rubber³ had come out, which caused a spillage at the tail piece. Tr. 109. Rennie also testified that later in the day, he was

²(...continued)

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," and establishes more severe sanctions for any violation that is caused by "an unwarrantable failure of [an] operator to comply with . . . mandatory health or safety standards."

³ A "skirt rubber" is comprised of two pieces of rubber that are placed on the top part of the tail piece to align coal on to the belt line. Tr. 109.

informed that the accumulations had been caused by the belt misaligning and the skirt rubber coming off. Tr. 44-45.

Based upon his observations, MSHA Supervisor Rennie issued Order No. 6683824 alleging an S&S and unwarrantable violation of section 75.400. Gov't Ex. A1. The belt was shut down for approximately six hours while the violation was abated. 32 FMSHRC at 1024. During that time, the accumulations were shoveled, equipment was brought to the area, and rock dust was applied. *Id.* Holmes testified that it took six or seven miners 15 to 20 minutes to clean up the material at the tail piece. Tr. 112.

The Judge affirmed the violation and special findings. Big Ridge's petition challenges the Judge's S&S and unwarrantable failure findings.

B. Disposition

1. The Judge's conclusion that the violation was S&S is affirmed.

A violation is S&S if, based on the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature. *See Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981). In *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984), the Commission further explained:

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

(footnote omitted); *accord Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power, Inc. v. Sec'y of Labor*, 861 F.2d 99, 103 (5th Cir. 1988) (approving *Mathies* criteria). An evaluation of the reasonable likelihood of injury should be made assuming continued normal mining operations. *See U.S. Steel Mining Co.*, 7 FMSHRC 1125, 1130 (Aug. 1985). The Commission has emphasized that it is the contribution of a violation to the cause and effect of a hazard that must be significant and substantial. *U.S. Steel Mining Co.*, 6 FMSHRC 1834, 1836 (Aug. 1984).

Big Ridge argues that the Judge erred in finding the violation to be S&S. It contends that the material at the tail piece merely constituted spillage caused by the skirt rubber coming off rather than a violative accumulation and that, accordingly, it should not have been considered in the Judge's S&S determination. The operator also asserts that the Judge failed to consider that its fire detection and fire suppression systems made injury unlikely. It argues that the Judge

further erred by not considering information in an MSHA report, which shows that there were no fatalities or lost time injuries resulting from reportable fires in belt entries between 1980 and 2005, because such information is relevant to application of the third and fourth *Mathies* elements.

Applying the *Mathies* elements, we conclude that the Judge properly concluded that the 4E beltline accumulations were S&S. The first *Mathies* element is satisfied in that Big Ridge conceded the underlying violation.

As to the second *Mathies* element, the Judge found that the violation exposed miners to the safety hazard of a belt fire from the friction caused by the belt cutting into the belt structure. 32 FMSHRC at 1023. We conclude that his finding of a hazard is supported by substantial evidence.⁴ MSHA Supervisor Rennie testified that there were “a lot” of accumulations at the tail, which extended almost 18 feet outby from the tail roller and were approximately two feet deep. Tr. 36-37; 32 FMSHRC at 1022. He stated that an ignition source was presented by the friction of the bottom belt sliding in the accumulations. Tr. 37; 32 FMSHRC at 1022. Rennie testified that an additional ignition source was present in that the belt had become misaligned and was rubbing against the belt structure. Tr. 37-38, 70; 32 FMSHRC at 1022. He explained that the belt had cut into the belt structure almost one inch in depth, and the structure was very hot to the touch. Tr. 37-38, 66. Applin, Big Ridge’s belt examiner, acknowledged that, although the belt was shut down at the time of his examination, a belt running in accumulations would constitute a hazard. Tr. 92. He explained that a “hazard is immediate danger that can cause a fire or explosion or lack of oxygen or a combination of gas – anything that can do bodily harm,” and that if he observed such a hazard, he would turn off the belt and have the hazard addressed. Tr. 81-82.

As to the third and fourth elements of *Mathies*, the Judge found that the hazard of smoke and fire would reasonably result in an injury that could reasonably be expected to be severe or even fatal from smoke inhalation, carbon monoxide poisoning and/or burns. 32 FMSHRC at 1023-24. MSHA Supervisor Rennie testified that he determined that injury or illness was highly likely given the amount of the cited accumulations and the presence of ignition sources. Tr. 46-47, 70. He explained that smoke from a fire would move directly to miners working on the section which could result in disorientation and that fatal injuries could result from a fire. Tr. 46-47, 67.

⁴ When reviewing an administrative law judge’s factual determinations, the Commission is bound by the terms of the Mine Act to apply the substantial evidence test. 30 U.S.C. § 823(d)(2)(A)(ii)(I). “Substantial evidence” means “such relevant evidence as a reasonable mind might accept as adequate to support [the Judge’s] conclusion.” *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2163 (Nov. 1989) (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)).

Even if we were to accept Big Ridge's argument that the material cited at the tail piece did not constitute violative accumulations, the record is clear that accumulations existed along the beltline. MSHA Supervisor Rennie testified that there were accumulations by the head roller and inby to the No. 8 crosscut that ranged up to 5 inches in depth. Tr. 36-37; Gov't Ex. A1. He observed black float coal dust along the roof, rib, floor and belt structure. Gov't Ex. A1. As noted above, the belt rubbing against the belt structure constituted an ignition source for those accumulations. Tr. 37-38, 66, 70. Thus, there remains substantial evidence in the record to support the Judge's S&S determination.

We find unpersuasive the operator's argument that the Judge erred in determining that the violation was S&S because he refused to consider the safety measures that Big Ridge had in place, such as its fire detection and suppression systems. In *Buck Creek Coal Co. v. FMSHRC*, the court rejected the operator's contention that other fire prevention safety measures mitigated the S&S nature of an accumulation. 52 F.3d at 136. The court reasoned that the fact that an operator has "safety measures in place to deal with a fire does not mean that fires do not pose a serious safety risk to miners." *Id.*; see also *AMAX Coal Co.*, 19 FMSHRC 846, 849-50 (May 1997). As the Commission has recognized, adopting the position that redundant mandatory safety protections provide a defense to an S&S finding would lead to the anomalous result that every protection would have to be nonfunctional before an S&S finding could be made. *Cumberland Coal Res., LP*, 33 FMSHRC 2357, 2369 (Oct. 2011).

Likewise, we are not persuaded by Big Ridge's argument that the Judge erred by not relying upon the MSHA report in his consideration of whether injury would be reasonably likely to result from a belt fire. The report is a Power-Point presentation, entitled, "Reducing Belt Entry Fires in Underground Coal Mines," which was submitted by MSHA to the Belt Study Commission in 2007, as part of an evaluation of the use of belt air to ventilate working sections. R. Ex. 1; Tr. 622; Oral Arg. Tr. at 7-8. It would have been inappropriate for the Judge to draw broad conclusions about the likelihood of injury from belt fires from the presentation, when the presentation was prepared for a different reason and had a different focus. In any event, as the Commission has long recognized, the question of whether a particular violation is S&S must be based on the particular facts surrounding that violation. *Youghioghney & Ohio Coal Co.*, 9 FMSHRC 2007, 2011-12 (Dec. 1987). Here, the Judge appropriately considered the nature of the specific cited conditions in concluding that the violation cited in Order No. 6683824 was S&S, and substantial evidence supports that conclusion.

Accordingly, we affirm the Judge's S&S determination.

2. The Judge's conclusion that the violation resulted from unwarrantable failure is reversed.

The Commission has defined unwarrantable failure as "aggravated conduct, constituting more than ordinary negligence, by a mine operator in relation to a violation of the Act." *Emery Mining Corp.*, 9 FMSHRC 1997, 2004 (Dec. 1987). It is characterized by "reckless disregard,"

“intentional misconduct,” “indifference,” or the “serious lack of reasonable care.” *Id.* at 2002-04.

The Commission has further recognized that whether conduct is “aggravated” in the context of unwarrantable failure is determined by considering the facts and circumstances of each case to determine if any aggravating or mitigating circumstances exist. Factors relevant to that consideration 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); *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). While an administrative law judge may determine, in his or her discretion, that some factors are not relevant, or may determine that some factors are much less important than other factors under the circumstances, all of the factors must be taken into consideration. *IO Coal Co.*, 31 FMSHRC 1346, 1351 (Dec. 2009).

Big Ridge argues that the Judge erred in concluding that the 4E belt accumulation violation was unwarrantable. It contends that he failed to consider all of the factors identified by the Commission as relevant to an unwarrantable failure consideration. It asserts that, moreover, the Judge erred with respect to the factor of whether the operator had been placed on notice that greater efforts were necessary for compliance. The operator explains that the Judge failed to provide a qualitative analysis of the reasons that Big Ridge’s past violations would have put it on notice with respect to the cited condition.

We disagree with Big Ridge that the Judge erred in his consideration of the operator’s past violation history in his unwarrantable failure analysis. The Secretary submitted evidence that the operator had 110 final citations and 8 final orders alleging violations of section 75.400 within the 15 months prior to issuance of the subject order. 32 FMSHRC at 1025; Tr. 48-49. It was appropriate for the Judge to conclude that such violations were sufficient to place the operator on notice that greater efforts were necessary for compliance with the standard. We do not agree that past violations of section 75.400 can provide such notice only if they are factually indistinguishable from the cited condition. Indeed, as recognized by the D.C. Circuit, the Commission has concluded that ““even if a different area was cited, past violations may, nonetheless, provide an operator with sufficient awareness of an accumulation problem.””⁵ *Black Beauty Coal Co. v. FMSHRC*, 703 F.3d 553, 561 (D.C. Cir. 2012), *quoting San Juan Coal Co.*, 29 FMSHRC 125, 131 (Mar. 2007).

⁵ In any event, if the operator believed that some of the past violations were qualitatively distinguishable so as not to place the operator on notice that greater efforts were necessary for compliance with section 75.400, it was incumbent upon Big Ridge to place that evidence in the record.

Nonetheless, we agree with Big Ridge that the Judge failed to consider relevant factors, including the length of time that the violation existed, the operator's efforts in abating the violative condition, and the operator's knowledge of the existence of the violation. If the evidence in the record regarding these factors is weighed against the evidence and factors considered by the Judge, there is not substantial evidence in the record to support the Judge's unwarrantable failure determination.

Regarding the length of time that the violation existed, the Judge did not resolve the differences in testimony regarding when the accumulations existed on the morning of the inspection. 32 FMSHRC at 1022-25. Mine Examiner Applin testified that he did not observe any accumulations at the 4E tail piece during his examination at 3:15 a.m. and did not note the presence of such accumulations in his examiners' report. Tr. 84-85; R. Ex. 3. MSHA Supervisor Rennie testified that he observed the cited accumulations at approximately 8:15 a.m. on the morning of the inspection. Tr. 39-40. Section Foreman Holmes, however, testified that he checked the 4E tail piece at 6:45 a.m. and just before 9:00 a.m. on the day of the inspection and observed no accumulations. Tr. 102-03. He stated that, approximately 15 minutes after his last inspection, he observed that the 4E tail was "gobbed out," or full of coal fines. Tr. 107-09.

The record is undisputed that the 4E belt's skirt rubber came out at some point, and that coal can accumulate quickly under such circumstances. Tr. 44-45, 66, 109. Holmes concluded that the cited accumulations at the 4E tail piece had resulted from the skirt rubber coming out. Tr. 109. MSHA Supervisor Rennie also acknowledged that he had been informed that the accumulations had been caused when the skirt rubber came out. Tr. 44-45, 66. Thus, regardless of whether the accumulations existed at approximately 8:15 a.m. or at 9:15 a.m., it appears that the accumulations at the tail piece likely occurred when the skirt rubber came out, and that the violation did not exist for a lengthy period of time.

The Judge also did not consider Big Ridge's actions in abating the violative condition. 32 FMSHRC at 1024-25. In considering the abatement element, the Commission focuses on compliance efforts made prior to the issuance of the order. *Enlow Fork Mining Co.*, 19 FMSHRC 5, 17 (Jan. 1997). Section Foreman Holmes checked the 4E tail piece at the beginning of his shift, and again before 9:00 a.m. Tr. 102-03. Holmes observed the accumulations at the tail piece at approximately 9:15 a.m. Tr. 107-08. He stated that it was his practice to check the tail piece at the beginning of a shift and then approximately four to five times during the course of a shift in order to monitor its condition. Tr. 102-03. The Secretary did not place evidence in the record disputing Holmes' testimony. Evidence of such monitoring does not support the Judge's finding that the operator's actions in permitting the material at the 4E belt to accumulate were aggravated.

For similar reasons, evidence regarding the operator's knowledge of the existence of the violation does not support the Judge's unwarrantable failure finding. As discussed above, it appears that the material at the tail piece existed for a brief period of time, and there is no evidence in the record that the operator knew of the violative condition but failed to take

appropriate corrective action. The record on these factors does not reflect the reckless disregard or serious lack of reasonable care that characterizes violations caused by unwarrantable failure.

Accordingly, we reverse the Judge's determination that the violation described in Order No. 6683824 was due to the operator's unwarrantable failure to comply. We remand this matter to the Chief Administrative Law Judge for assignment to a Judge for the reassessment of an appropriate civil penalty.

II.

Order No. 6683087

A. Factual and Procedural Background

On January 26, 2009, MSHA Inspector Scott Lee inspected the 1A belt at the mine. 32 FMSHRC at 1032. The 1A belt was approximately 500 feet long and had a water pump beneath it. *Id.* The inspector issued Order No. 6683087, which alleged an S&S and unwarrantable violation of section 75.400, because he observed accumulations of coal fines on top of the water pump and on the skid plate, the plate on which the water pump rested. *Id.* Inspector Lee described the accumulations on top of the water pump as 4 to 8 inches deep, 10.5 feet long, and 4 feet wide, and the accumulations on the skid plate as 4 to 6 inches deep. *Id.* He testified that approximately 150 feet away from the water pump, the 1A belt was rubbing on a damaged roller. *Id.* at 1033. Union President Greg Fort also testified that there were "quite a bit" of coal fines around the top of the water pump and "around the external parts in the sides." *Id.*; Tr. 479.

Earlier that day, at approximately 8:00 a.m., Charlie Hyers, an examiner for Big Ridge, had performed an onshift examination of the 1A belt. Tr. 553, 559. Hyers noted in the examination book that the beltline was "dark in color." R. Ex. 75.

Mike Davis, Big Ridge's Safety Manager who accompanied Inspector Lee, disagreed with the inspector's description of the accumulations. 32 FMSHRC at 1033. He testified that there were five rock dust bags on top of the water pump and less than an inch of accumulations on top of the bags. *Id.* Davis further testified that the material on the skid plate was non-combustible gob. *Id.*; Tr. 541-42. He explained that when the pump is pushed, the skid plate will push up fireclay and dirt from the floor in front of it. Tr. 521, 542.

The Judge upheld the violations and special findings. 32 FMSHRC at 1033. In ruling that the violation was S&S, he found that the belt rubbing on the damaged roller constituted an ignition source, although the pump itself did not. *Id.* He also concluded that the violation had been caused by an unwarrantable failure because the amount of the accumulations on and around the pump was extensive, they were hazardous due to the nearby ignition source of the damaged roller, and because the operator was on notice that greater efforts were required to maintain the subject belt. *Id.* The operator appealed the S&S and unwarrantable failure designations.

B. Disposition

1. The Judge's conclusion that the violation was S&S is affirmed.

Applying the *Mathies* analysis, we conclude that the Judge properly determined that the accumulation violation was S&S. Big Ridge conceded the violation in satisfaction of the first *Mathies* element. As to the second *Mathies* element, the Secretary submitted evidence in the record that the accumulations on the water pump contributed to the hazard of coal ignition, and the Judge credited the Secretary's evidence. The Commission has recognized that a judge's credibility determinations are entitled to great weight and may not be overturned lightly. *Farmer v. Island Creek Coal Co.*, 14 FMSHRC 1537, 1541 (Sept. 1992); *Penn Allegh Coal Co.*, 3 FMSHRC 2767, 2770 (Dec. 1981).

The Judge credited the testimony of Inspector Lee, as corroborated by Union President Fort, that there were significant accumulations on the water pump. 32 FMSHRC at 1032. Inspector Lee testified that the water pump was approximately 10.5 feet long and 4 feet wide, and that the accumulations on top of the cover were 4 to 8 inches deep, while the accumulations underneath the unit were 4 to 6 inches deep. Gov't Ex. F1; Tr. 393. Lee testified that the accumulations were black in color and estimated that, given their color, they were 99 to 100% combustible. Tr. 392. Fort testified that the water pump had been under the belt approximately three to four weeks and had accumulated quite a bit of coal fines, black in color, around the top and along the sides of the pump. Tr. 478-79. Given this evidence, we find insufficient reason to overturn the Judge's credibility determinations that there were a significant amount of combustible accumulations on the water pump.

The Judge also relied upon the presence of the broken roller as an ignition source for the cited accumulations. 32 FMSHRC at 1033. Inspector Lee testified that there was a broken bottom roller on the belt, and that the bottom belt had rubbed a flat spot on the roller. Tr. 398, 400, 404. He explained that the frictional heat constituted an ignition source and that the roller was hot to the touch. Tr. 398-401, 404-05. Lee further stated that one end of the roller was in contact with other accumulations he had cited along the beltline, and that belt shavings could drop on the accumulations under the belt and start an ignition. Tr. 412. Fort observed belt shavings that resulted from pieces of the belt being torn off from the friction. Tr. 483. As the Judge found, Big Ridge's expert, Chad Barras, testified that hot lubricant from damaged rollers and belt shavings can generate enough heat to ignite coal. 32 FMSHRC at 1033; Tr. 639-40, 641.

As to the third and fourth elements of *Mathies*, there is evidence in the record that the hazard from smoke and fire would reasonably result in a reasonably serious injury. Inspector Lee explained that the accumulations and ignition source could have caused a fire or smoke which could engulf the area. Tr. 404-05. He explained that miners can die from carbon monoxide poisoning, get disoriented from smoke, and suffer burns from fires. Tr. 420-21.

For these reasons, we affirm the Judge's determination that the violation was S&S as supported by substantial evidence.

2. The Judge's conclusion that the violation resulted from an unwarrantable failure is affirmed.

We conclude that substantial evidence supports the Judge's determination that the violation was caused by an unwarrantable failure. As discussed above, a majority has concluded that the Judge's findings that the violation was extensive and hazardous are supported by substantial evidence.

Regarding the operator's knowledge of the existence of the violation, the Judge found that the report of the onshift examination had placed management on notice of the potentially hazardous conditions along the 1A belt. However, even if we were to agree with Big Ridge that Hyers' examination report did not provide the operator with knowledge of the accumulations at the water pump, we conclude that the operator had reason to know of the water pump accumulations given the amount of time that they existed and their obviousness. Inspector Lee testified that the condition was obvious, and that the belt examiners should have seen the accumulations particularly since they knew the equipment was under the belt. Tr. 406. In addition, he stated that the pump was very near the travel road where miners continually passed under the belt. Tr. 399; Gov't Ex. F3. The inspector further testified that the accumulations had been there for "some time," at least two to three shifts, but probably longer. Tr. 401, 402. There is no record support of the operator's efforts in abating the violation as a mitigating factor.

We further conclude that the Judge appropriately considered the factor of whether the operator had been placed on notice that greater efforts were necessary for compliance. The Judge also appropriately considered the operator's past violations. Moreover, the record reveals that MSHA held closeout and pre-inspection conferences with Big Ridge that provided the operator with notice that greater efforts were necessary for compliance with section 75.400. 32 FMSHRC at 1025; Tr. 492-95. Union President Fort testified that compliance with section 75.400 "has been our big problem area" and that there were discussions in the meetings that the operator had to "take control of [its section 75.400 violations] and get them down." Tr. 494-95. In the quarterly meeting on September 26, 2008, before issuance of the subject order, Big Ridge was informed that violations of section 75.400 had increased 6% over the prior quarter and comprised 24% of the cited violations. Tr. 497-98. MSHA also indicated that it wanted the operator to have fewer violations of section 75.400 pertaining to equipment. Tr. 503-04.

Accordingly, we affirm the Judge's determination that the violation cited in Order No. 6683087 was caused by an unwarrantable failure as supported by substantial evidence.

III.

Order No. 6683088

A. Factual and Procedural Background

During the same inspection on January 26, 2009, MSHA Inspector Lee observed float coal dust accumulations that were along the entire 1A beltline, from rib to rib, and coal fines that were under the belt's rollers and in the take-up and drive motors that were four to eight inches deep. 32 FMSHRC at 1034; Tr. 410. The inspector observed that a damaged bottom roller had dropped on one side, and the belt was rubbing on the roller. Tr. 411. One end of the damaged roller was in contact with the accumulations. Tr. 412. Union President Fort also observed the accumulations and that the damaged roller had torn pieces, or shavings, from the belt. Tr. 482-83. Mine Examiner Hyers, who had examined the 1A belt prior to the inspection, noted in the examination book that the 1A beltline was "dark in color." Tr. 553, 557; R. Ex. 75. Inspector Lee issued Order No. 6683088, alleging an S&S and unwarrantable violation of section 75.400. The Judge affirmed the violation and special findings. 32 FMSHRC at 1033-34. Only the unwarrantable failure designation was appealed.

B. Disposition

The Judge's conclusion that the violation was unwarrantable is affirmed.

We affirm the Judge's finding of unwarrantable failure. Regarding the extensiveness of the accumulations, Inspector Lee's testimony that there were float coal dust accumulations from rib to rib, along the entire length of the 500 foot-long belt, as well as accumulations 4 to 8 inches deep under the belt rollers and in the takeup and drive motors, supports the Judge's extensiveness finding. Tr. 410. As the Judge stated, the inspector's testimony was corroborated by Union President Fort, who testified that there were "quite a few accumulations and a lot of black coal dust in the area." 32 FMSHRC at 1034; Tr. 483. We note that although three hours elapsed between the time that the inspector issued the order and the time that he terminated it, Bob Pate, the shift mine manager, testified that it took 30 minutes to shovel the beltline and 20 to 30 minutes to rock dust it. Tr. 528. We nonetheless conclude that there is substantial evidence in the record to support the Judge's finding.⁶

There is also substantial evidence in the record to support the Judge's determination that the operator had knowledge of the cited condition. See 32 FMSHRC at 1034. After examining the 1A beltline on the day of the inspection, Big Ridge's examiner, Hyers, placed a comment in the examination book that read, "Beltline dark in color." R. Ex. 75. Regardless of whether Hyers believed the condition to be merely a condition rather than a hazard that required

⁶ The operator does not challenge the Judge's finding that the violative condition was obvious. BR Br. at 35-37; 32 FMSHRC at 1035. Accordingly, that finding stands.

immediate attention, as argued by Big Ridge, the notation gave the operator notice of a potential accumulation violation along the beltline. Moreover, Inspector Lee testified that the accumulations existed for at least one shift. Tr. 414-15. Although the operator had received notice for that period of time, there is no evidence in the record that the operator took abatement measures to address the accumulations prior to issuance of the order. Tr. 415.

The Judge did not specifically address whether the violative condition posed a high degree of danger in his unwarrantable failure analysis. However, the Judge concluded that the violation was S&S (which the operator did not challenge), and there is evidence in the record regarding the danger posed by the violation. The record reveals that a damaged bottom roller had dropped on one side and was making contact with the belt, and that one end of the roller was in contact with the accumulations. Tr. 410-12. There were also belt shavings lying in the accumulations. Tr. 483. As the Judge found, Big Ridge's expert, Chad Barras, testified that hot lubricant from damaged rollers and hot rubber and metal particles from a belt are a source of coal ignition. 32 FMSHRC at 1034; Tr. 619-20, 639. Finally, for the reasons discussed above, we hold that the operator's past history of violations placed Big Ridge on notice that greater efforts at compliance were necessary. Accordingly, we affirm the Judge's unwarrantable failure determination.

IV.

Order No. 6683968

A. Factual and Procedural Background

On January 29, 2009, MSHA Inspector Larry Morris issued Order No. 6683968, alleging an S&S and unwarrantable violation of section 75.400 due to accumulations at the 2C conveyor belt. 32 FMSHRC at 1037. The order alleged that loose coal and coal fines were observed at the 2C belt tail piece, and ranged from 1 to 18 inches deep, 6 feet wide, and 15 feet long. *Id.* The inspector observed that the accumulations on the floor were wet or damp but that the accumulations at the tail roller were dry and powdery. *Id.* at 1038. Morris testified that the rotating 2C belt and tail roller were in contact with the accumulations. Tr. 564.

Approximately two days before the citation was issued, Section Foreman Brad Champley reported a spillage problem at the 2C belt to Terry Butler, a maintenance foreman. Tr. 589, 597. Butler testified that he walked the entire belt and aligned it. Tr. 598. During the two hours before the order was issued, the 2C tail piece had already been shoveled twice. Tr. 581-83, 591. After the order was issued, the belt was removed from service and cleaned. Tr. 569. The operator discovered that the belt was running out of alignment at crosscut 18. Tr. 569. Inspector Morris testified that the operator placed the belt back into alignment, which corrected the problem. Tr. 569.

The Judge affirmed the violation and special findings. He rejected the operator's argument that the material was non-violative spillage. 32 FMSHRC at 1038. The Judge

concluded that the cited accumulations were extensive and had not been cleaned with reasonable promptness given the operator's knowledge of the serious spillage problem at the tail piece. *Id.*

The Judge next found that the violative conditions were S&S. *Id.* at 1038. The Judge credited the testimony of Inspector Morris that the material was significant in amount, black in color, and was dry at the tail roller. *Id.* He also credited the testimony of Morris that the belt and metal tail roller were in contact with the accumulations and inferred that such a condition amounted to an ignition source. *Id.* at 1038-39. The Judge noted that the belt had become misaligned, and that with continued normal mining conditions, the misaligned belt could create metal or rubber shavings hot enough to ignite coal. *Id.* at 1039. Regarding his finding that the violation was caused by the operator's unwarrantable failure, the Judge concluded that the violation was serious and obvious, and that the operator's past violations placed it on notice that greater compliance efforts were necessary. *Id.*

B. Disposition

1. The Judge's conclusion that the operator violated section 75.400 is affirmed.

Big Ridge argues that the cited material was mere spillage rather than violative accumulations. It maintains that it attended to the spillage at the 2C tail piece in a timely fashion, and that Section Foreman Champley had reported the condition and remedial measures had been taken.

The D.C. Circuit has found unpersuasive an operator's argument that coal accumulations that resulted from a sudden spill were not violative accumulations. *Black Beauty Coal Co. v. FMSHRC*, 703 F.3d 553, 558-59 (D.C. Cir. 2012). The Court relied upon Commission precedent rejecting the position that accumulations of combustible materials may be tolerated for a reasonable time. *Id.* It noted that the Commission has explained that section 75.400 is “directed at preventing accumulations in the first instance, not at cleaning up the materials within a reasonable period of time after they have accumulated.” *Id.* (citations omitted).

Consistent with this precedent, we affirm the Judge's finding of a violation. Here, the operator had not taken appropriate action to prevent the accumulation of combustible materials. As the Judge found, Foreman Champley knew that there was a problem of spillage at the tail piece that needed constant attention. 32 FMSHRC at 1038. During the morning of the inspection, the operator had shoveled the tail piece twice in the two hours before Inspector Morris observed the cited condition, and only about one-and-a-half hours had elapsed between the two cleanups. Tr. 581-83, 591. Champley knew that the problem with spillage at the tail piece was not new and had brought his concerns about the spillage to Butler “a day or so” before the inspection. Tr. 589, 597. Inspector Morris testified that the operator “knew [it] had a problem with the belt and chose to periodically clean the tail piece and keep running coal, and by continuing to run coal without correcting the problem, it allowed it to get in a citable condition.” Tr. 566.

Moreover, substantial evidence supports the Judge's finding that the accumulations observed by Inspector Morris after the belt had been cleaned a second time were extensive. Morris observed that the accumulations were approximately 15 feet long, extending a distance of 75% of the tail piece, were approximately 6 feet wide and 1 to 18 inches deep. Tr. 563, 569. Regarding the amount of accumulations, Morris testified that "there was enough that it had actually pushed the belt out away from the tail pulley approximately 2 inches." Tr. 564. Accordingly, we affirm the Judge's determination that Big Ridge violated section 75.400.

2. The Judge's conclusion that the operator's violation was S&S is affirmed.

Applying the *Mathies* elements, we conclude that the Judge properly determined that the violation was S&S. As discussed above, substantial evidence supports the Judge's determination of violation in satisfaction of the first *Mathies* element.

There is also substantial evidence to support the Judge's determination that the second *Mathies* element was satisfied and that the cited accumulations contributed to the hazard of a coal ignition. The accumulations were extensive, as described above, and black in color. Tr. 563, 572. The accumulations at the tail roller were dry and powdery,⁷ and the tail roller and belt were in contact with the accumulations. Tr. 563-64, 566. In addition, the record reveals that the belt was running out of alignment at the time Inspector Morris observed the conditions. Tr. 569. As the operator's expert testified, metal and rubber shavings worn from a misaligned conveyor belt can become hot enough to constitute an ignition source. 32 FMSHRC at 1038; Tr. 619.

As to the third and fourth elements of *Mathies*, the Judge found that the hazard of smoke and fire would reasonably result in a severe or even fatal injury. 32 FMSHRC at 1039. Inspector Morris testified that a fire would produce smoke and carbon monoxide, and that breathing carbon monoxide can cause light-headedness, unconsciousness, and death, and that miners could suffer burns from a fire. Tr. 567.

We do not find persuasive the operator's argument that the violation was not S&S because the accumulations had only existed for a short period of time and that regular maintenance would have continued on the belt. The Commission has recognized that "[t]he *Mathies* test requires evaluation of the violation at the time of citation, including an examination of the risk of serious injury, given the *presence* of the violative condition in normal mining operations." *Gatliff Coal Co.*, 14 FMSHRC 1982, 1986 (Dec. 1992) (emphasis added).

⁷ The inspector testified that he was accompanied by Bill Shovers, a miners' representative, and that Shovers had agreed that the fines at the tail roller were dry. Tr. 565-66.

Accordingly, for these reasons, we affirm the Judge's S&S determination as supported by substantial evidence.⁸

3. The Judge's conclusion that the operator's violation was unwarrantable is affirmed.

We agree with the Judge's determination that the operator's knowledge of the violative condition constituted an aggravating factor. 32 FMSHRC at 1038. The operator had reason to know that there was an accumulation problem on the 2C belt given past spillage problems within a day or two of the inspection and that the tail piece had to be shoveled twice during the two hours before the inspection. Tr. 566, 569. As the inspector testified, Big Ridge essentially made the decision to continue production and periodically clean the belt rather than stop the belt and resolve the cause of the spillage problem. Tr. 566. In considering an operator's efforts in abating a violative condition, the Commission considers "whether the operator's efforts to comply with safety standards and to correct conditions that could lead to violations were taken with sufficient care under the circumstances, even if ultimately unsuccessful in completely preventing a violative condition." *Windsor Coal Co.*, 21 FMSHRC 997,1005 n.9 (Sept. 1999). Big Ridge's efforts in abating the violative condition prior to citation were insufficient, since mine management knew of a continuing problem at the location but chose to take temporary superficial measures rather than corrective action designed to prevent accumulations. 32 FMSHRC at 1038.

The operator does not dispute the Judge's findings that the violation was serious and obvious. *Id.* Although the Judge did not specifically address the factors of the extent of the violation and the length of time that the violation existed with respect to his unwarrantable failure determination, he made findings in other portions of his decision, based on evidence in the record.

In the S&S portion of his decision, the Judge found that the cited accumulations "probably had not been present for more than 30 minutes to an hour." *Id.* at 1039. Even if such a factor is considered mitigating, it is insufficient to outweigh other evidence relied upon by the Judge in concluding that the violation was unwarrantable. Regarding the extent of the violation, in the violation portion of his decision, the Judge found that the cited accumulations were extensive in size and amount, and we have concluded that substantial evidence supports that finding. *Id.* at 1038. Finally, for the reasons discussed above, we are not persuaded by Big Ridge's argument that the Judge erred in considering the operator's past violations in determining that it had been placed on notice that greater efforts were necessary for compliance with the standard. *Id.* at 1034.

⁸ For the reasons discussed above, we find unpersuasive the operator's arguments that the Judge erred in his S&S determination by not taking into consideration the operator's fire detection and suppression systems and the MSHA report.

Accordingly, for these reasons, we affirm the Judge's unwarrantable failure determination.

V.

Conclusion

For the reasons discussed above, with respect to Order No. 6683824, the Commission affirms the Judge's conclusion that the violation of section 75.400 was S&S and reverses the Judge's determination that the violation resulted from unwarrantable failure. With respect to the penalty assessed for the violation, we remand to the Chief Judge for reassignment⁹ and for the reassessment of an appropriate civil penalty. With respect to Order No. 6683087, we affirm the Judge's determination that the violation was S&S and affirm the Judge's unwarrantable failure finding. With respect to Order No. 6683088, we affirm the Judge's determination that the violation of section 75.400 was caused by unwarrantable failure. With respect to Order No. 6683968, we affirm the Judge's conclusions that the operator violated section 75.400, and that the violation was S&S and caused by Big Ridge's unwarrantable failure.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

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

⁹ Judge Melick retired prior to the issuance of this decision.

Commissioner Young, concurring in part and dissenting in part:

I concur with the majority in affirming the Judge's determination that the violation of 30 C.F.R. § 75.400 alleged in Order No. 6683824 was significant and substantial ("S&S") and in reversing the Judge's determination that the violation resulted from the operator's unwarrantable failure to comply with the standard. I join the majority in remanding the matter to the Chief Judge for reassignment and for the reassessment of an appropriate civil penalty. As to Order No. 6683087, I join the majority in affirming the Judge's determination that the violation of section 75.400 alleged in the order resulted from an unwarrantable failure. I join the majority in affirming the Judge's determination that the violation of section 75.400 alleged in Order No. 6683088 resulted from unwarrantable failure. I also join the majority in affirming the Judge's determination that the operator violated section 75.400 as alleged in order No. 6683968.

I write separately, and briefly, to dissent from the remaining sections of the majority opinion.

I.

Order No. 6683087

I conclude that substantial evidence does not support the Judge's determination that the violation of section 75.400 alleged in Order No. 6683087 was S&S. In particular, I do not find substantial evidence in the record to satisfy the second element set forth in *Mathies Coal Co.*, 6 FMSHRC 1, 3 (Jan. 1984), that is, that the water pump accumulations contributed to the hazard of a coal ignition. As the Judge found, the water pump itself did not constitute an ignition source because the pump was equipped with solid state controls, which eliminate the possibility of sparking. 32 FMSHRC 1020, 1033 (Aug. 2010) (ALJ); Tr. 515.

Moreover, the record does not support the Judge's finding that the damaged roller constituted an ignition source for the water pump accumulations. Inspector Lee testified that there was a broken bottom roller on the belt, and that one end of the roller was in contact with the accumulations he had cited in a separate order, Order No. 6683088. Tr. 398-99, 404, 412. The inspector testified that the heat caused by the damaged roller constituted an ignition source. Tr. 398-401, 404-05. Union President Fort also observed belt shavings in the area of the damaged roller. Tr. 483. However, the damaged roller was approximately 150 feet away from the pump. Tr. 398-99. The frictional heat of the damaged roller posed a hazard of ignition to the accumulations in the area of the damaged roller, rather than to the water pump accumulations which were 150 feet away. The ignition hazard of the accumulations in the area of the damaged roller is addressed by allegations in Order No. 6683088 that the violative accumulations along

the 1A beltline were S&S.¹ Gov't Ex. G1. Even if the belt shavings remained on the belt, it is possible that the shavings would have to travel the entire circuit of the belt before reaching the water pump and would no longer be hot. Oral Arg. Tr. at 55-56. In any event, it is the Secretary's burden to establish how the circumstances presented here contributed to the hazard of a mine fire, and I would hold that the Secretary failed to meet his burden.

II.

Order No. 6683968

I would also hold that the violation cited in this order was not S&S and that it did not arise from the operator's unwarrantable failure. As we have noted, our *Mathies* formulation requires us to examine the confluence of factors to determine whether the hazard contributed to by the violation would be reasonably likely to result in a serious injury. *Texasgulf, Inc.*, 10 FMSHRC 498, 500, 501 (April 1988) (stating that 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). We have also noted that the potential for injury must assume the continuation of normal mining operations. *See U.S. Steel Mining Co.*, 7 FMSHRC 1125, 1130 (Aug. 1985).

In this case, continued normal mining operations must take into account that the operator was attending to the problem – imperfectly, and not wholly effectively, but with an ongoing awareness of the circumstances. This monitoring and cleanup, though certainly far from the best response among available options, significantly reduced the potential that these accumulations would contribute to a mine fire or propagation hazard.

This is not a case where an operator asserts that it would have discovered a problem and corrected it in the course of normal operations. *See U.S. Steel*, 7 FMSHRC at 1130 ("fact that upon being told of a deficiency by an MSHA inspector an operator proceeds to make necessary corrections, does not obviate the need for determining whether an injury would have been reasonably likely to occur if mining operations had continued without the inspector's intervention"). Rather, the maintenance effort here was already underway, with awareness of the nature and origin of the problem.

The burden of proof is on the Secretary to establish a reasonable likelihood of serious injury arising from the hazard *in this specific context*. I would hold that the majority, like the Judge, fails to account for the ongoing remedial measures aimed at the conditions in this order.

Similarly, I would hold that this violation did not result from the operator's unwarrantable failure. Although the condition was obvious and extensive, and although accumulations may

¹ Big Ridge has not challenged the Judge's determination that the violation cited in Order No. 6683088 was S&S.

pose a serious risk of fire or propagation, the intermittent intervals of accumulation were brief and were being attended to. Tr. 581, 583, 589, 590-91, 597. Additionally, efforts were underway to identify and address the misaligned belt which was causing the problem. Tr. 598. This is thus not a case where the operator may be said to be recklessly disregarding or willfully neglecting its duties. Nor is the danger so profound and its looming presence so evident that the operator can be found to have engaged in anything worse than ordinary negligence.

Furthermore, the remedial steps being taken, while not wholly effective, are the type of pre-citation mitigation which must be taken into account. *See IO Coal Co.*, 31 FMSHRC 1346, 1356 (Dec. 2009) (holding that “[t]he focus on the operator's abatement efforts is on those efforts made prior to the citation or order”). The operator’s attention also significantly reduces the gravity of the situation. None of this was wholly addressed in the Judge's decision, and I would hold that substantial evidence refutes, rather than supports, his conclusion that this violation resulted from the operator’s unwarrantable failure. *See Am. Mine Servs., Inc.*, 15 FMSHRC 1830, 1834 (Sept. 1993) (remand not necessary when record supports no other conclusion).

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

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COMMISSION ORDERS

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).

The operators’ representative asserts that he received the proposed assessments on April 24, 2012, and placed them in his secretary’s work box for contest. Due to unforeseen medical developments, the secretary did not contest the assessments until June 6, 2012. However, the proposed assessment had become a final order on May 24, 2012. The Secretary of Labor does not oppose the requests to reopen, but urges the representative to establish procedures to ensure that personal developments do not prevent timely filing of future penalty contests. The Secretary also notes that Pay Car is currently delinquent in the payment of approximately \$91,946.

Having reviewed the operators’ requests and the Secretary’s responses, in the interests of justice, we hereby reopen these matters and remand them to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission’s Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

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

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

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June 6, 2013

SECRETARY OF LABOR,	:	Docket Nos.	WEST 2009-208
MINE SAFETY AND HEALTH	:		WEST 2009-209
ADMINISTRATION (MSHA)	:		WEST 2009-210
	:		WEST 2009-342
v.	:		WEST 2009-591
	:		WEST 2009-916
HIDDEN SPLENDOR RESOURCES, INC.	:		WEST 2009-1072
	:		WEST 2009-1162
	:		WEST 2009-1451

BEFORE: Jordan, Chairman; Young and Nakamura, Commissioners

ORDER

BY THE COMMISSION:

These civil penalty proceedings arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) (“Mine Act”). At issue is whether these proceedings must be stayed under an automatic stay provision of the Bankruptcy Code.

In these proceedings, Administrative Law Judge Richard Manning issued a decision disposing of issues and assessing civil penalties relating to 23 citations and orders issued to Hidden Splendor Resources, Inc. (“Hidden Splendor”) by an inspector with the Department of Labor’s Mine Safety and Health Administration (“MSHA”). 34 FMSHRC ___, slip op. at 72-73, No. WEST 2009-208 (Dec. 20, 2012) (ALJ). On January 22, 2013, the Secretary of Labor filed a petition for discretionary review with the Commission challenging three of the penalties assessed by the Judge. The Commission subsequently granted the petition. On February 26, 2013, the Secretary designated her petition as her opening brief. Hidden Splendor did not file a response brief.

On March 18, 2013, the Commission received a Suggestion of Bankruptcy from Hidden Splendor, stating that it had filed a Chapter 11 bankruptcy petition in the United States Bankruptcy Court for the District of Nevada. Hidden Splendor stated that, as a result, these proceedings are automatically stayed pursuant to 11 U.S.C. § 362(a).

The Secretary subsequently filed with the Commission a statement in opposition to the operator's Suggestion of Bankruptcy and motion to reset the briefing schedule. The Secretary asserts that the present proceedings should not be stayed because they fall within an exception to the automatic stay provision of the Bankruptcy Code. The Secretary requests that the Commission order the parties to resume briefing and proceed to decide the issues on review. The operator did not file a response to the Secretary's opposition.

Section 362(a) of the Bankruptcy Code provides that the filing of a Chapter 11 bankruptcy petition operates as an automatic stay of the continuation of administrative proceedings against the bankruptcy petitioner.¹ Section 362(b)(4) exempts from the automatic stay provisions the continuation of a proceeding by a "governmental unit" to enforce the governmental unit's police or regulatory power.²

To determine whether proceedings fall within the police or regulatory power exception to the automatic stay, courts have applied the pecuniary purpose test and the public policy test.

¹ 11 U.S.C. § 362, entitled "Automatic stay," provides in part:

(a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title . . . operates as a stay, applicable to all entities, of—

(1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title

² Section 362(b)(4) provides in part:

(b) The filing of a petition under section 301, 302, or 303 of this title . . . does not operate as a stay—

(4) under paragraph (1) . . . of subsection (a) of this section, of the commencement or continuation of an action or proceeding by a governmental unit . . . to enforce such governmental unit's . . . police and regulatory power, including the enforcement of a judgment other than a money judgment, obtained in an action or proceeding by the governmental unit to enforce such governmental unit's . . . police or regulatory power.

11 U.S.C. § 362(b)(4).

In re Halo Wireless, Inc., 684 F.3d 581, 588 (5th Cir. 2012). The “pecuniary purpose test asks whether the government primarily seeks to protect a pecuniary governmental interest in the debtor’s property, as opposed to protecting the public safety and health.” *Id.* (citations omitted). The “public policy test asks whether the government is effectuating public policy rather than adjudicating private rights.” *Id.* (citations omitted). Both tests contemplate the consideration of “whether the particular regulatory proceeding at issue is designed primarily to protect public safety and welfare, or represents a governmental attempt to recover from property of the debtor estate, whether on its own claim, or the nongovernmental debts of private parties.” *Id.* (citations omitted).

As the Commission has previously recognized, the Secretary, the Department of Labor, and MSHA are all “governmental units” within the meaning of the Bankruptcy Code.³ *Jim Walter Res., Inc.*, 12 FMSHRC 1521, 1530 (Aug. 1990) (“*JWR*”). The present case was brought by the United States, through the Secretary, to effectuate and enforce mandatory safety standards that implement the Mine Act. This is the kind of regulatory action covered by the police or regulatory power exception to the automatic stay. *See Holst Excavating, Inc.*, 17 FMSHRC 101, 102 (Feb. 1995); *JWR*, 12 FMSHRC at 1530.

Accordingly, this case shall proceed in accordance with the Mine Act and the Commission’s Procedural Rules, 29 C.F.R. Part 2700. Hidden Splendor must file its response brief, if any, with the Commission within 30 days of the date of this order. The Secretary may file any reply brief in accordance with the provisions of 29 C.F.R. § 2700.75(a)(2).

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

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

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

³ 11 U.S.C. § 101(27) defines “governmental unit” as the “United States; . . . department, agency, or instrumentality of the United States.”

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June 27, 2013

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	Docket No. CENT 2012-73-M
v.	:	A.C. No. 25-01093-269393-02
	:	
L & L GRAVEL	:	

BEFORE: Jordan, Chairman; Young 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 December 18, 2012, the Commission received from L & L Gravel (“L&L”) a motion seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

We have held, however, that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) (“*JWR*”). In evaluating requests to reopen final 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).

MSHA's records indicate that the proposed assessment was delivered on October 17, 2011, and became a final order of the Commission on November 16, 2011. L&L asserts that its office manager forgot to check one box on the contest form for Citation No. 8587317. A settlement agreement for the remaining citations in this proposed assessment was approved by Chief Administrative Law Judge Lesnick on July 26, 2012. The Secretary opposes the request to reopen and notes that a delinquency notice was mailed to the operator on January 3, 2012, and the case was referred to the U.S. Department of Treasury for collection on April 19, 2012.

Under Rule 60(c), a Rule 60(b) motion shall be made within a reasonable time, and for reasons of mistake, inadvertence, or excusable neglect, not more than one year after the judgment, order, or proceeding was entered or taken. This motion to reopen was filed more than one year after becoming a final order. Therefore, L&L's motion is untimely. *J S Sand & Gravel, Inc.*, 26 FMSHRC 795, 796 (Oct. 2004).

Accordingly, we deny L&L's motion with prejudice.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

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

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

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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June 27, 2013

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

v.

L & W QUARRIES, INC.

:
:
:
:
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:
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:
:
:

Docket No. CENT 2013-162-M
A.C. No. 13-02138-293342

BEFORE: Jordan, Chairman; Young 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 December 5, 2012, the Commission received from L & W Quarries, Inc. (“L&W”) a motion seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

We have held, however, that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) (“*JWR*”). In evaluating requests to reopen final 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).

The Department of Labor's Mine Safety and Health Administration's ("MSHA") records indicate that the proposed assessment was delivered on July 10, 2012, and became a final order of the Commission on August 9, 2012. L&W asserts that it paid the proposed penalties in the erroneous belief that payment would end any litigation arising from the alleged violations. In his affidavit, L&W's general manager contends that a significant factor in his decision to timely pay the citations was that MSHA had not issued any penalties against individuals employed by L&W under section 110(c) of the Mine Act, 30 U.S.C. § 820(c). Because MSHA sent proposed assessments to two individuals on July 17, 2012, L&W seeks to reopen this matter to ensure that payment will not constitute an admission of wrongdoing on the part of the company or its agents.

The Secretary opposes the request to reopen, noting that the operator's concerns are unfounded. The Secretary assures the operator that if the section 110(c) assessments proceed to litigation, he will not argue that L&W's payment estops its agents from litigating any aspect of the underlying violations. Moreover, the Secretary established that the payment in this case was postmarked on November 7, 2012, three months after the proposed assessment became a final order, and almost four months after the individual assessments were issued.

Having reviewed L&W's request and the Secretary's response, we conclude that the outcome of the matter before us will not prejudice any future section 110(c) proceedings. Accordingly, the motion to reopen is denied.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

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

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

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June 27, 2013

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Docket No. CENT 2013-355-M
ADMINISTRATION (MSHA)	:	A.C. No. 41-04433-309396
	:	
	:	Docket No. CENT 2013-356-M
	:	A.C. No. 41-04433-275623
	:	
	:	Docket No. CENT 2013-357-M
	:	A.C. No. 41-04433-261135
	:	
	:	Docket No. CENT 2013-358-M
	:	A.C. No. 41-04433-249717
v.	:	
	:	Docket No. CENT 2013-359-M
AMISTAD READY MIX	:	A.C. No. 41-04433-226284

BEFORE: Jordan, Chairman; Young 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”). On March 21, 2013, the Commission received from Amistad Ready Mix (“Amistad”) five motions seeking to reopen five penalty assessments that had become final orders of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).¹

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

¹ Pursuant to Commission Procedural Rule 12, on our own motion, we hereby consolidate docket numbers CENT 2013-355-M, CENT 2013-356-M, CENT 2013-357-M, CENT 2013-358-M and CENT 2013-359-M, all captioned *Amistad Ready Mix*, and involving similar procedural issues. 29 C.F.R. § 2700.12.

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).

The Department of Labor’s Mine Safety and Health Administration’s (“MSHA”) records indicate that proposed assessment No. 000309396 was delivered on December 20, 2012, and became a final order of the Commission on January 22, 2013. A delinquency notice was mailed on March 7, 2013. Proposed assessment No. 000275623 was delivered on December 22, 2011, and became a final order of the Commission on January 23, 2012. A delinquency notice was mailed on March 7, 2012, and the case was referred to the U.S. Department of Treasury for collection on June 28, 2012. Proposed assessment No. 000261135 was delivered on July 20, 2011, and became a final order of the Commission on August 19, 2011. A delinquency notice was mailed on October 7, 2011, and the case was referred to the U.S. Department of Treasury for collection on January 19, 2012. Proposed assessment No. 000249717 was delivered on March 23, 2011, and became a final order of the Commission on April 22, 2011. A delinquency notice was mailed on June 8, 2011, and the case was referred to the U.S. Department of Treasury for collection on September 29, 2011. Proposed assessment No. 000226284 was delivered on July 21, 2010, and became a final order of the Commission on August 20, 2010. A delinquency notice was mailed on October 26, 2010, and the case was referred to the U.S. Department of Treasury for collection on January 28, 2011.

Under Rule 60(c), a Rule 60(b) motion shall be made within a reasonable time, and for reasons of mistake, inadvertence, or excusable neglect, not more than one year after the judgment, order, or proceeding was entered or taken. The motions to reopen in Docket Nos. CENT 2013-356-M, CENT 2013-357-M, CENT 2013-358-M and CENT 2013-359-M were filed more than one year after becoming final orders. Therefore, these motions are untimely. *J S Sand & Gravel, Inc.*, 26 FMSHRC 795, 796 (Oct. 2004).

Regarding Docket No. CENT 2013-355-M, Amistad asserts that it has recently been told that the penalties it received were exceedingly harsh for a quarry of its size. The Secretary opposes the request to reopen, noting that the operator provided no explanation for its failure to timely contest the proposed assessment.

Having reviewed Amistad's requests and the Secretary's responses, we conclude that Amistad has failed to establish good cause for reopening the proposed penalty assessments. Accordingly, we hereby deny Amistad's motions to reopen.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

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

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

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June 27, 2013

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	
	:	
v.	:	Docket No. LAKE 2012-870-M
	:	A.C. No. 11-00102-279217
LIVINGSTON STONE COMPANY, INC.	:	

BEFORE: Jordan, Chairman; Young 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 4, 2012, the Commission received from Livingston Stone Company (“Livingston”) a motion seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

We have held, however, that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) (“*JWR*”). In evaluating requests to reopen final 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).

MSHA's records indicate that the proposed assessment was delivered on February 6, 2012, and became a final order of the Commission on March 7, 2012. Livingston's safety director asserts that after receiving the citations in December 2011, he discussed with counsel Livingston's intent to contest the proposed assessment. After receiving the proposed assessment, the safety director timely emailed it to counsel along with copies of the citations, photographs, and Livingston's defenses. Livingston's counsel states that she believed that Livingston had already filed the contest. Counsel did not discuss this assessment with her client until Livingston received a collection notice from the U.S. Department of Treasury, dated August 15, 2012.

The Secretary opposes the request to reopen and notes that MSHA mailed a delinquency notice on April 23, 2012, and the operator does not explain why it took four months to request reopening. The Secretary points out that the contest form Livingston forwarded to counsel was not properly marked for contest, and that neither the remittance coupon nor the contesting official information form was filled out. Under the circumstances, the Secretary maintains that counsel should have contacted her client to confirm the operator's intent. The Secretary further notes that the counsel's office does not appear to have an internal tracking system to monitor and ensure that contests are timely filed. Moreover, under well-established case law, attributing the failure to timely contest to the counsel rather than the operator, is not an adequate basis for reopening.

The Commission has made it clear that where a failure to contest a proposed assessment results from an inadequate or unreliable internal processing system, the operator has not established grounds for reopening the assessment. *Oak Grove Res., LLC*, 33 FMSHRC 103, 104 (Feb. 2011); *Double Bonus Coal Co.*, 32 FMSHRC 1155, 1156 (Sept. 2010); *Highland Mining Co.*, 31 FMSHRC 1313, 1315 (Nov. 2009); *Pinnacle Mining Co.*, 30 FMSHRC 1066, 1067 (Dec. 2008); *Pinnacle Mining Co.*, 30 FMSHRC 1061, 1062 (Dec. 2008). Moreover, as the Commission stated in *M3 Energy Mining Co.*, 33 FMSHRC 1741, 1746 (Aug. 2011):

The fact that many of the inadequate and unreliable office procedures in these cases occurred at counsel's office rather than the office of the operators does not affect our analysis. As the Commission noted in *Keokee Mining, LLC*, 32 FMSHRC 64, 66 n.1 (Jan. 2010), "[i]n requesting relief from a final order, a client may be held accountable for the acts and omissions of its attorney." *Keokee Mining* relied on *Pioneer Investment Services Co. v. Brunswick Associates Ltd. P'ship*, 507 U.S. 380, 397 (1993), where the Supreme Court made clear that when a party's failure to meet a deadline was caused by the actions of its counsel, and the issue is whether the party would be exonerated on the basis of "excusable neglect," the party would "be held accountable for the acts and omissions of [its] chosen counsel." This is because the party "voluntarily chose this attorney as his representative in the action, and he cannot now avoid the consequences of the acts or

omissions of this freely selected agent.”” *Id.* (quoting *Link v. Wabash R. Co.*, 370 U.S. 626, 633-34 (1962)).

(Footnote omitted). In this case, we conclude that the lack of any procedure to confirm that the required paperwork was timely filed represents an inadequate or unreliable internal processing system. We note that although the operator implemented new procedures to prevent future defaults, this failure occurred in its counsel’s office. Counsel should take all steps necessary to ensure that penalty contests are filed timely.

Having reviewed Livingston’s request and the Secretary’s response, we conclude that Livingston has failed to establish good cause for reopening the proposed penalty assessment. Accordingly, we hereby deny Livingston’s motion to reopen.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

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

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

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ADMINISTRATIVE LAW JUDGE DECISIONS

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June 3, 2013

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING:
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 2011-1093
Petitioner,	:	A.C. No. 15-17497-255229
	:	
v.	:	
	:	
LEECO, INC.,	:	Mine: # 68
Respondent.	:	

DECISION

Appearances: Alisha I. Wyatt-Bullman, Esq.; Leslie Brody, Esq., U.S. Department of Labor, Atlanta, Georgia, on behalf of the Secretary

Noelle True, Esq., Rajkovich, Williams, Kilpatrick, & True, Lexington, Kentucky, on behalf of Leeco, Inc.

Before: Judge David F. Barbour

This case is before me on a petition for assessment of civil penalty filed by the Secretary of Labor on behalf of the Mine Safety and Health Administration (MSHA) against Leeco, Inc. (“Leeco”), pursuant to sections 105(d) and 110 of the Federal Mine Safety and Health Act of 1977.¹ 30 U.S.C. §§ 815(d), 820. The Secretary alleges that Leeco is liable for two violations of § 75.370(a)(1), a mandatory safety standard that requires a mine operator to develop and follow a ventilation plan that is approved by the MSHA district manager. Once the plan is approved, an operator must comply with all of its provisions. *Wyoming Fuel Company n/k/a Basin Resources, Inc.*, 16 FMSHRC 1618, 1624 (Aug. 1994) (*citing UMWA v. Dole*, 870 F.2d 662, 671 (D.C. Cir. 1989); *Ziegler v. Kleppe*, 536 F.2d 398 (D.C. Cir. 1976); *Freeman United Coal Mining Co.*, 11 FMSHRC 161, 164 (Feb. 1989); *Jim Walter Resources, Inc.*, 9 FMSHRC 903, 907 (May 1987)). The Secretary proposes the assessment of \$107,716.00 for the violations. The parties presented testimony and documentary evidence at a hearing in Hazard, Kentucky. They also filed post-hearing briefs. One alleged violation of section 75.370(a)(1), set forth in Order No. 8346197, was settled shortly before the hearing. Details of the settlement are discussed at the end of this decision. The Secretary asserts that the remaining alleged violation, which is cited in Order No. 8346316, is correctly characterized as a significant and substantial contribution to a mine safety hazard ("S&S"), is the result of Leeco's high negligence and unwarrantable failure to comply with the standard and that the penalty proposed – \$47,716.00 – is appropriate.

¹ Hilda L. Solis resigned as Secretary of labor on January 22, 2013. Deputy Secretary Seth D. Harris is Acting Secretary of Labor.

STIPULATIONS

Before presenting testimony regarding the contested violation the parties stipulated as follows:

1. At all times relevant to this matter, Leeco was the operator of Mine # 68.
2. The Respondent's operation at Mine # 68 involved [products] which entered commerce or products which affected commerce.
3. Respondent admits that Order No. 8346316[, the order in which the contested violation is alleged,] was properly issued.
4. Respondent admits to the fact of the violation in Order No. 8346316.
5. Mine # 68 produced 715,374 tons of coal in 2010.
6. Leeco terminated the conditions giving rise to the [settled and contested] orders in a timely, effective, and good manner.
7. The proposed penalties for the [settled and contested] orders will not affect Leeco's ability to continue in business.
8. The MSHA inspectors' methane detectors and anemometers, used to obtain methane and air readings on November 4, 2010 [.,] at Leeco's Mine # 68[,.] were properly calibrated.

See Tr. 18-20.

BACKGROUND

Mine # 68 is an underground bituminous coal mine located in Perry County, Kentucky. On November 4, 2010, MSHA inspectors James Daniels and Gary Oliver were sent to the

mine.² The inspectors' visit was the result of an anonymous complaint filed with MSHA by a Leeco miner.³ The complaint alleged "poor ventilation." Tr. 77. On November 4 the mine was on a 15-day spot inspection schedule and an approved ventilation plan was in place.⁴ Tr. 41, 47-48; Ex. S-5. The mine also was subject to the provisions of section 104(d)(2) of the Act. 30 U.S.C. §814(d)(2). As a result, any alleged violation found by an inspector to be S&S and caused by the unwarrantable failure of Leeco to comply was cited in a section 104(d)(2) withdrawal order. *Id.*; see Tr. 65. The inspectors' November 4 investigation resulted in the issuance of the following order:

<u>ORDER NO.</u>	<u>DATE</u>	<u>30 CFR §</u>
8346316	11/4/10	75.370(a)(1)

The operator is not complying with the provisions of the methane and dust control portions of the approved ventilation plan for the 014 MMU. The Joy

² Prior to starting with MSHA in 2007, James Daniels graduated from Morehead State University with a bachelor's degree in industrial technology. Tr. 36. Daniels minored in mining technology. *Id.* After graduation, Daniels worked in the mining industry for 13 years. Tr. 37. During nine of those years he was a foreman and two of the nine years were spent as a section foreman at Mine # 68. Tr. 37-38. As a foreman, one of Daniels' duties was to train miners on maintaining proper ventilation. Tr. 38. Daniels has been an MSHA inspector for the past five years. Tr. 39.

Gary Oliver started with MSHA in 2006. Prior to that he worked in the mining industry for five years and at Mine # 68 for approximately two of those years. Tr. 71, 74. He also worked at Blue Diamond Coal Company's ("Blue Diamond's") Mine # 77 where he received his foreman papers. Tr. 74, 147. Both Leeco and Blue Diamond are subsidiaries of the same parent company, James River Coal Company ("James River"). Oliver has been an MSHA inspector for the past six years. Tr. 70-71, 73.

³ Section 103(g)(1) of the Act provides:

Whenever . . . a miner . . . has reasonable grounds to believe that a violation of this Act or a mandatory health or safety standard exists . . . such miner . . . shall have a right to obtain an immediate inspection by giving notice to the Secretary or his authorized representative of such violation or danger.

30 U.S.C. § 813(g)(1).

⁴ Pursuant to section 103(I) of the Act, a mine that liberates more than 200,000 cubic feet of methane during a 24-hour period is subject to one spot inspection every 15 working days. 30 U.S.C. § 823(I).

continuous miner is observed mining in the No.4 heading without a properly installed line curtain for methane and dust control. An attempt to take an air reading with a properly calibrated anemometer indicated that there was not enough air movement to turn the blades to obtain an air reading. The currently approved plan requires a velocity of 6,150 CFM of air movement behind the line curtain. The installed curtain was located approximately 25 feet from the back of the miner and was not installed out into the last open crosscut to deflect and move air up into the entry where the miner is cutting and loading. Additionally dust was suspended in the air so thick that the lights on the miner and shuttle car were [barely] visible from approximately 70 feet away. These conditions expose the miners working in the 014 MMU to the risk of fatal injuries if a methane explosion were to occur and to permanently disabling lung diseases from dust inhalation. This mine is currently on a 15 day 103(I) spot inspection schedule due to methane liberation[,] and methane explosions have historically caused serious injuries and death to miners. Exposure to respirable dust is the leading cause of Black Lung and Silicosis disease in coal miners. The section foreman was observed walking across the last open crosscut and the amount of dust suspended in the air would be recognized as a hazard to miners by the most casual observer and is a clear indication of problems with the ventilation controls.

This failure to comply with the ventilation plan constitutes more than ordinary negligence and is an unwarrantable failure to comply with a mandatory health and safety standard.

Ex. S-1.

Prior to entering Mine # 68 on November 4 Oliver reviewed the mine's records. Tr. 79. He found that the required pre-shift examinations were being conducted. *Id.* There were no recorded hazardous conditions reported by the pre-shift examiners. *Id.* Oliver then proceeded

underground and traveled to the No. 14 Section. *Id.* He was accompanied by Ricky Wells.⁵ Tr. 79-80. The men arrived at the last open crosscut in the No. Four entry of the No.14 section and Oliver noticed what he thought was an excessive amount of dust in the air coming from the entry. Tr. 79, 81-82; Ex. S-1. He also saw the section foreman, Bobby Meade, coming from the No. Five entry to the last open crosscut of the No. Four entry.⁶ Tr. 83-84. Meade did not immediately recognize Wells and Meade did not know Oliver. He therefore walked directly up to the men, saw that one was Wells and introduced himself to Oliver. Wells explained to Meade why he and Oliver were in the section. Tr. 158, 235, 301.

Oliver then walked toward the face of the No. Four entry where a continuous mining machine (“continuous miner”) and a shuttle car were operating. Tr. 84-85. As he traveled toward the face, he noticed what seemed to be an increasingly thick concentration of dust suspended in the air, some of which he asserted was respirable.⁷ Tr. 129. Oliver flagged the operator of the continuous miner who shut down the machine. Tr. 84-86. Oliver then approached the continuous miner. He noticed that the middle part of the line curtain that was used to direct air into the entry (the “deflector curtain”) was hanging from the mine roof while the inby and outby parts of the curtain were lying on the mine floor.⁸ Tr. 86, 100. Oliver tried to take an air reading inby the hanging part of the curtain but there was no air flow to turn the blades of his anemometer. Tr. 86. The suspended dust and his inability to obtain an air reading were indications to Oliver that there was no ventilation at the face or in the area of the continuous miner. Tr. 87.

⁵ Ricky Wells is currently employed by James River as a mine superintendent. Tr. 221-22. However, on November 4, 2010, Wells was the general mine foreman at Mine # 68. Tr. 79-80. He had worked for Leeco for 15 years. Tr. 222. For approximately 11 of those years he worked as a section foreman. At the time of the hearing, Wells had 28 years of experience in underground coal mining. Tr. 222-23.

⁶ Bobby Meade, who is a current employee of Excel Mining Co., was employed as a section foreman at Mine # 68 on November 4, 2010. Tr. 278. Prior to becoming a section foreman, Meade worked as a roof bolting machine operator for approximately 10 years. Tr. 279-80.

⁷ Coal dust is produced when coal is mined. The coal dust is often mixed with varying amounts of dust from rock that is interspersed in the coal seam or that lies above or below the seam. Coal dust presents two hazards: (1) an explosion hazard, and (2) a pneumoconiosis hazard. Coal dust of a size that can pass through a 20 mesh screen can propagate an explosion while coal dust that is larger has little, if any, influence on the development of an explosion. Coal dust that is harmful from a pneumoconiosis standpoint measures 5 microns or less. Am. Geological Institute, *Dictionary of Mining Mineral and Related Terms* (“DMMRT”) at 224 (1968). Oliver did not sample the dust to determine its content and size. Tr. 133.

⁸ The mining terms “inby” and “outby” are used as underground directional points of reference. In general, “inby” means of or toward the working face and/or the interior of the mine, and “outby” means away from the working face and/or toward the entrance of the mine. See *DMMRT* (1968) at 572,778.

One of the sections of the mine's approved plan is titled "Safety Precautions for Scrubbers and Extended Line Curtains." Ex. S-5 at 6. Part 3 of the section requires an air flow of 6,150 cubic feet per minute ("cfm") on the 014 mechanized mining unit. Tr. 87; Ex. S-5 at 6. To achieve the required air flow the plan states:

Deflector curtains will be maintained, in all idle places and places where work is being performed, to provide air movement. The deflector curtain will extend to within 40 feet of the face. Curtains will extend [outby] the corner, into the intersection a minimum of 4 feet.

Ex. S-5 at 2; *see* Tr. 178.

In addition, the plan requires that the curtain be maintained within 10 feet of the shuttle car at all times. Tr. 102; Ex. S-5 at 2.

Meade testified that prior to seeing Oliver and Wells, the last time he was in the No. Four entry, he saw Tom Hensley, the continuous miner operator, taking a first cut. Tr. 283. Meade maintained that at that time the curtain was hung within 10 feet of the shuttle car and extended into the crosscut as required. Tr. 286-87, 289-90. However, when Oliver saw the curtain it was approximately 25 feet from the shuttle car and part of it was lying by the corner of the crosscut, not in the crosscut. Tr. 102-103, 179; Ex. S-6. Oliver testified that it was possible the curtain had once extended four feet into the crosscut as Meade claimed, but Oliver did not think it was likely. Tr. 179.

Oliver asked Hensley why all but the middle part of the curtain was lying on the mine floor. Tr. 90-91. Hensley replied that he accidentally tore down the curtain with the trailing cable of the continuous miner when he was backing up. Tr. 90, 244-45. However, Oliver did not see the trailing cable lying on top of the downed curtain. Tr. 168, 201. Also, if the curtain had been pulled down by the trailing cable as Hensley maintained, Oliver believed the curtain would not have come down at both ends with its middle part still hanging. Tr. 114, 168, 169. Therefore, in his opinion, the curtain was most likely not properly installed in the first place. Tr. 90.

Wells countered that after Oliver spoke with Hensley, he attempted to rehang the curtain. Wells stated that he had to pick up the curtain from underneath the cable. Tr. 241, 244-45. Wells explained that trailing cables frequently became tangled in curtains, and it was the responsibility of continuous miner operators to rehang the downed curtains. Tr. 273. Meade also asserted it was possible for a cable to become tangled with a curtain in such a way that the curtain's outby and inby ends are torn down. Tr. 303-04, 306.

After inspecting the area where the continuous miner was operating, Oliver had Wells gather all eight miners who worked on the No. 14 section for a safety meeting. Tr. 115, 277. At the meeting, Oliver told the miners that running the continuous miner without ventilation was

inexcusable and that he did not want a situation where he had to explain to families that miners died in a coal mine explosion because a curtain was not hung properly. Tr. 115.

Following the meeting, the miners rehung the curtain. Tr. 116. At first, the miners hung the parts of the curtain lying on the ground, but when the curtain was rehung, it did not direct a sufficient air volume to meet the requirements of the ventilation plan. Tr. 117. The miners then added an additional 12-16 feet of curtain to the outby end of the original rehung curtain. Tr. 109. The augmented curtain achieved the proper air flow. Tr. 108. The fact that a fairly large piece of curtain had to be added to meet the requirements of the ventilation plan indicated to Oliver that even if the curtain was hung before mining commenced in the entry, the curtain was not long enough to extend into the crosscut and direct the air necessary to comply with the ventilation plan. Tr. 117.

THE VIOLATION

Section 75.370(a)(1) states, “[t]he operator shall develop and follow a ventilation plan approved by the district manager. The plan shall be designed to control methane and respirable dust and shall be suitable to the conditions and mining system at the mine.” 30 C.F.R. § 75.370(a)(1). The order alleges that the plan in effect on the day of the inspection required 6,150 cfm of air behind the line curtain and Oliver testified that not only was the curtain down at both ends, he could detect no air traveling in the entry. Tr. 86-77, 184. The parties stipulated that Leeco violated section 75.370(a)(1) as charged, and I so find. Tr. 20; Stip. 4; Tr. 20.

Oliver determined that the violation was reasonably likely to cause fatal injuries, that it was S&S, and that it was due to Leeco’s high negligence and unwarrantable failure to comply with the cited standard. Ex. S-1.

S&S

An S&S violation is a violation "of such nature as could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard." 30 U.S.C. § 814(d). A violation is properly designated S&S, "if, based upon the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981). As is well recognized, in order to establish the S&S nature of a violation, the Secretary must prove: (1) the underlying violation; (2) a discrete safety hazard - that is, a measure of danger to safety - contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury will be of a reasonably serious nature. *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984); *see also*, *Buck Creek Coal Co., Inc. v. MSHA*, 52 F.3rd 133, 135 (7th Cir. 1995); *Austin Power Co., Inc. v. Sec'y of Labor*, 861 F. 2d 99,103 (5th Cir. 1988) (approving *Mathies* criteria).

It is the third element of the S&S criteria that is the source of most controversies regarding S&S findings. The element is established only if the Secretary proves "a reasonable likelihood the hazard contributed to will result in an event in which there is an injury." *U.S. Steel*

Mining Co., Inc., 7 FMSHRC 1125, 1129 (Aug. 1985). An S&S determination must be based on the particular facts surrounding the violation and must be made in the context of continued normal mining operations. *U.S. Steel Mining Co.*, 6 FMSHRC 1573, 1574 (July 1984).

The parties agree, and I have found, that the violation existed as charged. Tr. 20; Stip. 4. *infra*. The Secretary charges that a total lack of ventilation led to the excessive atmospheric coal dust noted by Oliver and contributed to the discrete safety hazards of a build up of methane to explosive levels, a possible methane/coal dust explosion, and to the possibility of miners contracting pneumoconiosis. Tr. 129-31, 133. The issue of whether the violation was S&S turns on whether an explosion hazard was established by the Secretary and, if so, whether the hazard was reasonably likely to cause an injury or injuries of a reasonably serious nature.⁹

Oliver, an experienced miner and mine inspector, believed that the lack of ventilation was reasonably likely to result in an explosion. Tr. 129. The Commission has stated that in:

[E]valuating 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 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) (“*UP&L*”); *Texasgulf*, 10 FMSHRC at 500-03.

Enlow Fork Mining Co., 19 FMSHRC 5, 9 (Jan. 1997). Oliver explained that for an explosion to occur, oxygen, ignition, and fuel (coal dust, methane, or both) must be present. Tr. 189. I credit Oliver’s testimony that a significant amount of coal dust was suspended around the continuous miner and throughout the entry. Tr. 85. Oliver’s description of the dust as being so thick that the continuous miner’s lights were barely visible from 70 feet is compelling, and Oliver’s extensive experience in the mining industry gives added credence to his determination that the dust was “excessive.” Ex. S-1.

⁹ As previously noted, Oliver did not sample the dust to determine its nature and content. His belief that harmful respirable dust was present was based solely on his visual observations. I agree with Administrative Law Judge Michael Zielinski who held in *Leeco, Inc.*, 27 FMSHRC 39, 56 n.16 (Jan. 2005), that allegations of the presence of respirable dust based solely on visual observations and without analytical evidence of harmful concentrations and length of exposure cannot be considered in an S&S analysis.

Testimony from Wells and Meade indicated that Hensley left a brow standing and that at the time of the inspection, Hensley was using the continuous miner to remove the brow.¹⁰ Tr. 245-46, 248. Leeco contended that the dust Oliver saw suspended in the entry's atmosphere was rock dust from the cut brow, not coal dust, and that the suspended dust could not have led to an explosion. Tr. 190. I reject this contention and find that a significant amount of the suspended dust was in fact coal dust. Coal was being cut in the No. Four entry on November 4. As Oliver explained, "[I]t's a coal mine. As they mine, they have to mine coal." Tr. 202. It is reasonable to assume that the large amount of dust came from the ongoing mining at the face, not from cutting a single brow. In addition, and as I already have noted, Oliver, an inspector with considerable experience as an inspector and a miner, believed the dust was coal dust. Tr. 70-74.

I take note of the fact that coal dust can be highly explosive in and of itself and that a continuous miner's bits can cause sparks when they strike naturally occurring rock in a coal seam. *See* Tr. 130. In addition, even though Oliver did not detect methane prior to issuing the order, he posited that if mining continued, methane could have been suddenly released. Tr. 127, 130-31. This scenario was not unlikely. The mine is gassy and at the time of the inspection it was liberating at least 200,000 cfm of methane in a 24 hour period. Tr. 41, 75. Ongoing mining would have released even more methane. Without ventilation, methane would not have been diluted and the concentration of methane would have increased. Tr. 127. Moreover, when methane interacts with coal dust, coal dust can lower the explosive range of methane making the gas even more likely to explode. Tr. 128, 129-30. While there were methane sensors on the continuous miner to give the continuous miner operator a warning when methane levels reached 1% and to shut down the machine when methane levels reached 1.5-2%, Oliver credibly asserted that the sensors would not necessarily have prevented an explosion and that there have been explosions in the past where sensors worked properly. Tr. 131-32.

Oliver also determined that an explosion was reasonably likely to result in fatal or serious injuries. Tr. 136. There were eight miners working in the No. 14 section at the time the violation was cited, and Oliver believed that all of them could have been affected. Tr. 135, 137. Given the devastating potential of an explosion, I find that Oliver correctly determined that eight miners were reasonably likely to have been severely injured or killed because of the violation.

Based on the amount of coal dust that was in the air, the large amount of methane that was liberated and the large amount that reasonably could have been expected to be liberated as mining continued, and based on the fact that as mining continued the continuous miner represented an ongoing potential ignition source, I find that the lack of compliance with the approved ventilation plan in the No. Four entry was reasonably likely to result in an explosion causing fatalities and/or other injuries of a serious nature and that the violation was properly found to be S&S.

¹⁰ A brow is rock that projects from an entry's roof or from the top of a rib in an entry. Tr. 245-46. A brow normally is supported or cut down to prevent it from falling and injuring a miner or miners.

GRAVITY

The S&S nature of a violation and the gravity of a violation are not synonymous. The Commission has pointed out that the "focus of the seriousness of the violation is not necessarily on the reasonable likelihood of serious injury, which is the focus of the S&S inquiry, but rather on the effect of the hazard if it occurs." *Consolidation Coal Co.*, 18 FMSHRC 1541, 1550 (Sept. 1996). Here, the lack of ventilation due to Leeco's noncompliance with its approved ventilation plan could have resulted in an explosion which almost surely would have killed and/or injured up to eight miners. The violation was very serious.

UNWARRANTABLE FAILURE

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

The unwarrantable failure terminology is taken from section 104(d) of the Act, 30 U.S.C. § 814(d), and refers to more serious conduct by an operator in connection with a violation. In *Emery Mining Corp.*, 9 FMSHRC 1997 (Dec. 1987), the Commission determined that unwarrantable failure is aggravated conduct constituting more than ordinary negligence. *Id.* at 2001. Unwarrantable failure is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference," or a "serious lack of reasonable care." *Id.* at 2003-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194 (Feb. 1991) ("R&P"); *see also Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d 133, 136 (7th Cir. 1995) (approving Commission's unwarrantable failure test). Whether conduct is "aggravated" in the context of unwarrantable failure is determined by looking at all the facts and circumstances of each case to see if any aggravating factors exist, such as the length of time that the violation has existed, the extent of the violative condition, whether the operator has been placed on notice that greater efforts are necessary for compliance, the operator's efforts in abating the violative condition, whether the violation is obvious or poses a high degree of danger, and the operator's knowledge of the existence of the violation. *See Consolidation Coal Co.*, 22 FMSHRC 340, 353

(Mar. 2000) ("*Consol*");
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).

Lopke Quarries, 23 FMSHRC at 711.

Oliver found that the violation was the result of high negligence and an unwarrantable failure because of the amount of dust that was present, the failure of Meade to take corrective measures despite the presence of the dust, the fact that the curtain was not rehung after Oliver thought it was torn down, and because he believed that the curtain was likely never installed correctly in the first place. Tr. 137-38.

OBVIOUSNESS

When Oliver and Wells stepped into the last crosscut of the No. Four entry to take the first set of air readings, Oliver looked up and noticed that there was "a lot of dust in the air." Tr. 82. While there is always some dust in the air when mining is underway, the dust Oliver saw caught his attention because the amount seemed much more than normal. Tr. 82, 83. This signaled to Oliver that the ventilation in the entry was defective. However, when Meade approached Oliver and Wells, he was coming from the No. Five entry into the last open crosscut of the No. Four entry. Tr. 83-84; Ex. S-10. Wells stated without contradiction that coming from this direction, Meade would not have been in, nor seen, an abnormal amount of dust. Tr. 234. Meade testified that he did not look toward the face of the No. Four entry as he was walking up to Oliver and Wells, and Oliver did not ask Meade what he observed when walking towards them. Tr. 165, 300-01. Moreover, at the time he approached the men, Meade was not on notice that he should look for signs of defective ventilation in the entry. He credibly testified that when he visited the No. Four entry earlier in the shift, he was "110 percent certain" that the curtain

was properly hung and the ventilation “was working properly.” Tr. 290-291. While there was “a little dust” at the face, it was, he stated, no more than is always present when a continuous miner cuts coal. Tr. 291. Meade’s testimony was logical and believable, and I conclude that Meade was not on notice to look for excessive dust when he approached Oliver and Wells. In other words, I conclude that while the amount of dust signaling the lack of ventilation was visually obvious, the dust when first seen by Meade did not indicate that he should have been aware of the violation and should have reacted to it in the short time that Oliver allotted to him. In fact, all three of the men had to look toward the face in the No. Four entry to see that excessive dust was present in the area of the continuous miner. Tr. 82, 234, 299-301. Further, all of the men had to walk toward the area where mining recently occurred to see that the deflection curtain was down. Tr. 86, 240-41, 301. It was in this area that Oliver confirmed there was no ventilation in the vicinity of the miner. Therefore, I find that as Meade approached and reached Oliver the thick dust in the atmosphere and the downed curtain were not so obvious as to alert Meade that there was a ventilation problem that needed correcting. I also find the evidence does not establish that the condition was known or should have been known to Meade earlier in the shift.

Degree of Danger

There was excessive dust and no ventilation in the area of the continuous miner. Tr. 84-86. Although the record does not support a finding that methane was then present in the No. Four entry (*see e.g.* Tr. 127), as stated above, methane was reasonably likely to be released as mining continued based on the mine's history of liberating large amounts of methane. Tr. 127, 130-31. At the same time, the continuous miner could have caused sparks, an obvious ignition source, and once the methane ignited, the concentrated coal dust could likely have propagated an explosion resulting in the death and/or serious injury of up to eight miners. Tr. 132. There is no gainsaying the fact that the violation posed a high degree of danger, one that required a heightened level of awareness.

Length of Time

Oliver believed that the lack of required ventilation existed for “[p]robably close to 30 minutes” because he thought the entire cut had been mined while there was a lack of ventilation and that “it would’ve taken approximately 30 minutes to mine what they had mined.” Tr. 120. However, Oliver also testified that if Meade had stopped the continuous miner when Meade came up to Oliver and Wells in the crosscut, Oliver would not have regarded the violation as caused by Leeco’s unwarrantable failure. Speaking of Meade, Oliver stated:

[O]nce he observed that dust, that indicated there was a problem with the ventilation. And he [should have] stopped the miner the same way I stopped the miner when I entered that area. . . . [If he had stopped the miner] [t]hat would’ve been a mitigating factor and I would’ve considered that he took . . . corrective action, and it

would've probably been moderate negligence.

Tr. 121-22.

When Oliver was asked how much time elapsed between when he thought Meade should have shut down the miner and when Oliver shut it down, Oliver replied. “[O]ne to two minutes. From the time that he walked across over to where me and Rick Wells was and we kind of exchanged hello . . . and I asked him where the miner was cutting, a minute, a minute and a half.” Tr. 123. Oliver felt that Meade “could have signaled [the continuous miner operator] with his cap light. He could’ve went over to the entry [and] hollered at him . . . to shut off [the continuous miner.]” Tr. 123-24. Asked if there was a policy that required a section foreman to go directly to an MSHA inspector, Oliver replied, “I don’t know that there [is] a policy that you go immediately to an inspector. I mean, you talk to the inspector and you see what they want and you assist them, yes there is that.” Tr. 124.

Oliver’s testimony indicates that his finding of unwarrantable failure was heavily influenced by the fact that Meade did not take any action in the minute or two that it took Meade to reach and to identify Oliver and Wells. Also factoring into his unwarrantable failure finding was Oliver’s suspicion that the deflector curtain was not installed properly or, perhaps, was never hung. Tr. 126-27. In Oliver’s view, Meade should have known that the curtain was either improperly installed, that it had been torn down, or that it never was hung in the first place. Tr. 127. Although the continuous miner operator maintained that the curtain was properly hung but was torn down when he backed up, Oliver questioned this. He testified that he asked Hensley why he had not rehung the curtain. He stated that Hensley did not answer. Tr. 138-39. If the curtain had in fact been torn down, Oliver believed it had been down for approximately 30 minutes. Tr. 139.

Having considered all of the testimony, I reject Oliver’s rationale that Meade’s failure to stop the continuous miner before Oliver stopped it was indicative of an unwarrantable failure to comply with the approved ventilation plan. As noted, Oliver’s testimony gave Meade one to two minutes to take the action that Oliver thought was required. Tr. 123-24, 155-57. However, the testimony made clear that Meade was confronted with a situation wherein two people whom he did not recognize were unexpectedly present on a section for which he was responsible. It was a natural thing for Meade to want to understand why the people were present. Failure to give immediate priority in the very short time under consideration to the dust in the entry did not represent aggravated conduct or more than ordinary negligence. Rather, I find the fact that Meade first determined who was unexpectedly on the section represented normal conduct by a responsible supervisor.

I also conclude that the Secretary did not establish that Meade knew or should have known that the curtain was not hung or was improperly hung. If the Secretary had established that mining began with the curtain down or mostly down, then Meade either knew or should have known about the defect because as section foreman he was required to check the section for compliance with all safety standards prior to mining beginning. The downed or improperly hung

curtain would have been a sign that non-compliance with the ventilation plan was likely. However, the Secretary did not prove that the curtain was down or was improperly hung when mining began. Oliver suspected that either might have been the case, but an unwarrantable failure finding cannot be based on a suspicion. In fact, Oliver acknowledged his lack of certainty. Asked if he thought Meade was aware the curtain was improperly hung, Oliver replied, "I don't know that he knew one way or the other." Tr. 122.

Further, Wells testified that after Hensley had mined a cut in the No. Four entry and started to clean up on the left side of the entry, the cable was thrown to one side where it caught and pulled down the deflector curtain. Tr. 245, 246. In the meantime, as he was cleaning up Hensley noticed a brow and chose not to rehang the curtain before removing the brow with the continuous miner. Tr. 246, 259-60. This scenario is just as likely to have occurred as the curtain being improperly hung to start with, and under the "pulled down" scenario there was no showing by the Secretary that Meade should have known about the curtain's defective placement. Under these circumstances, I find that the length of time the violation existed is too speculative to be part of the basis for an unwarrantable finding.

Extent of the Violation

The extensiveness factor involves consideration of the scope or magnitude of a violation. *Eastern Associated Coal Corp.*, 32 FMSHRC 1189, 1195 (Oct. 2010). The lack of required ventilation existed in a relatively small area. The heavy concentration of suspended dust was contained mostly in the No. Four entry, at the face and around the continuous miner, with some dust traveling farther down to the last crosscut. The lack of ventilation was localized, which means that Meade's duty of care is judged on the knowledge he had or should have had of the conditions in the No. 4 entry where the continuous miner was cutting. This is not a situation where the scope of the violation was so extensive that management officials were apprised of or should have been apprised of the situation numerous times before the violation was cited.

Operator's Knowledge of the Existence of the Violation

As noted, Oliver believed that Meade should have known about the violation because the amount of dust should have caught his attention. Tr. 118. Oliver posited that if Meade was a prudent foreman, it would have only taken him a few seconds to be alerted to a ventilation issue when he reached the No Four entry. Tr. 118-19. Oliver did not believe that there were any mitigating circumstances as to why Meade did not shut down the miner very shortly after entering the entry. Tr. 121. If Meade had immediately shut down the machine, Oliver stated that he most likely would have issued a 104(a) citation and marked the negligence level as moderate. Tr. 122. I note, however, that as Mead approached the entry, there was no showing he looked toward the face and saw the dust, the visual sign of the violation. I have found that Meade acted as a responsible supervisor and that his failure to take corrective action in the very short time given to him by Oliver was excusable.

Oliver also believed that the addition of 12-16 feet of curtain needed to abate the violation suggested that the curtain was insufficient before mining started and that Meade should

have known about the lack of ventilation. Tr. 116-17, 120,127. However, prior to Oliver's arrival on the section, Meade examined all of the section's entries and took air readings in each entry to make sure the ventilation was working properly. Tr. 286-87, 289-90, 292, 295. Nothing alerted him that there was an actual or potential problem with the ventilation in the No. Four entry and Meade was a credible witness. *Id.* It is also highly unlikely that Meade would have been able to examine all of the other entries in the No. 14 section and return to the No. Four entry before Oliver arrived. In addition, Oliver acknowledged it was possible that the curtain had been up and had extended four feet into the No. Four intersection. Tr. 179.

I find the evidence does not establish that Meade had a reason to believe there was a violation in the No. Four entry and that Leeco had no reason to have, and in fact did not have, prior knowledge of the violation.

Operator Placed on Notice that Greater Efforts at Compliance are Necessary

At the time of the inspection, Leeco was on a "section 104(d)" sequence. Tr. 42, 257. Specifically, Mine # 68 received five 104(d) citations and orders for failure to maintain ventilation between February 2010 and November 4, 2010.¹¹ Exs. S-8-11; Tr. 207, 264-65. Although Wells stated that to his recollection, the No. 14 section was never issued citations or orders for violating the ventilation plan (Tr. 232), the citations and orders issued in other areas of the mine in the nine months before November 4, 2010 should have put Leeco on notice that greater compliance efforts were necessary to ensure required ventilation at the mine.

Operator's Efforts in Abating the Violation

The focus of the abatement effort factor is on the efforts (if any) that Leeco made prior to November 4 to prevent violations of its ventilation plan. In general, the factor measures an operator's response to violative conditions that were known to it or that should have been known to it. *Enlow Fork*, 19 FMSHRC at 17. The record reveals that Leeco made efforts to prevent violations of the approved plan by reminding its miners of the importance of adequate ventilation. Wells stated that after receiving a citation or order for a ventilation plan violation, his practice was to conduct a safety meeting with miners to discuss the violation and the proper safety procedures to take to avoid future similar citations or orders. Tr. 257, 259. The miners were also trained and required to take air readings if they thought ventilation had ceased. Tr. 320-21. According to Wells, continuous miner operators knew that when they knocked down a ventilation curtain they should immediately rehang it. Tr. 260. Testifying about Hensley in particular, Wells stated that Hensley had been trained and knew the requirements of the ventilation plan, including the need to rehang torn down curtains prior to continuing mining. Tr. 257-58. Specifically, in this instance, Hensley was "written up" and "sent home" for failing to rehang the curtain. Tr. 261-62. Moreover, in regard to action taken in other areas of the mine to prevent ventilation violations, Wells testified that Leeco fired the foreman of the No. 10 Section after two orders were issued for ventilation violations on February 10, 2010. Tr. 267. Further,

¹¹ In addition, two 104(d) orders were issued for ventilation violations in other sections of the mine on November 4, 2010.

Wells testified that he personally tried to prevent violations by always visiting at least one of the three sections for which he was responsible during his shift, and as mentioned above, the section bosses, including Meade, examined all of the entries on their sections. Tr. 270.

Wells was a credible witness, and I find that much of his testimony mitigates Leeco's level of negligence. While Leeco's post-citation discipline of Hensley is not relevant to the issue of Leeco's aggravated conduct (*Enlow Fork*, 19 FMSHRC at 17) and while the required examinations of its section bosses are not the kind of "extra effort" that ameliorates unwarrantable failure, the company's additional safety meetings following previously cited ventilation violations qualify as efforts to address the problem over and above what was required, as does its disciplining of those responsible for prior ventilation violations.¹²

Conclusion and Negligence Finding

As is almost always the case when considering an unwarrantable failure allegation, all of the determinative factors do not point in one direction. While the violation was very serious, the violation was localized and Meade's lack of knowledge of the violation until very shortly before it was cited and his failure to take action in the very short time afforded him by Oliver was excusable. In addition, although they were unsuccessful in this instance, Leeco's ongoing efforts to prevent the kind of violation that occurred were laudatory. After considering and weighing all of the factors, I conclude that a finding of unwarrantable failure is inappropriate. In reaching this conclusion I have especially noted Oliver's testimony that he most likely would have issued a 104(a) citation with a finding of moderate negligence if Meade had shut down the continuous miner down in the less than 2 minutes before Oliver acted. Tr. 123-24, 156-57. It is clear from the testimony that Oliver did not account for the impact on Meade of seeing two persons he did not recognize on the No. 14 section. Meade gave priority to finding out who the strangers were and what they were doing on the section. His immediate failure to act with regard to the continuous miner was understandable and the reason why he failed to act immediately substantially undercuts Oliver's unwarrantable finding. For all of these reasons I find that the violation was not caused by Respondent's unwarrantable failure to comply with its ventilation plan and that the company's negligence was moderate.

¹² The Secretary asserted that Leeco's actions were not sufficient. Sec'y Br. at 18-19; Tr. 46. For example, Hensley told Wells that he did not hang the curtain back up because he "did not figure it would hurt nothing," an indication, according to the Secretary, that Leeco's training was not effective. Tr. 261. In addition, Leeco did not change the way it trained its miners after the issuance of the five 104(d) citations and orders. Tr. 264-65, 268-69; Exs. S-8-11. While all of this may be true, it is clear that Leeco tried to heighten its miners' awareness of the importance of compliance with the mine's ventilation requirements. The effectiveness of its efforts was ongoing in nature and cannot be judged by what may have been an aberrational violation on November 4 or by prior violations about which the record reveals almost nothing.

OTHER CIVIL PENALTY CRITERIA

History of Previous Violations

Mine # 68's history of violations is reflected in a report from MSHA's database. Ex. S-13. The report lists violations issued at the mine and indicates that 755 violations became final between May 2009 and November 2010. I accept the figures in the report as accurate and find that the exhibit reflects a large history.

Size of the Operator

The parties did not agree on a characterization of the size of the operator, however they stipulated that in 2010 the mine produced 715,373 tons of coal (Tr. 19; Stip. 5), and on the form reflecting his calculation of the proposed penalty (MSHA Form 1000-179), the Secretary assigned 13 out of a possible 15 points for the size of the operator. I find that Leeco is a large operator.

Ability to Continue in Business

The parties stipulated that the proposed penalties will not affect Leeco's ability to continue in business, and I find that the same is true for the penalties assessed below. Tr. 20; Stip 7.

Good Faith Abatement

The parties stipulated that Leeco terminated the conditions giving rise to violation in a timely, effective, and good manner. Tr. 19, Stip. 6.

CIVIL PENALTY ASSESSMENTS

<u>ORDER NO.</u>	<u>DATE</u>	<u>30 CFR §</u>	<u>PROPOSED PENALTY</u>	<u>ASSESSMENT</u>
8346316	11/4/10	75.370(a)(1)	\$47,716.00	\$20,000.00

I have found that the violation was very serious and was caused by Leeco's moderate negligence. In all, eight miners were reasonably likely to suffer death and/or severe injuries as a result of the violation. Given these findings and Leeco's large size and large history of previous violations, I find that a civil penalty of \$20,000.00 is appropriate.

SETTLED VIOLATION

As stated at the outset, the parties settled the contested violation of section 75.370(a)(1) set forth in Order No. 8346197. Tr. 14, 329-30. Counsels assert that the purposes of the Act will be furthered if the company agrees it violated the standard as alleged and pays a penalty of \$50,000 for the violation. Tr. 329-30. I concurred and approved the settlement. Tr. 330.

<u>ORDER NO.</u>	<u>DATE</u>	<u>30 CFR §</u>	<u>PROPOSED PENALTY</u>	<u>ASSESSMENT</u>
8346197	11/4/10	75.370(a)(1)	\$60,000.00	\$50,000.00

ORDER

It is **ORDERED** that Order No. 8346316 be **MODIFIED** from an order issued pursuant to section 104(d)(2) of the Act (30 U.S.C. § 814(d)(2)) to a citation issued pursuant to section 104(a) of the Act (30 U.S.C. § 814(a)) and that the inspector's negligence finding be changed from "high" to "moderate." It is also **ORDERED** that within 30 days of the date of this decision, Leeco **SHALL PAY** a civil penalty in the total amount of \$70,000.00.¹³ Upon payment of the penalty, this matter **IS DISMISSED**.

/s/ David F. Barbour
David F. Barbour
Administrative Law Judge

Distribution (Certified Mail):

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Noelle True, Esq., Rajkovich, Williams, Kilpatrick, & True, 3151 Beaumont Centre Circle, Suite 375, Lexington, KY 40513

/db

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

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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June 4, 2013

SECRETARY OF LABOR	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 2011-546
Petitioner,	:	A.C. No. 15-19208-241954-01 YGX
	:	
v.	:	Docket No. KENT 2011-547
	:	A.C. No. 15-19208-241954-02 YGX
	:	
	:	
CLINTWOOD ELKHORN MINING	:	Mine: Hubble No. 6
COMPANY, LLC,	:	
Respondent.	:	

DECISION

Appearances: For the Secretary: J. Malia Lawson, Esq., Nashville, TN
For the Respondent: Melanie J. Kilpatrick, Esq., Lexington, KY

Before: Judge Tureck

These cases are before me on two *Petitions for Assessment of Civil Penalty* filed by the Secretary of Labor (“Secretary”), acting through the Mine Safety and Health Administration (“MSHA”), against Clintwood Elkhorn Mining Company, Inc. (“Respondent”), 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”). Both were issued on March 8, 2011. One was docketed as KENT 2011-546. It alleges two violations of the Mine Act addressed in an order and a citation, and assessed a total penalty of \$5654. The second was docketed as KENT 2011-547. It concerns a single citation and assessed a penalty of \$162. Respondent contends that the order and both citations should be vacated.

On motion by the parties, the two cases were consolidated for hearing and decision. A formal hearing was held in Pikeville, Kentucky on March 13 and 14, 2012. At the hearing, Secretary’s Exhibits 1-9, 14 and 16-25, and Respondent’s Exhibits 2, 3, 5, 6, 11 and 13 were admitted into evidence,¹ and each party provided testimonial evidence. Both parties then filed post-hearing briefs, the last of which was received on June 6, 2012. Then on June 25th,

¹ Citations to the record of this proceeding will be abbreviated as follows: SX – Secretary’s Exhibit; RX - Respondent’s Exhibit; TR - Hearing Transcript.

Respondent filed both a response brief and a motion to strike footnote 5 of the Secretary's post-hearing brief. The Secretary responded to the motion to strike on July 13, 2012.

Respondent's motion to strike footnote 5 of the Secretary's brief is granted. That footnote contains a discussion of four exhibits which were excluded from evidence at the hearing. Accordingly, they are not part of the record, and this footnote is clearly improper. As I stated in another case where the Secretary cited excluded evidence in a post-hearing brief, "it seems like a back-handed attempt to get around evidentiary rulings that did not go the Secretary's way. The proper action for counsel to have taken would have been to file a post-hearing motion for reconsideration of the evidentiary rulings made at the hearing." *Premier Elkhorn Coal Co.*, KENT 2011-827, slip op. at 2 (Jan. 22, 2013).

Findings of Fact and Conclusions of Law

Hubble No. 6 Mine ("Hubble 6") is a drift coal mine located in Pike County, Kentucky. It is a five-day, single shift mine employing about 12 miners on the shift. TR 280, 292. It is operated by Hubble Mining Company ("Hubble") under contract with the Respondent, which leases the mineral rights for the mine from the mineral rights owner, Big Sandy Mineral Company. (TR 278-79, 358). In addition to leasing the mineral rights and contracting with Hubble to operate the mine, Respondent is an independent contractor providing engineering services to Hubble. John George Blackburn is the Manager of Contract Mines for Respondent. TR 317.

On November 2, 2010, MSHA mine inspector Craig Plumley conducted an inspection of the Hubble No. 6 mine. He was accompanied by the Acting Assistant District Manager, David Isom, and two ventilation specialists, Kenneth Fletcher and Barry Johnson. TR 24. When they arrived at the mine, they met with Harold Akers, the owner of Hubble. Then Plumley and Isom reviewed the wall map of Hubble 6 prepared as required by 30 C.F.R. §75.1200 (hereinafter "1200 Map"). SX 7; TR 27. It was dated October 22, 2010, and showed the active works at the mine. TR 26-27. Hubble 6 is identified on the map as Big Sandy Mineral Lease 63017. Adjacent to Hubble 6, and part of the same mine seam, is the Blackhawk Mine, indicated on the map as Big Sandy Mineral. Mining in the Blackhawk Mine ended in 1996. TR 27-28.

Plumley and Isom saw that borehole drilling had been done in Hubble 6. TR 25. In discussions with Akers and Blackburn, Plumley found out that there had been water seeping into Hubble 6 from the direction of the Blackhawk Mine. TR 31-32; *see also* TR 332-33. Blackburn testified that although they had the final maps for the Blackhawk Mine when preparing the maps for Hubble 6, they wanted to make sure that the hydrostatic barrier² was in place, and the workings at the Blackhawk Mine were not closer to Hubble 6 than they believed. TR 332-33. There was no requirement that Clintwood Elkhorn do the borehole drilling (TR 31, 333); it only would have been required if mining was going to be undertaken within the 200-foot test drill line.

² A hydrostatic barrier is a block of coal large enough to prevent a blowout of water from one mine into another. TR 334.

See §75.388(a).³ Respondent hired Target Drilling to do the borehole drilling. TR 333. Target drilled three horizontal boreholes. The first, Borehole #1, did not encounter any voids. TR 336. The second, Borehole #2, intercepted a void on September 30, 2010, after drilling over 1900 feet. TR 347. After the void was intercepted, a third borehole, Borehole #3, was drilled. The drilling of Borehole #3 started on or about October 4, 2010, and was completed before the 1200 Map was prepared. But Target had not yet provided Respondent with a certified map, so Borehole #3 was described as “proposed” on the 1200 Map. TR 352. Borehole #3 did not encounter a void. TR 347.

Citation 8226822

At the conclusion of his inspection, Plumley issued Citation 8226822. SX 2. This citation alleges that respondent violated 30 C.F.R. §75.1200. This standard requires mine operators to have “an accurate and up-to-date map of [the] mine” which shows, *inter alia*, “[a]djacent mine workings within 1,000 feet[.]” The citation alleges that “[t]he operator failed to provide an accurate mine map depicting the abandoned adjacent mine works, identified as Blackhawk Mining Co.” The basis of the Secretary’s position is that maps of the Blackhawk Mine, which Respondent relied on in preparing the 1200 Map, did not show the full extent of the mining conducted at the Blackhawk Mine. Much of the dispute centers around whether mine maps showing the extent of mine workings with open ends () rather than closed ends (≡) can signify that no further mining was done beyond the open ends. Apparently, there are no regulations under the Mine Act governing how to signify the extent of mine workings on 1200 maps.⁴ So the Secretary presented its witnesses, who testified that open ended workings signify that additional mining may have occurred; and Respondent presented its witnesses, who testified that open-ended workings may indicate the full extent of the mining undertaken.

However, this dispute does not have to be resolved in the abstract. For the mining engineer who certified the final Blackhawk Mine map (RX 3), Phillip Willis, testified at the hearing. Willis currently is Respondent’s Chief Engineer. TR 234. But on February 28, 1996, he was employed by the Wellmore Division of United Coal Company, for whom he started working in 1987. TR 236. Wellmore Coal operated the Blackhawk Mine, and the Engineering Department of Wellmore was responsible for creating the maps of the Blackhawk Mine. TR 237. While working for Wellmore’s Engineering Department, Willis became familiar with how the company created mine maps, and ultimately he became the engineer responsible for certifying the Blackhawk Mine’s maps. TR 238.

Willis testified that no mining was done at Blackhawk Mine subsequent to February 28, 1996, and that Respondent’s Exhibit 3, the final map dated February 28, 1996, shows the full extent of the of the workings at that mine. TR 239-41. This map contains both closed end and

³ There is no contention that Respondent planned to mine within the 200-foot test drill line depicted on the 1200 Map.

⁴ Neither party cited any regulations in support of their respective positions on this issue.

open-ended entries. Willis testified that both mean the same thing - that it is the furthest extent of the mine. TR 251. Willis then stated that Secretary's Exhibit 7, the 1200 Map, accurately depicts the Northeastern boundary of the Blackhawk Mine (TR 260-61), the part of the Blackhawk Mine that is at issue.

Willis's testimony was unequivocal and highly credible. The Secretary has not suggested any reason for questioning Willis's credibility other than that he now works for the Respondent. *See Secretary's Post-Hearing Brief* and *Secretary's Reply to Clintwood Elkhorn's Post-Hearing Brief*. That is an unreasonable basis to discredit a witness's testimony. Further, Plumley agreed with the statement that "when an engineer submits the final map of a mine, that engineer has the duty to show the full extent of the mining in that mine." TR 129. Willis was not working for the Respondent when he prepared the final Blackhawk Mine map. Fletcher echoed this testimony, noting that "the map nomenclature that I'm familiar with in my work in the engineering, would . . . say if it was a final map, that meant that it was final, there would be nothing else." TR 180. Plumley further admitted that he never used the open-ended concept to indicate that the extent of an entry was unknown. TR 133. Moreover, Plumley admitted that MSHA inspectors would have reviewed Blackhawk's mine maps; and he agreed that "if MSHA inspectors saw that the Blackhawk Mine was mining an entry further than what it was depicting on the mine map and the ventilation map, you would certainly expect those MSHA inspectors to have issued citations and addressed that issue with Blackhawk Mine," and "Blackhawk Mine, to abate those citations, would have corrected their map . . ." TR 133. The testimony of Plumley and Fletcher supports Willis's testimony that the February 28, 1996 Blackhawk Mine map, as a final map, would have depicted the complete mine works.

Accordingly, I find that the 1200 Map accurately shows the full extent of the Blackhawk Mine, and that the void intercepted by Borehole #2 was not the workings of the Blackhawk Mine. Therefore, Citation 8226822 must be vacated.

Order 8226824

This order alleges a violation of §75.388(a), which requires that "[b]oreholes shall be drilled in each advancing working place when the working place approaches - . . . (3) To within 200 feet of any mine workings of an adjacent mine located in the same coalbed unless the mine workings have been preshift examined." This order, as was the case with Citation 8226822, is based on the contention that the 1200 Map is inaccurate. The Secretary contends that once the void was intercepted, Respondent could not be certain of the location of the Blackhawk Mine's workings, and therefore the 200-foot test-drill line on the 1200 Map was no longer accurate. But since I have found that the 1200 Map was accurate, this order has no factual basis. Accordingly, it is vacated.

Citation 8247677

This citation alleges a violation of §75.372(a)(1), which requires operators to submit up-to-date mine ventilation maps to MSHA every 12 months. Once again, the alleged violation is

based on the Secretary's contention that the Blackhawk Mine was depicted inaccurately on the Hubble 6 mine maps. Since I have found that the mine maps accurately depict the Blackhawk Mine, this citation is vacated.

ORDER

It is **ORDERED** that Citation 8226822, Order 8226824, and Citation 8247677 are vacated, and these cases are dismissed.

/s/ Jeffrey Tureck
Jeffrey Tureck
Administrative Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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June 4, 2013

SECRETARY OF LABOR	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 2011-220
Petitioner,	:	A.C. No. 46-06578-000234420
	:	
v.	:	Docket No. WEVA 2011-629
	:	A.C. No. 46-06578-000240531
	:	
	:	
JUSTICE ENERGY COMPANY, INC.	:	Mine: Red Fox Surface Mine
Respondent.	:	

DECISION

Appearances:

For the Secretary: Douglas L. Sanders, Esq., Denver, CO
For the Respondent: James F. Bowman, Midway, WV

Before: Judge Tureck

This case is before me on two *Petitions for Assessment of Civil Penalty* filed by the Secretary of Labor (“Secretary”), acting through the Mine Safety and Health Administration (“MSHA”), against Justice Energy Company, Inc. (“Respondent”), 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”). The first, filed on April 27, 2011, was docketed as WEVA 2011-220. It alleges a single violation of the Mine Act and assessed a penalty of \$176. The second, filed on April 28, 2011, was docketed as WEVA 2011-629. It alleges eight violations of the Mine Act and assessed \$10,659 in penalties. Respondent has accepted three of the citations in Docket No. WEVA 2011-629 and has agreed to pay the assessed penalties.¹ Respondent contends that five of the remaining citations should be vacated, and the penalty be reduced due to a lower level of negligence in the remaining citation.

¹ Respondent has accepted Citation 8103637 (\$100); Citation 8103635 (\$540); and Citation 8103636 (\$100).

A formal hearing was held in Beckley, West Virginia on October 23, 2012. At the hearing, Government Exhibits 1-13, and Respondent's Exhibits 1-3, were admitted into evidence,² and each party provided testamentary evidence. A list of stipulations was submitted as Joint Exhibit 1. Both parties then filed post-hearing briefs, the last of which was received on February 12, 2013.

Findings of Fact and Conclusions of Law

Respondent operates the Red Fox surface coal mine ("the mine") located in McDowell County, West Virginia. It is a mountaintop removal mine. TR1 109. The parties stipulated that Respondent is a large size mine operator under the Mine Act. JX 1. Respondent is a subsidiary of Mechel Bluestone. TR 207.

Either very late on October 13, 2010 or just after midnight on October 14, 2010, MSHA inspector Joseph Jones was conducting an inspection of the mine. Jones had started at MSHA in 2008, and received his AR card in 2009. Prior to working at MSHA, he had worked in the mining industry, both underground and at surface mines, for 16 years. TR 21-23. At 12:25 a.m. on October 14, Jones issued two citations to Respondent, Nos. 8110204 and 8110205, concerning the same truck, a 773B Cat haul truck,³ which was owned and operated by an independent contractor, Appalachian Leasing. Appalachian Leasing also was cited for these violations. TR 57, 61. The truck was hauling refuse from a preparation plant to the dump at the mine. GX 5, 7; TR 25. Citation 8110204 listed nine separate defects regarding the haul truck which were alleged to have been in violation of 30 C.F.R. §77.404(a).⁴ That section of the regulations requires mobile equipment to be maintained in safe operating condition and to be removed from service immediately if in unsafe condition. He also issued Citation 8110205 regarding the haul truck for violating §77.1104, which states that "[c]ombustible materials, grease lubricants, paints, or flammable liquids shall not be allowed to accumulate where they can create a fire hazard." For both of these violations the citations state that injury was reasonably likely and could reasonably be expected to be fatal; they resulted from high negligence; and were significant and substantial ("S&S"). Respondent was assessed a penalty of \$3,996 for each of these violations. Respondent contests the determination of high negligence in Citation 8110204. For Citation 8110205, Respondent contests the occurrence of the violation and the finding of high negligence. Respondent also contends that the violation in Citation 8110205 is duplicative of Citation 8110204.

² Citations to the record of this proceeding will be abbreviated as follows: GX _Government Exhibit; RX – Respondent Exhibit; TR - Hearing Transcript.

³ At my request, subsequent to the hearing the Secretary submitted a photograph of a CAT 773B haul truck. I have marked this photograph as ALJX 1. Without objection, it is admitted into evidence.

⁴ All of the regulations cited in this decision are contained in Title 30 of the Code of Federal Regulations.

The other citations still in contention were issued by MSHA Inspector Jeff Presley. Presley began working for MSHA in 2007, and received his AR card in 2008. Prior to working for MSHA, he had worked in the mining industry in underground mines since the early 1990's. TR 88-89. He testified that although he did not work in surface mines, all underground mines have surface areas and use large equipment aboveground, so he was familiar with what goes on at surface mines even prior to his MSHA training. Further, a large part of his MSHA training occurred in surface mines. TR 89-90.

Presley conducted three inspections of the mine which resulted in the issuance of citations. On August 27, 2010, he issued Citation 8117589 for not using adequate dust control measures in violation of §77.1607(i). GX 9. Presley testified that he observed two very large rock trucks driving "head on" towards each other on the main haul road, and when the trucks approached each other "the cloud of dust just engulfed both of them." TR 92. However, both trucks stopped without colliding. TR 92. Injury from this violation was found to be reasonably likely and could reasonably be expected to be lost workdays or restricted duty; negligence was low; two people would be affected; and the violation was S&S. Respondent was assessed a penalty of \$176 for this violation. Respondent contests the occurrence of this violation.

Presley also inspected the mine on October 12 and November 2, 2010. The citations issued on October 12th have been resolved and are no longer at issue. He issued three citations on November 2nd. Citation 8069361 alleges a violation of §77.1605(l), which states that "[b]erms, bumper blocks, safety hooks, or similar means shall be provided to prevent overtravel and overturning at dumping locations." The citation states that "[t]he berms at the dump site above the main haul road are not being maintained to mid axle of the equipment being used." Presley testified that he was at the dump site and observed a rock haul truck backing up to the berm. He stated that the berm was well below mid-axle height. He estimated that the berm was only about 36 inches high whereas mid axle on the truck was about 68 or 72 inches. TR 102-03. He believed that the berm was not close to being high enough to prevent one of these huge haul trucks from backing over it and overturning. TR 106. The citation lists injury to be reasonably likely and could reasonably be expected to be lost workdays or restricted duty. Presley explained that the drop off at the dump site was not great and he "don't believe the distance was great enough that the truck's going to roll enough times or be such a severe accident that it would permanently disable or kill somebody." TR 107. Further, he found Respondent's negligence to be moderate and the violation to be S&S. A penalty of \$362 was assessed for this violation. Respondent contests the occurrence of the violation.

Citation 8069362 (GX 12) alleges a violation of §77.1608(a), which requires dumping locations and haulage roads to be kept "reasonably free of water, debris and spillage." Presley observed a rock in the middle third of the main haul road (TR1 110-11) which he has described as being "1.5 times the size of a basketball" (*id.*), "beach ball size roughly. The size of a car tire" (TR111). He noted that the rest of the road was in good condition, and this was the only rock on it which could pose a hazard to the trucks. TR 112. Presley testified that the haul road where the rock was located was a "high traffic area." TR 117. The huge haul trucks, other heavy mine equipment, small trucks and personal vehicles use it. TR 111, 116-17. He believes that a haul

truck's tire could hit the rock, causing the truck to overturn or the rock to be propelled and hit another vehicle. TR 116. The citation states that injury was reasonably likely and could reasonably be expected to be lost workdays or restricted duty. Negligence was alleged to be moderate, and the violation was S&S. A penalty of \$362 was assessed for this violation. Respondent contests the occurrence of the violation.

Citation 8069363 alleges a violation of §77.404(a). It states that Respondent's fuel truck was not being maintained in safe operating condition, alleging five defects. GX 13. The citation states that injury was reasonably likely and could reasonably be expected to be lost workdays or restricted duty. Negligence was listed as high, and the violation was found to be S&S. A penalty of \$1,203 was assessed for this violation. Respondent contests both the occurrence of the violation and the finding of high negligence.

Discussion

Citation 8110204

Inspector Jones found that the 773B Caterpillar haul truck had the following safety defects:

1. The ball stud that connects the left steering jack to the bell crank has excessive slack.
2. The left rear tires have 35 psi; they should have 85 psi.
3. The keeper on the upper pen for the passenger side bed lift jack has a bolt missing and the pen is backing out.
4. The door stop is broken and allows the door to open too far, exposing the driver to a fall hazard.
5. No signal light or marker lights are working.
6. The battery box is busted on the bottom and sagging from the weight of the batteries.
7. Excessive oil leaks under the bed inside the frame and on the motor are contributing to accumulations of combustible materials.
8. The emergency steering is not working.
9. The access step on the passenger side of the machine is broken off.

Respondent concedes that these conditions existed and were reasonably likely to cause injury. Resp's Br. at 3. However, Respondent contends that it was not negligent. The truck was owned and operated by another company, Appalachian Leasing. It was Appalachian Leasing's responsibility to conduct pre-shift inspections and make any necessary repairs. TR 59, 234. Gilbert Witt, the safety manager at the mine, testified that Respondent has a program that contract trucking companies must follow to be allowed to operate at the mine. TR 235; *see* RX 3. The contractors are required, *inter alia*, to provide all inspection and repair documentation each month for trucks to be used at the mine. TR 236; RX 3. When the proper documentation is provided, a truck is given a sticker which permits it to operate at the mine for the next month. Respondent also conducts spot checks of contractors' trucks. TR 237. Further, the Cat truck at issue was used primarily at Black Bear Processing Plant, which was not owned by Bluestone

Mechel. TR 233-34. The truck came to the Red Fox mine only to haul refuse to the dump. TR 25, 233. Witt testified that the truck was at the processing plant 80% of the time, and spent the remaining 20% hauling the plant's refuse to the Red Fox mine's dump. TR 233.

Nevertheless, the Secretary contends that Respondent was highly negligent in permitting this truck to operate at the mine. Jones contends that Respondent should have known the truck was in violation of the safety standards. TR 70. He notes that he never wrote so many violations on a single truck. TR 40. Further, he stated that one of the truck's left rear tires was visibly low, and signal lights and marker lights were not working. TR 26-28. Since the inspection was being conducted around midnight, that lights on the truck were not working should have been noticeable to Respondent. In addition, the missing step on the passenger side of the truck and the low tire pressure may have been visible, even at night, depending on the lighting at the mine. But most of the truck's defects were not visible without examining the truck

A citation regarding the truck's condition alleging high negligence was also issued to Appalachian Leasing. TR 59-60. It is hard to see how, based on the facts in this case, that Respondent's negligence could equal that of the company which owned and operated the truck and was directly responsible for examining and maintaining it. Accordingly, although I otherwise uphold the citation, I find Respondent's negligence to have been moderate, not high. Finally, considering all of the factors set out in §110(i) of the Mine Act, I find that a penalty of \$2500 is appropriate.

Citation 8110205

Respondent contends that the Secretary failed to prove a violation of §77.1104. The citation states that "combustible materials, coal dust mixed with motor oil and hydraulic oil, have been allowed to accumulate where they could create a fire hazard." RX 7. Respondent argues that the materials which may have accumulated on the motor of the Cat haul truck did not create a fire hazard. Jones testified that what most concerned him was the accumulation of oil on both sides of the engine. TR 44-46. He also found that hydraulic oil had leaked down the frame of the truck. If the oil on the engine caught fire, the leaked hydraulic oil could cause the fire to spread throughout the truck. TR 45. But Jones testified that he does not know the ignition point of the accumulated oils, nor does he know the surface temperature of the sides of the engine. TR 72-73. He also did not know how much coal dust had accumulated on the engine (TR 71), nor did the Secretary present any evidence of the ignition point of coal dust. Apparently, the Secretary wants me to accept as a matter of faith the totally illogical contention that a truck's engine oil will catch fire at the temperature at which a truck's engine operates.

Under these conditions, there is no basis to find that the accumulations of oil and coal dust on the sides of the engine were combustible at the temperatures at which the truck operated. Therefore, there is no evidence that they created a fire hazard. Further, Respondent presented uncontradicted evidence that the ignition points of the oils which allegedly accumulated on the engine were substantially higher than the temperature of the outside of the engine. *See* TR 238-44; RX 1.

Therefore, Citation 8110205 is vacated. Since I am vacating this citation for the reasons stated above, I will not address Respondent's other contentions regarding this citation.

Citation 8117589

Section 77.1607(i) states that “[d]ust control measures shall be taken where dust significantly reduces visibility of equipment operators.” Respondent alleges that it took adequate dust control measures in that the four and a half miles of haul roads are watered continuously on each shift by a full-time employee whose sole job it is to operate the water truck. TR 212-14. Presley did not dispute this; in fact, he agrees that Respondent “kept pretty good water on the roads most of the time.” TR 99. This explains why he found only low negligence. *Id.* But Presley stated that the section of the haul road where he observed the two trucks raising a cloud of dust was a particularly dry section of the road because it was near an intersection and was heavily traveled, and it needed additional watering. TR 95-97.

Although Respondent disagrees with Presley's description of the incident, Presley was the only eyewitness to it to testify at the hearing, and I credit his observation that the road was extremely dusty where the two trucks were approaching each other.⁵ Presley testified that he was sitting about 100 to 150 feet from the haul road and slightly above it when he saw the two haul trucks approaching each other head on from opposite directions. When they got close to each other, all he could see from his vantage point was the rear foot or two of each truck. TR 91-92. However, Presley's testimony that the trucks were approaching each other “head on” is not convincing. Doubtless, this conclusion was influenced by his belief that the haul road “wasn't a whole lot wider than two rock trucks passing”, and each rock truck was 24 feet wide. TR 94. Although he did not measure the width of the haul road, he estimated that when two rock trucks were passing each other, there was only five feet of space between them. *Id.* But subsequently, he testified that the road was about 75 feet wide (TR 158); and Gilbert Witt, who as Mechel Bluestone's safety director should know, testified that the haul road at the point it was being observed by Presley was 100 feet wide (TR 211), which is greater than the width of four rock trucks. There would have been no reason for the trucks to approach each other head on when the road was that wide. Moreover, Presley testified that he could clearly see the trucks' drivers in their cabs until their vehicles almost reached each other (TR 94), meaning that each driver would have been able to see the other truck while the trucks were approaching each other. So unless one or both of the drivers were asleep or suddenly incapacitated, it is hard to believe the trucks would have been approaching each other head on. Further, Presley testified that the dust cloud around the trucks dissipated in a few seconds. TR 156.

⁵ I find Respondent's attempt to discredit Presley due to the vacation of citations he has issued unconvincing. For one thing, citations can be vacated for reasons having nothing to do with the validity of an inspector's determinations. Moreover, even if other citations issued by Presley have been vacated due to MSHA's disagreement with his findings, that does not mean that all of his inspections were faulty.

Accordingly, I find that Respondent's negligence was low, as the Secretary alleged, and injury due to the violation was unlikely.

The only remaining issue regarding this citation is whether the violation was significant and substantial ("S&S"). 30 U.S.C. § 814(d)(1) provides:

If, upon any inspection of a coal or other mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard, and if he also finds that, while the conditions created by such violation do not cause imminent danger, such violation is of a nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard, and if he finds such violation to be caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standards, he shall include such finding in any citation given to the operator under this [Act].

The Commission and several courts of appeals have agreed that four conditions must be met to find that a violation is "significant and substantial":

[T]he 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. *Secretary of Labor v. Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (1984); *see also, Austin Power, Inc. v. Secretary of Labor*, 861 F.2d 99, 103 (5th Cir.1988); *Consolidation Coal Co. v. Federal Mine Safety and Health Review Comm'n*, 824 F.2d 1071, 1075 (D.C.Cir.1987).

Since I have found that an injury was unlikely to result from the violation, I conclude that the violation was not S&S.

Finally, I find that a penalty of \$100 is appropriate for this violation.

Citation 8069361

Section 77.2(d) defines "berm" as "a pile or mound of material capable of restraining a vehicle." Presley testified that the berm at Respondent's dump site was only about 36 inches high, too low to restrain the huge rock trucks which used it. TR 102-03.

He added that “a [CAT] 793 rock truck wouldn’t even feel it. He’d back plumb through it.” TR 106. Although Presley did not measure the height of the berm, he testified that he knows from experience how high 36 inches is in relation to his body. TR 104.

Regardless, he stated that in order to be effective, the berm would have to reach at least mid-axle height, which on a CAT 793 rock truck would be about 68 to 72 inches high (TR 102; *see* GX 11, at 2), and the berm at the dump site “was significantly inadequate. It was pretty obvious.” TR 104. Because he believed the violation was obvious, he found Respondent’s negligence to be moderate. TR 108-09. He also found that injury to the driver could reasonably be expected to be lost workdays or restricted duty rather than anything more severe because the dump site was not significantly elevated and if a truck went over the edge he did not believe “the truck’s going to roll enough times or be such a severe accident that it would permanent disable or kill somebody.” TR 107.

Respondent’s defense to this citation consists of two prongs. First, Respondent contends that Presley’s testimony on this issue is inconsistent; but to the extent that he was inconsistent the inconsistencies relate to irrelevant facts. Respondent has not even argued that the berm at the dump site was higher than 36 inches. Second, Respondent contends that the operator of the bulldozer which was working at the dump site would spot the rock trucks to assure they did not drive through the berm. But the standard does not allow for spotting as a means of preventing vehicles from overtraveling and overturning at dump sites; the standard requires a physical barrier or restraint.

Therefore, I conclude that Respondent violated §77.1605(l). Moreover, Respondent has not challenged the inspector’s determinations that an injury was reasonably likely and would cause lost workdays or restricted duty; that Respondent was moderately negligent; and that the violation was S&S; and I concur with all these determinations. Finally, the Secretary assessed a penalty of \$362 for this violation, which I find appropriate.

Citation 8069362

This citation is based on the presence of a single large rock in the road. GX 12; TR 112. The Secretary contends that “in allowing the rock to sit in the middle of the active, main haul road, Respondent violated the cited standard.” Sec’y’s Br. at 25. But the standard only requires that haulage roads be kept “reasonably free” of debris and spillage. Both Presley and Witt testified that rocks on the haul roads are a common occurrence at surface mines. TR 111-12, 224. Rocks often fall off haul trucks. TR 118, 222-24. Moreover, the haul roads are made of rock, as are the berms and embankments. TR 117. Accordingly, it would not be unreasonable for a large rock to be in the road, and the mere presence of one in the road would not necessarily equate with a violation of a standard requiring roads to be kept “reasonably free” of debris. Presley did not see how the rock came to be in the road or how long it had been there, but assumed it fell off a rock truck. TR 119-21. Consistent with Presley’s surmise, Witt testified that the rock had fallen off a truck as the truck was turning. TR 220. He added that the driver reported that

the rock had fallen onto the road, and a rubber-tired dozer was on the way to remove it when the citation was issued. TR 220-21. Although Presley disputes that anyone reported the rock in the road over the CB radio (TR 180), he admits the violation was abated by a rubber-tired dozer moving the rock. TR 182.

Based on this evidence, I conclude that no violation of §77.1608(a) occurred. By requiring that the roads be kept “reasonably free” of debris, the standard accepts that perfection would be unreasonable to expect under the circumstances. The presence of a single large rock on a surface mine haul road which was removed promptly after it was discovered to be there is consistent with the road being kept “reasonably free” of debris. It should be stressed that Respondent did not receive a citation for a violation of §77.1607(aa), which requires that “trucks shall be trimmed properly when they have been loaded higher than the confines of their cargo space.” Citation 8069362 should not be permitted to serve as a backhanded means to establish a violation of that standard because a large rock was found in the roadway. In any event, no evidence was presented that the rock in question fell from an improperly loaded truck. TR 119-20. Accordingly, how the rock came to be in the roadway is not relevant. What is relevant is that other than the single large rock at issue, Presley conceded that the haul road was in good condition (TR 112); and the rock was removed from the roadway as soon as practicable.

Therefore, Citation 8069362 is vacated.

Citation 8069363

The Secretary alleges that Respondent’s fuel truck was not being maintained in safe condition, in violation of 77.404(a), and it was required by that standard to have been removed from service immediately, because:

The drive shaft for the fueling pump is bent and vibrating against the frame of the battery box[;] the straps holding both fuel tanks are loose[;] the hinges for the hood are loose and hood [*sic*] is broken to the point it is very hard to open[;] the switch for the air on the drivers [*sic*] seat does not work[;] and there is 1/4" of slack in the steering jack on the off side of the machine.

Apparently, none of these alleged defects specifically violate any safety standards. Rather, the Secretary is relying on Presley’s opinion that these factors affected the safe operation of the fuel truck to prove his case.

Presley admitted that the driver’s seat can be adjusted manually, and there is no requirement that trucks have an air-adjustable seat (TR 194). This is not a safety issue.

In regard to the hood of the fuel truck, Presley’s safety concern was that it could bounce or break loose. TR 125. But both Presley and Witt testified, as was alleged in the

citation, that the hood was very heavy and hard to open. TR 126, 229, 232. Presley failed to explain why a truck's hood which was very heavy and often required two men to open it would suddenly open by itself and possibly fall off the truck. The evidence fails to prove that the fuel truck was not maintained in safe operating condition because the hood was hard to open.

Next, Presley admitted that he received no training from MSHA or mining equipment manufacturers regarding the wear on steering jacks (TR 138-40). Further, Presley did not measure the slack in the steering jack. He determined that the steering jack had one-quarter inch of slack just by looking at it. (TR 128). Presley's testimony that without measuring, "you can determine a quarter inch. Anybody, you know, can determine a quarter inch" (TR 129), is ludicrous. Accordingly, I reject Presley's opinion regarding this contention. It is unprofessional and lacking in credibility.

In regard to the straps holding the fuel tanks, there was relatively little testimony. The tanks sit on a bracing or shelf. TR 193, 227. Presley testified that he could see the straps were loose and he could move them with his hands. TR 123-25. He inferred that this condition could cause the fuel tanks to fall off the truck. Witt testified that only one of the two fuel tanks was operational; the other was sealed shut because it had a hole in it. TR 227. The only function the sealed fuel tank served was as a step for the driver to get in the cab. Nevertheless, Witt did not dispute that the straps around both fuel tanks were loose or that the fuel tanks could break off. TR 227-28. A fuel tank falling off a moving truck, whether the tank is full or empty, presents an obvious hazard to other vehicles and pedestrians, and possibly to the fuel truck itself.

Finally, the Secretary contends that the drive shaft to the fueling pump was bent and was hitting the frame of the battery box. The Secretary argues that this creates a safety hazard because the metal-on-metal contact could cause a spark which could ignite the fuel or fumes given off by the battery. TR 123-24. The Secretary also argues that the contact could cause the battery box to become loose, causing the battery to fall off the truck. TR 124. Witt testified that the drive shaft had only a gradual bend (TR 226), in contrast to Presley's testimony that there was an obvious bend in the drive shaft. TR 123. Witt also testified that the drive shaft was in a metal enclosure, and Presley agreed that it would have to be guarded. TR 188, 226. When Presley was asked "[s]o if the drive shaft's guarded, then how is it rubbing against the battery box?", his answer was equivocal. TR 188. I find that the Secretary has failed to prove that the drive shaft presented a safety hazard.

The only alleged safety problem regarding the fuel truck which the Secretary has proven was the loose straps on the fuel tanks. Nevertheless, since Witt testified that the fuel tanks could fall off, this single deficiency is sufficient to prove that the fuel truck was not being maintained in a safe operating condition, a violation of §77.404(a). But the Secretary has not proven that it is reasonably likely a fuel tank would fall off the truck.

The fuel tanks sit on a platform or shelf, and obviously are connected to the truck itself in order for the fuel to reach the engine. It would appear that the role of the straps is to keep the tanks from moving around on the shelves or platforms. Although loose, the straps were still intact, and there is no evidence that they were failing to hold the tanks in place or that the tanks were in imminent danger of falling off. Therefore, I find that injury from this violation was unlikely. Since injury was unlikely, the violation cannot be S&S. Finally, since the straps were visibly loose, I find that negligence was moderate.

The Secretary assessed a penalty of \$1,203 for the alleged violation in this citation. However, only one of the five alleged deficiencies regarding the fuel truck was proven; negligence has been reduced from high to moderate; injury has been found to be unlikely; and the violation is not S&S. Under these conditions, I find that a penalty of \$100 is reasonable.

In sum, penalties totaling \$3,800 are assessed for the violations which have been proven or were unopposed.

ORDER

It is **ORDERED** that:

Citation 8103635 is unchanged, with an assessed penalty of \$540.

Citation 8103636 is unchanged, with an assessed penalty of \$100.

Citation 8103637 is unchanged, with an assessed penalty of \$100.

Citation 8110204 is modified to reduce negligence from “high” to “moderate”, and the assessed penalty is reduced to \$2,500.

Citation 8110205 is vacated.

Citation 8117589 is modified from injury being “reasonably likely” to “unlikely”, and the violation is changed from S&S to non-S&S. The assessed penalty is reduced from \$176 to \$100.

Citation 8069361 is unchanged, with an assessed penalty of \$362.

Citation 8069362 is vacated.

Citation 8069363 is modified from injury being “reasonably likely” to “unlikely”, negligence reduced from “high” to “moderate”, and the violation from S&S to non-S&S. The assessed penalty is reduced from \$1,203 to \$100.

It is further **Ordered** that Respondent pay a penalty of \$3,802 within 30 days of the date of this order.

/s/ Jeffrey Tureck
Jeffrey Tureck
Administrative Law Judge

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June 4, 2013

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 2011-858
Petitioner	:	A.C. No. 46-06265-241821-01
	:	
	:	Docket No. WEVA 2011-2051
	:	A.C. No. 46-06265-255704-01
v.	:	
	:	Docket No. WEVA 2011-409
	:	A.C. No. 46-06265-235736
	:	
	:	
RAW COAL MINING COMPANY, INC.	:	
Respondent	:	Mine: Sewell Mine B

DECISION

Appearances: Cheryl Carroll, Esq. & Aleksandr Felstiner, Esq., U.S. Department of Labor, Office of the Solicitor, Arlington, VA, for Petitioner;

James Bowman, Midway, WV, for Respondent.

Before: Judge Steele

This case is before me on petitions for assessment of civil penalties filed by the Secretary of Labor, (“Secretary” or “Petitioner”) acting through the Mine Safety and Health Administration, (“MSHA”) against Raw Coal Mining Company, (“Raw Coal” or “Respondent”) at the Sewell Mine B (“The Mine”), pursuant to Sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815, 820 (the “Mine Act” or “Act”). These dockets involve four citations and two orders issued pursuant to the Act with assessed penalties totaling \$69,740. The parties presented testimony and documentary evidence at the hearing held in South Charleston, WV, on September 25, 2012.

Common Facts and Law

The parties agreed to the following stipulations at the hearing:¹

- 1) The mine is a “mine” as that term is defined in section 802(h).
- 2) The product of the mine entered commerce within the meaning and scope of section 4 of the Mine Act, 30 U.S.C., Section 803.
- 3) The citations/orders at issue in this matter were issued on the date stated therein and were issued by a duly authorized representative of the Department of Labor, MSHA.
- 4) None of the exhibits that the parties intend to offer into evidence and that were exchanged prior to hearing will be subject to objection as to authenticity.
- 5) This proceeding is subject to the jurisdiction of the Federal Mine Safety and Health Review Commission and its designated administrative law judges pursuant to Section 105 and 113 of the Federal Mine Safety and Health Act of 1977(“the Act”)
- 6) Raw Coal Mining Company, Inc. is the owner of Sewell Mine B.
- 7) Raw Coal Mining Company, Inc. was an operator as defined by Section 3(d) of the Act at the coal mine at which the citations and orders at issue in this proceeding were issued.
- 8) Raw Coal Mining Company, Inc. is considered a large mine operator and Sewell Mine B is considered a large mine for purposes of 30 U.S.C. 820(i).
- 9) The products of the mine at which the citations and orders at issue in the proceeding were issued entered commerce or the operation or products thereof affected commerce within the meaning and scope of Section 4 of the Act.
- 10) Operations of Raw Coal Mining Company, Inc. at the coal or other mine at which the citation and orders at issue in this proceeding were issued are subject to the jurisdiction of the Act.
- 11) The maximum penalty which can be assessed for these violations pursuant to 30 U.S.C. 820(i) will not affect the ability of Raw Coal Mining Company, Inc. to remain in business.
- 12) The individual or individuals whose signatures appear in block 22 of the citations and orders that are issued in this proceeding were each acting in their official capacity and as an authorized representative for the Secretary of Labor when each citation and order was issued.

¹ The numbered paragraphs correspond to those in the Secretary’s Pre-Hearing Report.

- 13) True copies of each of the citations and orders that are at issue in this proceeding, along with any and all modifications and abatements, were served on Raw Coal Mining Company, Inc. or its agents as required by the Act.
- 14) The citations contained in Exhibit A attached to the Secretary's Prehearing Report are authentic copies of the citations and orders that are at issue in this proceeding, including any and all modifications or abatements.
- 15) Exhibit B attached to the Secretary's Prehearing Report accurately sets forth the total number of assessed violations for the 24 months preceding the month of the referenced citations and orders. Such history of violations may be used to calculate penalty assessment amounts for the citations at issue.
- 16) The information contained in Exhibit A attached to the Secretary's Petition for Assessment of Civil Penalty regarding the mine tonnage of Raw Coal Mining Company, Inc. accurately reflects tonnage production at Sewell Mine B.
- 17) Each citation and order at issue in this proceeding may be admitted into evidence without objection, although Respondent may dispute specific allegations contained with the citation or order.
- 18) Citation No. 8110734 should be affirmed as it was issued and the proposed penalty should be affirmed.

Sec. Post-Hearing Brief, 2-4; Tr. 6.

Applicable legal principles

All four citations and two orders discussed below have been designated as Significant and Substantial (S&S). S&S is described in section 104(d)(1) of the Act as a violation "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." 30 U.S.C. § 814(d)(1). A violation is properly designated S&S "if, based upon the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981).

As is well recognized, in order to establish the S&S nature of a violation, the Secretary must prove: "(1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard – that is, a measure of danger to safety – contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury will be of a reasonably serious nature." *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984); *accord Buck Creek Coal Co., Inc.*, 52 F. 3rd. 133, 135 (7th Cir. 1995); *Austin Power Co., Inc. v. Sec'y of Labor*, 861 F. 2d 99, 103 (5th Cir. 1988) (approving *Mathies* criteria).

It is the third element of the S&S criteria that is the source of most controversies regarding S&S findings. The element is established only if the Secretary proves "a reasonable likelihood the hazard contributed to will result in an event in which there is an injury." *U.S. Steel Mining*

Co., Inc., 7 FMSHRC 1125, 1129 (Aug. 1985). An S&S determination must be based on the particular facts surrounding the violation and must be made in the context of continued normal mining operations. *Texasgulf, Inc.*, 10 FMSHRC 498, 500 (Apr. 1988) (quoting *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574 (July 1984)). The Commission has provided additional guidance: “We have emphasized that, in accordance with the language of section 104(d)(1), it is the *contribution* of a violation to the cause and effect of a hazard that must be significant and substantial.” *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1866, 1868 (August 1984); *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574-75 (July 1984).

Further, “The Secretary need not prove a reasonable likelihood that the violation itself will cause injury.” and “the absence of an injury-producing event when a cited practice has occurred does not preclude a determination of S&S” *Cumberland Coal Resources, LP*, 33 FMSHRC 2357, 2365 (Oct. 2011) (citing *Musser Engineering, Inc. and PBS Coals, Inc.*, 32 FMSHRC 1257, 1280-81 (Oct. 2010); *Elk Run Coal Co.*, 27 FMSHRC 899, 906 (Dec. 2005); and *Blue Bayou Sand & Gravel, Inc.*, 18 FMSHRC 853, 857 (June 1996)). The Commission and courts have observed 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 1275, 1278-79 (Dec. 1998); *Buck Creek Coal, Inc., v. MSHA*, 52 F.3d 133, 135-36 (7th Cir. 1995).

The S&S nature of a violation and the *gravity* of a violation are not synonymous. The Commission has pointed out that the “focus of the *seriousness* of the violation is not necessarily on the reasonable likelihood of serious injury, which is the focus of the S&S inquiry, but rather on the effect of the hazard if it occurs.” *Consolidation Coal Co.*, 18 FMSHRC 1541, 1550 (Sept. 1996) *emphasis added*. By definition, **negligence** is:

conduct, either by commission or omission, which falls below a standard of care established under the Mine Act to protect miners against the risks of harm. Under the Mine Act, an operator is held to a high standard of care. A mine operator is required to be on the alert for conditions and practices in the mine that affect the safety or health of miners and to take steps necessary to correct or prevent hazardous conditions or practices. The failure to exercise a high standard of care constitutes negligence.

30 C.F.R. §100.3(d). The categories and definitions of the negligence criterion are as follows:

No negligence is where the operator exercised diligence and could not have known of the violative condition or practice;

Low negligence is where the operator knew or should have known of the violative condition or practice, but there are considerable mitigating circumstances;

Moderate negligence is where the operator knew or should have known of the violative condition or practice, but there are mitigating circumstances;

High negligence is where the operator knew or should have known of the violative condition or practice, and there are no mitigating circumstances; and

Reckless disregard is where the operator displayed conduct which exhibits the absence of the slightest degree of care.

30 C.F.R. §100.3(d).

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

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; *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.

The provisions of the Mine Act cited are as follows:

§104(d)(1). If, upon any inspection of a coal or other mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard, and if he also finds that, while the conditions created by such violation do not cause imminent danger, such violation is of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard, and if he finds such violation to be caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standards, he shall include such finding in any citation given to the operator under this Act. If, during the same inspection or any subsequent inspection of such mine within 90 days after the issuance of such citation, an authorized representative of the Secretary finds another violation of any mandatory health or safety standard and finds such violation to be also caused by an unwarrantable failure of such operator to comply, he shall forthwith issue an order requiring the operator to cause all persons in the area affected by such violation, except those persons referred to in subsection (c) to be withdrawn from, and to be prohibited from entering, such

area until an authorized representative of the Secretary determines that such violation has been abated.

(2) If a withdrawal order with respect to any area in a coal or other mine has been issued pursuant to paragraph (1), a withdrawal order shall promptly be issued by an authorized representative of the Secretary who finds upon any subsequent inspection the existence in such mine of violations similar to those that resulted in the issuance of the withdrawal order under paragraph (1) until such time as an inspection of such mine discloses no similar violations. Following an inspection of such mine which discloses no similar violations, the provisions of paragraph (1) shall again be applicable to that mine.

30 U.S.C. §814(d).

104(a). If, upon inspection or investigation, the Secretary or his authorized representative believes that an operator of a coal or other mine subject to this Act has violated this Act, or any mandatory health or safety standard, rule, order, or regulation promulgated pursuant to this Act, he shall, with reasonable promptness, issue a citation to the operator. Each citation shall be in writing and shall describe with particularity the nature of the violation, including a reference to the provision of the Act, standard, rule, regulation, or order alleged to have been violated. In addition, the citation shall fix a reasonable time for the abatement of the violation. The requirement for the issuance of a citation with reasonable promptness shall not be a jurisdictional prerequisite to the enforcement of any provision of this Act.

30 U.S.C. § 814(a).

Findings and Conclusions

1) Testimony of Eddie Bailey:

a. Background and Experience

Eddie Bailey has been an inspector with MSHA for five and a half years, and currently serves as the ventilation supervisor for District 12. Tr. 17. Prior to that, he was a ventilation supervisor in District 4 for one year. Tr. 17. Before becoming an inspector, Bailey worked as a miner for Pinnacle Mining Company in Pineville, West Virginia, for two and a half years. Tr. 17-18. During that time, he worked as a long wall production supervisor and a long wall outby supervisor. Tr. 18. As an outby production supervisor for one year, Bailey was in charge of all outby head gate maintenance, including the long wall belt. Tr. 18. In this capacity, he was responsible for belt maintenance, which included cleaning, dusting, and changing out rollers and structures. Tr. 18. He has a bachelor's degree in mining engineering and an associate's degree in electrical engineering technology from Bluefield State College. Tr. 17. Bailey was not a certified foreman, so he never conducted pre-shift or on-shift examinations. Tr. 86-87.

b. Sewell Mine B

There are four belts in the Sewell Mine B. Tr. 20. The No. 1 belt is a short belt that is approximately 12 cross-cuts long. Tr. 20. After a 90-degree turn, the 2 and 3 belts are in line. Tr. 20. Then, after a left-turn, the 4 belt was installed. Tr. 20. In addition to the belts, there are tracks in the entry as well. Tr. 20. Man-buses (or mantrips) travel on the track haulageway, which also serves as an escapeway. Tr. 20.

Miners work three shifts at the Sewell Mine B. Tr. 20. The day shift starts at 8:00 am; the evening shift starts at 4:00 pm; and the owl (or “hoot owl”) shift starts at midnight. Tr. 20-21. The mine only produces coal during the day and evening shift, while the owl shift serves as a maintenance shift. Tr. 21. Bailey did not know if the belts were run on the owl shift. Tr. 21.

On September 8, 2010, Bailey was inspecting the Sewell Mine B. Tr. 18. He arrived at the mine at 7:00 am, during the owl shift when the mine was not producing coal. Tr. 19. Bailey contacted Superintendent Randy Campbell to inform him that he was starting the E01 inspection. Tr. 19. Bailey then reviewed the pre-shift and on-shift examination books and the map, held a safety talk with the entire day shift, and proceeded underground. Tr. 19.

c. Citation No. 8114320

Bailey issued Citation No. 8114320 for the violation on the No. 1 belt. Tr. 23. Bailey traveled underground at approximately 8:40 am by foot in by the double doors, which are located at the drift, in order to get on a mantrip to travel inside the mine. Tr. 21. The belt was running, but Bailey was not sure if coal was being produced. Tr. 24. He was accompanied by an hourly employee, whose name he could not remember. Tr. 23. Bailey testified that after going through the double doors, but before he got to the first two crosscuts, he noticed a violation on the No. 1 belt. Tr. 22, 23. Bailey saw a large amount of coal under the belt, so he inspected further. Tr. 24. He walked the entire belt, looking at the coal accumulations and rollers. Tr. 24. He noticed that seven rollers were stuck or frozen,² so he put his hand on the outside of the roller in order to determine the reason why they were stuck. Tr. 24, 26-27. Bailey defined a roller that is stuck or frozen as one that is touching the belt and not rolling when it should be. Tr. 27.

Bailey went out to tell Campbell about the violation, and Campbell shut the belts down. Tr. 22, 24-25. Campbell began performing measurements and found that 31 rollers were touching coal, 24 of which were turning in coal, and seven of which were stuck. Tr. 24-25. Bailey testified that six of the rollers that he touched were warm or hot, even though the mine’s ambient temperature was approximately 60 degrees, and he remembers that at least some of these were frozen rollers. Tr. 25, 30, 122. A frozen roller cannot cause heat from the bearing, but only from the belt rubbing the metal roller. Tr. 122. Bailey estimated that these rollers were

² Throughout all the witness’s testimonies, the terms “stuck” and “frozen” are used interchangeably.

approximately 100 degrees. Tr. 123. The ignition temperature of coal varies, but Bailey estimated that the coal in the mine would likely ignite at between 600-700 degrees, but also said it could be as high as 1,000 degrees. Tr. 123.

Bailey testified that the No. 1 belt is approximately 12 crosscuts long, making it approximately 850 feet long. Tr. 25. The belt is located on the right hand side as one enters the mine, with the track on the left. Tr. 25. The belt is held up by belt stands, which has one long bottom roller that traverses the width of the belt, and a top roller that is made up of three rollers holding up the top belt. Tr. 25-26.

The rollers cited in the citation were all bottom rollers. Tr. 26. On cross-examination, Bailey testified that there were no stuck top rollers in any of the belts that he examined. Tr. 116-117. Bottom rollers wear out faster than top rollers, because they get more water and coal on them. Tr. 117. He did not consider the lack of stuck top rollers as a mitigating circumstance. Tr. 117. Furthermore, bottom rollers in high impact areas that hold the belt up are likely to deteriorate faster than normal rollers in a flat belt. Tr. 117. An example of a high impact area is the crown of the slope of a belt that travels uphill and turns downhill. Tr. 118. In the high impact area, the rollers carry more of the load, resulting in more pressure on the bearings. Tr. 118. Bailey did not witness any coal on the belts that came out over the ball of the rail. Tr. 118-119.

He determined that the rollers were stuck by viewing that they were not knocking the coal down and breaking it up, as turning rollers do when they are moving. Tr. 27. At the time, he did not see what caused the rollers to become stuck. Tr. 27. However, after, a company representative told Bailey that coal was removed and the rollers turned, he interpreted that to mean that it was likely that accumulations were causing the rollers to freeze. Tr. 27. Bailey was told by the operator that there were no bad bearings, flat rollers, or rollers that were worn through so that the peripheries of the rollers were gone. Tr. 124-125. Bailey admitted that since the No. 1 belt was not operating on the midnight shift, it was possible that water and coal fines could have caused the rollers to seize between shifts. Tr. 125.

Bailey observed accumulations of coal beneath the frozen rollers, the top layer of which was dry and touching the rollers. Tr. 27-28. He described the belt as being very close to the ground, with the coal being four to 16 inches deep. Tr. 26. In most places, the coal was built up to the belt. Tr. 26. The coal was layered, with the bottom portions being wet and the top portions close to the belt being dry. Tr. 26. Bailey believed that the frozen rollers rendered the belt unsafe to operate because they constituted a frictional heating hazard. Tr. 28. When the belt continuously runs atop frozen rollers, the rollers create friction by rubbing along the belt rather than turning with it. Tr. 28. Furthermore, coal is an abrasive substance that increases the friction. Tr. 28. Bailey testified that the frozen rollers can generate enough heat to cause an ignition of the coal they are touching. Tr. 30.

In the day shift pre-shift examination, the examiner would not be able to determine whether the rollers were frozen if the belt was not moving. Tr. 125-126. However, Bailey stated that they should have seen the coal accumulations that were causing the rollers to freeze. Tr.

125-126. An operator is not required to run the belt during a pre-shift examination, but it is required to look for frozen rollers because they constitute a hazard. Tr. 159. In order to find frozen rollers, it would be easiest to run the belt. Tr. 159. Similarly, accumulations of combustible materials, such as coal, should be recorded as a hazard in a pre-shift examination. Tr. 159-160.

Bailey asserted that Section 360 requires a pre-shift examination of the belt, because miners would be traveling the entry. Tr. 126. Bailey did not believe that the fact that the belt was not running during the midnight shift mitigated the operator's negligence because the extensiveness of the condition indicated that previous exams had also been deficient. Tr. 127. He also stated that if all the coal had been wet, then perhaps that could have been a mitigating circumstance. Tr. 128. However, in this instance, only the coal on the floor was wet. Tr. 128.

Bailey stated that a roller turns in coal when the coal has built up to the level where it is touching the roller but the roller is not frozen. Tr. 29. The coal was dry that was surrounding the rollers turning in the coal. Tr. 29. Bailey explained that this was because the spillage off the belt is dry and most of the water was ground water. Tr. 29. Furthermore, the belt dries the top layer of coal during its process of heating and cooling. Tr. 29.

Bailey testified that the 24 rollers that were turning in the accumulation rendered the belt unsafe because they also increased the frictional heating on the coal. Tr. 29-30. With continued operations, these rollers had an increased probability that they will similarly freeze. Tr. 29-30. Bailey testified that a reasonably prudent mine operator would recognize the conditions he witnessed and would have taken immediate corrective action. Tr. 30.

The belt had been running for approximately 45 minutes when Bailey cited them. Tr. 30-31. There was not much pressure on the belts yet because there was little coal produced this early in the shift. Tr. 31. Under normal mining operations, Bailey estimated that the belt would be run for approximately 16 hours per day. Tr. 31. Bailey testified that he would expect additional heat to be generated the longer the belt ran. Tr. 31. Wet and damp coal accumulations also pose a hazard because in a heating event the coal dries out. Tr. 31-32. Additionally, in winter months there is less water in the mine, so coal dries quicker. Tr. 32.

Bailey considered this information in determining that the violation was S&S. Tr. 31. He testified that if left unabated, the conditions he witnessed would result in a frictional heating event on the belt, igniting the coal fuel, and causing a fire in the belt entry. Tr. 32. He further testified that a fire or ignition was reasonably likely to cause serious injury to miners. Tr. 32. At the time Bailey issued the citation there were 12 miners working inby on the section. Tr. 32-33. This created a danger, because in order to escape these miners would have to travel by the belt, which is an alternate escapeway with a lifeline. Tr. 33. It is also a normal haul road, so that people traveling the road could be exposed to hazards. Tr. 34. There is a further danger in that if a fire rages out of control and damages the adjacent intake stopping line, it would short-circuit the air, potentially pushing belt air to the face or cause smoke to enter the intake. Tr. 33. It was

for these reasons that Bailey designated everyone inby as exposed. Tr. 33. These miners would be exposed to smoke inhalation and potential burns. Tr. 34.

Bailey testified on cross-examination that this condition could have led to lost workdays for 12 miners even though there were emergency evacuation plans, directional lifelines, additional SCSRs, a refuse chamber, and other plans to ensure safety. Tr. 128-129. This was because that entry was used for travel as well as an alternate escapeway. Tr. 128. Bailey testified that when a disaster occurs, one cannot always assume that all technologies and plans will be followed, and cited the Sago and Upper Big Branch mine disasters as examples. Tr. 129.

The air was traveling outby, and anyone on the working section could travel all the way down to the No. 1 belt without any difficulty. Tr. 130. If they were to run into smoke, then they should cross the belt and enter the intake escapeway. Tr. 130. The man doors would be approximately 300 feet away, and if one were somewhere in between the man doors, it would be approximately 150 feet to get out of the entry. Tr. 130. Bailey stated that because the mine is low and wet, crossing the No. 1 belt would be difficult. Tr. 130-131.

Bailey designated the citation as high negligence resulting from the operator's unwarrantable failure to comply with the standard. Tr. 34. Upon receiving the citation, Campbell did not supply Bailey with any mitigating circumstances. Tr. 34-35. Bailey described the conditions that he observed as extensive because it was a relatively short belt and had 31 rollers turning in coal. Tr. 35. He described it as so "excessive and extensive" that he observed the rollers turning in coal even though he was not inspecting the belts at the time that he noticed them. Tr. 35.

Bailey testified that company employees must have been aware of the issues with the belt, including the owl shift foreman, the evening shift foreman, and two day shift foremen. Tr. 35-36. Furthermore, a pre-shift examiner would have also passed by the No. 1 belt. Tr. 36. When one rides the man-bus down the track, the No. 1 belt is a distance of six inches to three feet. Tr. 36.

Bailey estimated that this condition existed for at least two days and likely over a week. Tr. 36-37. Bailey based these estimates on his experiences as a coal miner and inspector, wherein he has been in over 20 different coal mines in the county in question. Tr. 37. It was highly unlikely that the conditions Bailey witnessed could have been produced in the 45 minutes that the belt had been running that morning. Tr. 37-38.

The violation was abated by sending nine miners for four hours to shovel and remove the accumulations. Tr. 38-39. The manpower required to clean up a belt that was 12 cross-cuts long was consistent with Bailey's estimate that the accumulations existed for at least several days. Tr. 39.

There were three previous citations issued at the Sewell Mine B for accumulations. Tr. 39. The first citation was issued by Bailey 10 months prior to the hearing. Tr. 40. The second citation was issued by Bailey nine months prior to the hearing. Tr. 40. The most recent citation was issued by Rodney Lusk six and a half months prior to the hearing. Tr. 39-40. Bailey confirmed in the mine data retrieval system that these citations were final orders. Tr. 40. Two of the three citations were designated as S&S, and Bailey testified that these citations should have put the operator on notice that greater efforts were needed to clean and maintain the No. 1 belts. Tr. 41.

Bailey cited § 75.1725 in Citation No. 8114320 for the seven frozen rollers, but he could have also cited § 75.400 for the coal. Tr. 119-121. He consolidated these violations so as not to "double dip" or duplicate citations. Tr. 120-121. Bailey testified that he mentioned the 31 rollers because they contributed to negligence and S&S. Tr. 121. The operator was not cited for coal accumulations, however the presence of coal factors into whether the belt is safe because coal provides the fuel in a possible fire. Tr. 121, 158-159. Bailey testified on cross-examination that the seven frozen rollers, plus the additional rollers turning in the coal, plus the coal accumulation all fit under the condition that he cited. Tr. 121-122.

d. Order No. 8114323

Bailey issued Citation No. 8114323 for a violation of Section 75.1731(a) on the No. 2 belt. Tr. 42. The No. 2 belt was not running at the time that the citation was written, because the No. 1 belt had been shut off for the previous citation, which resulted in all the belts being turned off. Tr. 42. Bailey described seeing engineering ribbon hanging from the roof bolts, as well as paint on the structure where the rollers were located. Tr. 42-43. He testified that there was visible damage to five bottom rollers that were marked by paint and ribbon, but could not recall if it was flattening of the roller or a bearing issue that had "bored the roller out." Tr. 43. He also observed accumulations, which were causing the rollers not to turn, and instead act as scrapers scraping coal off the bottom of the No. 2 belt. Tr. 43.

On cross-examination, Bailey testified that frozen rollers can become flat in a matter of hours or a matter of weeks, depending on the pressure on the belt. Tr. 110. He was certain that the rollers on the No. 1 belt were not flat, however he could not recall if any rollers on the No. 2 belt were flat. Tr. 110.

In order to abate the order, the operator replaced five rollers. Tr. 44. Bailey testified that the damaged rollers were not touching the coal accumulations beneath them, but they still posed a hazard. Tr. 44. Specifically, Bailey testified that they posed a fire hazard because of the metal on metal grinding. Tr. 44. Bailey explained that a roller has three parts: a shaft, a bearing, and a

roller turning about the shaft. Tr. 44. If there is damage, and metal rubs against metal, then there is a heating event, which can lead to a spark or ember falling into the coal below. Tr. 44. In this instance, the coal below the rollers was dry. Tr. 44.

Bailey testified that damaged rollers increase the likelihood that coal will accumulate around the rollers. Tr. 44. He described how a bottom roller can knock off coal. Tr. 45. The coal is carried on the top surface of the belt and, as the belt travels over the discharge roller, the top surface of the belt becomes the bottom of the belt. Tr. 45. Small particles of coal become stuck to the belt, which the scraper on the discharge roller usually eliminates. Tr. 45. However, some coal returns and, over time, turning and stuck rollers will knock the coal off as it is going back to the tail of the belt. Tr. 45. Bailey testified that after the passage of enough time and enough coal, accumulations may result from this. Tr. 45.

The five damaged rollers were not consecutive, but rather spread throughout the belt. Tr. 46. Bailey saw the paint on the structure, just above the roller, which is a typical mining practice to identify a damaged roller. Tr. 45-46. Bailey did not see any paint on the rollers, only on the frame, and did not know how long the paint had been on the frame. Tr. 147-148. Bailey admitted on cross-examination that it was possible that the paint was being used to call attention to rollers that were making noise. Tr. 150-151. He also saw flags tied to the roof bolts adjacent to the damaged rollers, which is also a typical mining practice to identify a damaged roller. Tr. 45-46. Mines sometimes also hang ribbons from the roof to signify damaged roof bolts, bad roof, or bad rib. Tr. 46-47. However, Bailey testified that he saw none of these reasons for why ribbon was hanging. Tr. 47. Bailey believed the ribbon to also identify the damaged rollers because it was the only place he saw ribbon on the track. Tr. 148-149. Furthermore, there was one ribbon hanging from the roof bolt in each of these five locations. Tr. 149. When Bailey issued this Order to Campbell, Campbell did not dispute Bailey's conclusion that the ribbon and paint were because of the rollers. Tr. 47. Similarly, no one else at the mine provided an alternate reason as to why the structure was painted or why the ribbon was hung. Tr. 47-48.

Upon reviewing the Program Policy Manual for Section 75.1725, Bailey agreed that it gives the inspector some discretion in whether to cite Section 1725 as an unsafe operating condition. Tr. 115. If only one roller were frozen or damaged, and it was not producing heat and there was no combustible material or fuel, Bailey stated that it would likely not affect the safe operating conditions. Tr. 115.

Bailey designated the violation as S&S because a bad roller will result in metal on metal grinding. Tr. 48. Once this occurs, the roller can get hot enough to start a fire or completely fail and fall apart. Tr. 48. This made it a reasonably likely ignition source. Tr. 48. Additionally, the rollers had deposited coal on the ground, which could serve as fuel if an ignition occurred. Tr. 48. Bailey testified that a fire or ignition was reasonably likely to cause serious injury to miners because there are miners traveling in and out all day. Tr. 48. If a fire rages out of control, it can damage the ventilation bradishes. Tr. 48. Bailey cited 12 persons affected for the same reason that he cited 12 persons affected in Citation No. 8114320. Tr. 49. He believed that these 12 miners would suffer smoke inhalation and burns. Tr. 49. Bailey designated the violation as

resulting from the operator's high negligence and unwarrantable failure to comply with the standard, and he was not presented with any mitigating circumstances. Tr. 49.

The standard for citing high negligence is whether a violation is obvious or extensive with no mitigating circumstances. Tr. 161. For high negligence, the operator either must know or should have known about the condition. Tr. 161. Here Bailey believed that the operator either knew or should have known because the rollers were identified with flagging or tape. Tr. 162.

Bailey testified that the violation had been made obvious by someone's flagging and painting it. Tr. 49-50. Bailey estimated that the condition existed for at least one day before he issued the citation. Tr. 50-51. He based this estimation on the paint not being glossy, which indicates that it was not new, and having dirt on it, which indicates that the mantrip has driven by it several times. Tr. 51. Bailey admitted that it was possible that the frame was painted months before and the rollers had been changed since that time, but stated that it would be an unlikely coincidence for there to be paint at the only five rollers that were damaged. Tr. 148. Prior to issuing the citation, Bailey believes that at least the following employees had passed the violation: the evening shift foreman entering and exiting, the owl shift foreman entering and exiting, and the day shift foreman entering. Tr. 50.

e. Citation No. 8114321

After citing the No. 1 belt, Bailey went to the section for an imminent danger run. Tr. 52. As he went by the No. 3 belt head, Bailey flashed his light from the mantrip and noticed a large pile of coal. Tr. 52. Bailey remarked to the person with whom he was traveling, "That's a violation. Let's go down to the section to do an imminent danger run because the belts are down, and then come back and evaluate it after." Tr. 22-23, 52. Bailey recorded the violation at that time, but he didn't evaluate it by taking any measurements. Tr. 52-53.

When Bailey examined the No. 3 belt head, he found a large pile of coal, relative to the low mine, within the drive and extending the 36-foot length of the guarding. T. 54. Bailey measured the coal at between 10 to 28 inches deep, with a 4-inch margin of error, and testified that it was touching the belt. Tr. 54-55. The accumulations were inside the guarding, and Bailey measured them from outside the guarding using a tape measure. Tr. 55.

Bailey testified on cross-examination that the belt was approximately 42 inches wide and the structure was roughly the width of the belt. Tr. 137. The 28 inches of coal that Bailey saw inside the metal guards was in a pile, so there were lower areas as well. Tr. 137-138. A portion of the coal was touching the belt, but Bailey could not remember if it was the 28-inch peak or another section of the pile. Tr. 138.

Bailey testified that accumulations in the belt entry that can cause a frictional heating hazard constitute violations of Section 75.1731(c). Tr. 56. Here the accumulations were a frictional heating hazard because they reached the bottom belt. Tr. 56. Had the belt been running at the time, rather than being down because the No. 1 belt was down, the belt would have been

running in the coal. Tr. 56. The belt is an abrasive surface, so that if it runs in coal it constitutes a frictional heating hazard. Tr. 56. The heat dries out the coal and could ignite the coal. Tr. 56-57.

The mine is required to have flame resistant belts, which means that the belt is self-extinguishing and won't burn unless a direct flame is applied. Tr. 132. Bailey testified that a flame resistant belt causes no less friction than a regular belt, and can still ignite the coal beneath it. Tr. 57. Bailey described the coal here as similar in moisture content to the coal in the No. 1 belt, with the coal on the floor being wet, but dryer as it neared the belt. Tr. 57. The top layer of coal was dry. Tr. 57.

On cross-examination, Bailey could not cite to any memoranda, program policy letters, instructional letters, or other source that showed that a belt rubbing against coal can develop frictional temperatures sufficient to ignite coal. Tr. 132. As an inspector, Bailey has seen solid metal belt bottoms in tail pieces, with the belt running over the solid metal bottom each minute that the belt is running. Tr. 133. However, he did not know of any fires caused by a flame resistant belt running over metal bottoms in tail pieces. Tr. 133. In some coal mines there are mobile bridges where the belt runs over solid metal bottom, which often causes friction. Tr. 133. However, in the case of a bridge, the load is uniformly distributed. Tr. 133-134.

The operator had made no effort to clean the accumulation by the time that the condition was cited. Tr. 58. Bailey marked this violation as S&S, explaining that the specific safety hazard contributed to was a frictional heating event that would cause the fuel and coal to ignite and lead to a fire on the belt. Tr. 58. Furthermore, as more coal accumulates, there is a larger area for friction, which raises the likelihood of a frictional heating hazard. Tr. 85. Such an event would be reasonably likely to cause serious injury to miners because the belt was on an alternative escapeway. Tr. 58-59. There are miners traveling in and out daily, and they could be exposed to smoke inhalation and burns. Tr. 59. Bailey also explained that as coal starts rubbing the bottom of the belt and lifting the bottom belt, it can un-train the belt, which leads it to spill more coal. Tr. 85. Bailey cited 12 miners as affected for the same reason that he did so in citations 8114320 and 8114323. Tr. 59.

The belt could have been running for approximately 45 minutes by the time Bailey cited it, but he does not believe that the conditions were created during that short time period. Tr. 59. He reached this conclusion because the conditions were extensive, and there was little, if any, coal run by that time in the morning. Tr. 59-60. Bailey testified that the conditions likely existed for at least two days, and probably longer. Tr. 60. Bailey marked it as moderate, rather than high, negligence because Campbell explained to him that the small holes in the guarding can make accumulations difficult to see. Tr. 60-61. When Bailey cited the No. 3 belt there was no one cleaning or working on it. Tr. 61. The violation was abated by removing the coal. Tr. 61.

f. Citation No. 8114322

After traveling the section and conducting the imminent danger run, Bailey traveled back to evaluate the violation on the No. 3 belt drive. Tr. 61-62. He exited the mantrip looking outby the belts on his left and, as he tried to travel around the mantrip, he began to struggle in the mud. Tr. 62. Bailey determined the mud he encountered was a violation of 380(b)(1). Tr. 62.

Bailey described the belt as being on his left when facing outby. Tr. 62. The track was in the center of the entry, and to the right of the outside rail was the lifeline for the alternative escapeway. Tr. 62. MSHA requires a primary and secondary escapeway, and the track haulageway is one of the escapeways in this mine. Tr. 160. The mine must maintain the entries so that miners can walk the escapeway. Tr. 160-161. The rib is approximately four to six feet from the rail. Tr. 62. The lifeline is attached to the roof bolts that are directly above the outside track rail. Tr. 62-63.

Bailey described encountering thick solid mud as he exited the mantrip. Tr. 63. There was a pump nearby, but the mud was too thick for the pump to help. Tr. 63. Bailey measured the mud at 13 inches by measuring the depth of his deepest footprint. Tr. 63-64. The mud extended from rib to belt, but the thicker mud was to the right of the rail between the rib, as one looked outby. Tr. 64. The mud extended the length of two cross-cuts, which measures approximately 130-150 feet long. Tr. 64. Bailey testified on cross-examination that though the mud in the area of the No. 3 drive was wet, there was no water running across the track. Tr. 138-139. The mud was up to the ball of the rail. Tr. 139.

Bailey testified that the mud appeared solid, and it was impossible to determine where it was shallow and where it was deep. Tr. 64. There were likely undulations and holes beneath the mud, but one could not determine their locations through the mud. Tr. 65. The mine is a low mine, approximately 48 inches high, so one must walk bent over. Tr. 65. Walking in this manner, Bailey fell into the mud several times. Tr. 65.

Bailey designated the violation S&S because if an event occurred and miners were to use this escapeway, there would be a hazard of tripping and falling down onto the rail or the ground. Tr. 65-66. In the event of an emergency, if the miners could exit using the mantrip, then the mud would have no effect on their ability to escape. Tr. 139. However, there is a possibility that the mantrip would be unavailable due to battery trouble or other issues. Tr. 139-140. Exiting by foot could result in one spraining or breaking a leg, knee, back, or wrist, as well as increased exposure to smoke. Tr. 66-76. Furthermore, it would be difficult to carry an injured miner on a stretcher in this escapeway. Tr. 66. Since the lifeline was located above the mud, it would be impossible for a miner to use the lifeline and avoid the mud. Tr. 67. Under normal circumstances, miners would be exposed to the mud during fire suppression checks, which cannot be performed from the mantrip. Tr. 66, 68, 141.

Bailey testified that under normal continued mining operations the mud would persist for the remainder of the day and evening shifts. Tr. 69. He arrived at this conclusion because there

was no effort being made to remove the mud. Tr. 69. Furthermore, it was not recorded in any books that this mud constituted a hazard, which indicates that it was not a priority to abate. Tr. 69. Bailey estimated that the condition existed for at least one week prior to the citation. Tr. 69. Bailey assessed the violation at moderate negligence because the mud was not apparent from the mantrip, but rather required one to step off into it. Tr. 70. No one provided any additional mitigating circumstances. Tr. 70. Bailey cited the violation as affecting one miner, because even if there were 12 people evacuating, it would be likely that only one person would fall and be hurt. Tr. 70. The mud was abated by adding water in order to liquefy it and allow the pump to remove it. Tr. 70-71. Miners also shoveled out some of the mud, which was difficult because there is only 12 inches between the belt and the roof. Tr. 142.

g. Citation No. 8114324

Bailey found five localized piles of coal underneath the damaged rollers at the No. 2 belt, as well as accumulation within the guarding at the drive. Tr. 71. Bailey examined the coal and determined that the coal under the rollers was dry. Tr. 71. He used his tape measure to determine the height of the piles and found that the smallest pile was four inches deep and the largest was 15 inches deep. Tr. 71.

Bailey determined that this violation was S&S for the same reason stated above with regard to the fire hazards of damaged rollers. Tr. 72. He believed that the belt in this condition would continue to be used in normal mining operations, which would lead to further accumulations. Tr. 72. Bailey testified that he believed a fire ignition would be reasonably likely to cause serious injuries. Tr. 72-73. If such a fire were to occur, it would affect the miners that travel the track daily and those that use it as an alternative escapeway. Tr. 73. This could result in smoke inhalation and burns. Tr. 73. Bailey estimated that this condition existed for one or more days because the accumulations were caused by the rollers, and the rollers had been there for some time. Tr. 73. Similar to the citations above, Bailey did not think that these accumulations could have been caused during the 45 minutes that the belt was running that morning. Tr. 73. Bailey assessed the violation at moderate negligence because the accumulations were not as large, obvious, or extensive as what he discovered at the No. 1 and No. 3 belts. Tr. 74. He cited 12 miners affected for the same reason listed in the above citation. Tr. 74. No one from mine management provided any other mitigating circumstances. Tr. 74. The violation was abated by the operator removing the coal from under the belt. Tr. 74.

h. Order No. 8114325

Bailey reviewed the mine's pre-shift and on-shift examination records before proceeding underground on September 8, and found no hazards or violations listed for the 1, 2, or 3 belts. Tr. 75. Bailey reviewed the two previous weeks of examination records and found that there had been no hazards or violations recorded on any of the belts in the two weeks prior to his inspection. Tr. 75-76.

Under MSHA regulations, pre-shift examinations are required before miners work or travel in an area that could contribute to a hazard. Tr. 76. It must be performed within 3 hours prior to the shift on which work or travel is scheduled. Tr. 76-77. In this instance, the pre-shift examination for the oncoming day shift would have to be performed between 5:00 and 8:00 am. Tr. 77. The pre-shift examiner must record hazards and locations of hazards, as well as corrective actions taken. Tr. 77. Such recordable hazards include bad roof, bad rib, accumulations on a belt, broken rails on a track, or anything else that could potentially hurt a miner. Tr. 77. Here, the operator was required to do a pre-shift examination of the belts because they were in the entry that miners were working or traveling. Tr. 77. Furthermore, the belts were in the same entry as the track haulage way. Tr. 77. Bailey stated on cross-examination that he did not know if any miners were scheduled to work on the belts. Tr. 102-103.

Bailey testified that he believes that the operator had performed inadequate pre-shift examinations previous to the day, owl, and evening shifts at the 1, 2, 3, and 4 belts. Tr. 78. The cited conditions existed at the time of the pre-shift examinations, and since they were not recorded, the examinations were inadequate. Tr. 78.

Most mines keep a pre-shift examination book, an outby or belt book for the belts, and a section book for the haulageways and roadways. Tr. 78-79. Sewell Mine B had only one book, where they kept their pre-shift and on-shift examinations. Tr. 79. They did not have a separate book for their belt examinations, but rather wrote comments about the belt below the upper section of the record in the pre-shift and on-shift book. Tr. 79. Bailey was only aware of some smaller mines that keep records in this fashion. Tr. 79-80.

Bailey reviewed the pre-shift examination for the September 8 day shift, and it stated that “1, 2, 3, and 4 belts okay ... at the time of the exam.”³ Tr. 80; RX-1, p. 2. When the citations were issued Bailey believed that the operator was regularly conducting pre-shift examinations of the belts. Tr. 81. Bailey held this belief because the belts are mentioned in the reports. Tr. 81. Furthermore, Bailey’s experience has taught him that many small mines include examinations of the belt in the pre-shift examination so that a later supplemental examination would not be needed. Tr. 81. A supplemental examination would be required if there was no pre-shift examination performed on the belt and something occurred during the shift where someone had to work on the belt. Tr. 82. In such a situation, a supplementary examination would have to be performed to show that there were no hazards prior to sending someone to work on the belt. Tr. 82.

Bailey testified on cross-examination that the evening shift examiner would have to perform a pre-shift examination for the entry because people would be traveling up the track. Tr. 106. He further stated that for the day shift there would have to be a pre-shift examination because people work or travel in the entry, even if no one would be specifically working on the belt. Tr. 106-107. In such a pre-shift examination, the examiner would have to look for any

³ Several of the words in the report, admitted as RX-1, are not legible.

hazard in the entry, including roof rib, broken rail, accumulations along the ribs, problems with the high voltage wire running in the entry, track blockages, and other possible hazards. Tr. 107.

On cross-examination, Bailey testified that the belt was not running on the owl shift of September 8, 2010, and agreed that if no one was scheduled to work on the belts, then there would be no requirement for an on-shift examination. Tr. 103-104. Bailey said that in this instance, miners traveled on the mantrip in the belt entry, which would require a pre-shift examination. Tr. 104-105.

Bailey designated this order as S&S because the violation contributed to the specific health or safety hazard of fire in the belt entry from a frictional heating event. Tr. 82. He also marked it as high negligence and unwarrantable failure because the conditions were “absolutely obvious and extensive.” Tr. 82. Bailey testified that the violations were so obvious that he observed the violations at the No. 1 belt when he was not examining it. Tr. 83. He explained that the examiners are agents of the operator, and they either knew or should have known that the conditions existed. Tr. 82-83. Bailey testified that his rationale for marking 12 people affected was the same as for the citations above. Tr. 83-84. The violation was abated by re-training all examiners. Tr. 84.

On cross-examination, Bailey testified that he found unwarrantable failure because it was obvious and extensive, as well as because he could place an agent in the entry making an examination. Tr. 108.

In determining that the violation was the result of unwarrantable failure, Bailey wrote in the Order, “The operator has not recorded one hazard or violation on any of the belts for at least two weeks going back to 08/2010.” Tr. 88; GX-7. However, after reviewing the reports from the two weeks previous to the citation, Bailey testified that hazards on the No. 4 belt (which he did not travel to) were reported immediately, and hazards on the all the belts were reported 11 days prior to the inspection. Tr. 88, 94. In the pre-shift report for September 7, 2010, it reports that the No. 4 drive “needs cleaned.” Tr. 90; RX-1, p. 6. Bailey testified that this was proper reporting of a hazard on a pre-shift report. Tr. 90. In the on-shift report, it lists as a hazard that the No. 4 drive “needs cleaned,” and lists as an action taken, “Cleaned.” Tr. 91; RX-1, p.7. In the September 6, 2010 report, it lists as a hazard on the belt that the “Section tail roller needs cleaned.” Tr. 91; RX-1, p. 9, 10. In the on-shift report for the owl shift on September 7, 2010, it states that the “Section tail roller needs cleaned.” Tr. 92; RX-1, p.3. This refers to coal accumulation, and it is marked as “corrected” on the form. Tr. 92; RX-1, p.3. In the pre-shift report for September 3, 2010, it states that the “Tail roller needs cleaned,” as the hazard, and “reported” as the action taken. Tr. 92; RX-1, p.12. In the August 28, 2010 pre-shift report, it states that “All tail pieces needs cleaned.” Tr. 93; RX-1, p. 42. Then, on the August 28, 2010 follow-up inspection it states that “1, 2, 3, and 4 belts cleaned on the drives.” Tr. 93; RX-1, p.43. Bailey testified that if he had noticed these hazardous conditions in the book, it would not have altered his designation of negligence because the only hazard related to the 1, 2, or 3 belts was 11 days prior to his citation. Tr. 94-95. Bailey stated that the way the entries are written lead

him to believe that these are not hazards that are being reported. Tr. 100. Bailey stated that most of these were on-shift examinations, rather than pre-shift examinations. Tr. 155-156.

What is recorded in an on-shift examination for the belts does not factor into pre-shift examination violations. Tr. 155. Bailey admitted to missing the one pre-shift examination record 11 days prior to the record, but stated that the other pre-shift examinations in the two weeks prior to the citation were inadequate. Tr. 155. The on-shift and pre-shift exams are separate exams, and proof that the operator worked on the belts in the on-shift exam does not indicate that adequate pre-shift exams were being performed. Tr. 155-156.

On cross-examination Bailey agreed that the reports indicated that in the several weeks prior to the citation the belt structure was changed, however he could not speak to the reason or extent of these repairs. Tr. 95-98. Similarly, in the several weeks prior to the citation, the reports indicate that there were six occasions where the belts were spot cleaned. Tr. 98-99. However, Bailey testified that these appeared to be work orders rather than hazard reports, because there was a lack of specificity to them. Tr. 100-101, 156.

With regard to mitigating circumstances, Bailey testified on cross-examination that it is the inspector's responsibility to ask and the operator's responsibility to tell. Tr. 101-102. Bailey usually tells the operator, "I feel this is high negligence because you knew or should have known," and then gives the operator a chance to respond with mitigating circumstances by asking, "Are there any mitigating circumstances?" Tr. 102.

2) Testimony of James Anthony Graham:

a. Background and Experience

At the time of hearing, James Anthony Graham had worked for Raw Coal for two years and three months. Tr. 165. He had 19 years of mine experience. Tr. 166. He started working for Consolidation Coal Company, as a red cap laborer, and worked his way up to section foreman. He then went to Cleveland Cliffs before coming to Raw Coal. He has West Virginia Assistant Mine Foreman/Foreman, EMT Basic, and State of West Virginia certifications. Tr. 166. He is currently the evening shift section foreman outby, and at the time of the citation was the foreman supervisor for third shift. Tr. 165. As part of the third, or owl, shift, Graham supervised the prepping of the mine for day shift production. Tr. 165. The third shift's main duties included cleaning, dusting, ventilating, building stoppings, cleaning up excess coal spillage in the roadways, rock dusting, and putting up ventilation fixtures. Tr. 167. Graham's immediate supervisor is Fred Ciampanella. Tr. 191.

b. The Third Shift

The owl shift had belt work, such as belt moves and maintenance, at least once per week. Tr. 165-166. When they were assigned to work on the belt, they made slices on the belt and advanced and retreated the belt as necessary. Tr. 167. According to Graham's directives, no one

was scheduled to work on the belts on the day shift of September 8, 2010. Tr. 167-168. Graham testified that they were not required to conduct a pre-shift examination of the belts because no one was going to be assigned to work on the belts that day. Tr. 168. They also did not perform an on-shift examination because there was no coal production. Tr. 168-169. Alfred Ciampanella, the mine foreman, was responsible for assigning pre-shift and on-shift examinations. Tr. 168.

Graham was not present at the mine when Bailey conducted his September 8 inspection. Tr. 182-183. Graham conducted a pre-shift examination, but stated that he was looking at the track rather than the belts.⁴ Tr. 183. During his day shift examination, Graham looked for rocks on the belt, as well as significant rips or tears. Tr. 184. Graham testified that his remarks in the examination book were only indicating that the belt should have been able to be turned on and started. Tr. 186.

Graham performs pre-shift examinations for the oncoming day-shift only if he is on notice that there will be workers on the belt in that shift. Tr. 186-187. Miners must travel each day in the track haulage way, which requires them to travel past the belts. Tr. 187.

During his September 8 pre-shift examination, Graham was not looking for accumulations on the belt, frozen rollers, or for rollers turning in accumulations. Tr. 191-192. Graham could not see frozen rollers during his pre-shift examination even if he was looking at them because the belt was not running. Tr. 203. However, he would have been able to see accumulations if he had looked for them. Tr. 203. Graham said he did not see the accumulations that Bailey viewed at the No. 1 belt because the belt is the last thing on his mind. Tr. 204.

Even if the belt is not running, Graham stated that he could see if coal was surrounding a roller. Tr. 192. Graham stated that he looks for things on the belt even though he has no legal obligation to do so, because otherwise Ciampanella would make his life difficult. Tr. 200. He stated that for safety reasons, he records additional things that he sees along the belt that might affect miners. Tr. 201. Graham testified that if he had seen a large accumulation that “would have been large enough to stick out like a sore thumb” then he would have recorded it as an accumulation that needed immediate attention. Tr. 192-193. He testified that he would not record rollers that were flagged or painted. Tr. 193. Graham was not looking for problems with the belt, other than major ones. Tr. 194. He stated that he did a visual ride-by and everything looked intact. Tr. 195.

c. Citation No. 8114320

Graham performed a pre-shift examination of the track entry because miners use the area for travel. Tr. 169. When Graham traveled the track entry out, he did not observe any accumulations at the No. 1 belt. Tr. 169. He testified that the No. 1 belt is always wet and muddy, because water is used to help control the coal dust and water is along that belt

⁴ Graham equivocated on whether in his report in the examination book, when he referred to the “1, 2, 3, and 4 belts,” he was actually referring to the track. Tr. 183-184.

continuously. Tr. 169-170. When Graham performed his pre-shift examinations, the belt was not running and he could not determine if there were any frozen rollers or rollers turning in coal. Tr. 170.

Graham testified that there was no potential hazard from the belts turning in mud. Tr. 170. He also stated that it would not be possible for 12 miners to suffer lost time injuries from the condition cited, “unless they were like a moth drawn to the flame.” Tr. 171. He explained that the way air moves on the belt would make it so any smoke, dust, or residue would be vented outside. Tr. 171. The miners would be in by that area, and would have been notified and exited the mine down the intake escapeway which is isolated with fresh air. Tr. 171. Furthermore, the mine conducts escapeway drills when it does fire drills. Tr. 171-172.

On cross-examination, Graham testified that it is possible to see an accumulation after passing through the double doors. Tr. 180. One could see an excessive accumulation at the No. 1, 2, or 3 belts that had pushed itself out along the track from the man-bus. Tr. 181. If the accumulation were not so excessive, one would have to exit the man-bus and do a visual inspection. Tr. 181. Furthermore, while riding on the man-bus, one can clearly see the belts and any ribbon hanging from the roof. Tr. 181.

d. Citation No. 8114321

The accumulations cited in Citation No. 8114321 were located underneath the No. 3 belt head. Tr. 172. Graham testified that the drive roller is approximately 14-16 inches off the ground. Tr. 172-173. The air lock is approximately six feet high. Tr. 173. The belt conveyer is approximately 4-6 feet off the ground. Tr. 173. The No. 3 belt head has an expanded metal guard, which has a half-inch hole. Tr. 173. While riding in an area where the belt is only 40 inches high, one cannot see underneath the belt. Tr. 198. Graham stated that for these reasons it is difficult to accurately determine the amount of accumulation in the metal guard without removing the guard. Tr. 173.

The belt at the Sewell B Mine is flame resistant, which means that it only burns if something burning is in contact with it. Tr. 174. The belt rubs along solid steel tail pieces with flat steel in them for approximately 8-10 feet, which creates friction. Tr. 174. However, Graham said that the friction would only cause the belt to get warm to the touch. Tr. 174. He testified that if a smoke or fire condition were to occur, the smoke would exit towards the outside because of the air flow in the mine. Tr. 174.

e. Citation No. 8114322

When Graham conducted his pre-shift examination on the morning of September 8, 2010, he determined that the conditions at the No. 3 belt drive were as normal as any other shift. Tr. 175. He testified that there is always mud at the belt head because of the water used on the belts. Tr. 175. The lifeline was over the solid track and one would have to deviate from the lifeline to get into the mud. Tr. 175. If there was an emergency event, the miners would likely go on the

track-mounted battery powered man-bus and travel the secondary escapeway to the surface. Tr. 175-176. The mud would not hinder escape using the man-bus, which Graham described as “very reliable.” Tr. 176-177. The man-buses also have voltage indicators on them, which helps monitor the battery charge. Tr. 177. Graham testified that the height of the area—a little over five feet—made it easy for a person to walk with a stretcher. Tr. 176.

f. Order No. 8114323

When Graham conducted his pre-shift examination on the morning of September 8, 2010, he determined that the conditions at the No.2 belt entry were normal. Tr. 177. The belt was not running. Tr. 177. Graham saw the paint on the structure, which he testified had been present for as long as he’s been at the mine. Tr. 177-178. With regards to ribbons hanging from roof bolts, Graham stated that they have no significance to him unless he hung them. Tr. 178. Graham hangs ribbons for a variety of reasons, including using them to mark areas he wants to revisit, and said there is no specific reason for hanging a ribbon. Tr. 178. Furthermore, he did not see the ribbons hanging during his September 8 examination. Tr. 178. Graham testified that his negligence should not have been determined to be high because he did what was required by law. Tr. 179. He testified that the only thing he could have done additionally would have been to fire boss that belt, and he had no instructions to do so. Tr. 179.

During a typical pre-shift examination, Graham examines the roof, rack, clearance, and anything that might be in the track that might pose a hazard to a bus. Tr. 179. He looks for anything that would be obvious, such as broken rails, broken bridles, tracks that are not blocked properly, bad top, and hanging cable. Tr. 179. He described certain conditions as common, including broken pieces of the belt structure, rollers that are out of the hanger, rock on the belt, and the ribs having rolled and shoved the belt towards the track. Tr. 179. Graham agreed that a damaged roller is a violation that should be recorded during a pre-shift examination of the belt. Tr. 189. Similarly a roller turning in loose dry coal is a hazard that should be recorded during a pre-shift examination of a belt. Tr. 189. Graham stated that if it were turning in wet coal, then it would not be a violation. Tr. 190.

3) Testimony of Alfred Ciampanella:

a. Background and Experience

Alfred Ciampanella has worked as the mine foreman at Raw Coal since 2009. Tr. 206. He has 40 years of mining experience, working for United States Steel, A.T. Massey, Hughes Enterprise, Base Star Mining, Raw Coal Mining, and a few smaller enterprises. Tr. 206. Ciampanella has the following certifications: West Virginia mine foreman, electrician, dust, noise, and shop foreman; MSHA instructor; and several Joy certifications for equipment repair. Tr. 207. He has been a certified foreman for 37 years and a certified electrician for 38 years. Tr. 207. In addition to working as mine foreman at Raw Coal, he has also worked as the face boss. Tr. 207.

b. The Sewell Mine B

The mine works two production shifts beginning at 8:00 am and 4:00 pm, and one down shift beginning at midnight. Tr. 207-208. The mine had no designated belt workers in September 2010. Tr. 208.

Ciampanella described the Sewell mines as damp mines. Tr. 211. Additionally, millions of gallons of water are added each day in order to saturate the belts and keep the respirable dust down and to help with heat problems. Tr. 211. This results in wet and muddy conditions in the mine. Tr. 211.

There were 12 production workers on the day shift in September 2010. Tr. 208. Ciampanella testified that the mine had purchased a new belt system, with the No. 1 belt having been purchased in 2009, so they did not feel it was necessary to have an examiner or maintenance people on the belt. Tr. 208, 253-254. He stated that pre-shift examinations of the belt were only necessary when work was regularly scheduled to be done on the belt. Tr. 208-209. On-shift examinations are required on the belt daily during production shifts. Tr. 209.

The mine did not employ any belt examiners or belt shovelers in any of the three shifts. Tr. 228. There were also no regular maintenance or clean up program for the belts. Tr. 228. Ciampanella was employed at the mine when citations were issued in 2009 for accumulations. Tr. 229; GX-2. Following these citations there was no formal maintenance program change. Tr. 229-230. The mine operates without a belt man by relying on the foreman to see problems and dispatch people during breakdowns and the hoot owl shift. Tr. 230. If something on a belt needed attention, a miner would have to be pulled off of the section to go to the belt to make repairs or the motor crew would call Campbell to do a supplementary exam. Tr. 231.

Ciampanella was one of the two section foremen on the September 8 day shift. Tr. 236-237. However there were four certified foremen on shift, including Randy Campbell, Ciampanella, Joey Proffitt, and Dennis Worthington. Tr. 237. Because the mine operated on a day shift without a belt man, it relied on one of the foremen to see any problems with the belt, recording them, and correcting them. Tr. 237.

The on-shift examination occurs any time after production is started. Tr. 233. Sometimes the on-shift exam for the day shift is performed at the same time as the pre-shift exam for the oncoming evening shift. Tr. 233. At the time of the citations, Ciampanella usually performed on-shift examinations in the latter part of the day so that it could be included in his pre-shift. Tr. 234. He estimated that he usually performed examinations between 1:00 pm and 4:00 pm. Tr. 234. A motor crew travels up and down beside the belts between 8:00 am and 1:00 pm. Tr. 234. Therefore if there was a hazard on the belt, the motor crew would be exposed to it as they traveled back and forth. Tr. 235.

During the September 8 inspection no top rollers were found to be stuck. Tr. 214. Ciampanella guessed that the reason for this is that the top rollers distribute weight better and have superior bearings to the bottom rollers. Tr. 214-215.

Mines typically use a rope frame structure for the belt structure, however here the entire mine uses a rigid metal structure. Tr. 210-211. Ciampanella described the metal structure as being superior and “trouble-free.” Tr. 211.

Ciampanella estimated that there were approximately 4,000 rollers at the mine on all the belts. Tr. 214. If there is a bad roller, usually only the roller needs to be changed. Tr. 212. However, if there is a fault in the system and the belt is rubbing the stand, the whole structure may have to be changed. Tr. 212. The roller sits in a bracket, and in order to change it one pops it out and folds a new one in. Tr. 212-213. If the roller is stuck in spillage, then it may only need to be shoveled or “pecked.” Tr. 213. If the roller is stuck due to water or other reasons, sometimes one can simply touch it and it begins moving again. Tr. 213. Ciampanella defined a damaged roller as having a variety of features including gutting, without bearing, broken hangers, split or broken diameters, and containing holes. Tr. 213.

Ciampanella was already underground preparing to mine coal when Bailey began his inspection on September 8. Tr. 237, 268. He traveled to the section on the man-bus in the track haulageway. Tr. 237-238. Ciampanella did not see any of the belt conditions that Bailey cited, however he does not make it a habit of examining the belt on the way to the section. Tr. 238. Ciampanella could not remember if the belt was running that day when he traveled past it, but testified that he is generally the one who gets it started. Tr. 239. He testified that it would have been possible to see accumulations and hanging ribbon from the man-bus, if he was looking for them. Tr. 239-240.

Ciampanella maintained that pre-shift examinations were only required where miners are scheduled to work, not travel. Tr. 241. He also testified that pre-shift examinations for stuck rollers are not required if the belts are not running. Tr. 243-244. Ciampanella testified that on September 7, 2010, he conducted a full pre-shift exam because the belts were running. Tr. 244-245; RX-1, p. 6. He personally examined the 1, 2, 3, and 4 belts for accumulations, as well as frozen or damaged rollers. Tr. 245. With regards to the belts, Ciampanella wrote in his pre-shift report “appears safe at time of exam.” Tr. 245; RX-1, p. 6. He testified that this meant that if he saw an accumulation at one of the belts he probably would have reported it. Tr. 246-247.

Ciampanella testified that the pre-shift examination for the oncoming day-shift on September 8 did not examine the belts. Tr. 247-248; RX-1, p. 2. The examination only looked at the track entry and obvious conditions on the belt. Tr. 248. The report was called out by Graham to Ciampanella, with Ciampanella writing it down. Tr. 248. The report states, “1 and 2 and 3 and 4 belts along none observed at time of exams,” which Ciampanella explained meant that the belts were safe. Tr. 248-249; RX-1, p. 2.

Ciampanella testified that 10 of the 12 days prior to the citation work was done on the belts during the day shifts. Tr. 250-251. He testified that when the records state “change structure” they are referring to changing rollers. Tr. 251. Ciampanella denied that the records indicated that there was at least one miner regularly working on the belts during the day shift, because he may have been the one to change the rollers. Tr. 252. Since he is a certified miner, he testified that he can perform the pre-shift examination as he worked. Tr. 253. However, he admitted that at least some of the work must have been performed by a non-certified miner. Tr. 253.

c. Citation No. 8114320

After Citation No. 8114320 was issued, Ciampanella went down with men to clean the condition. Tr. 215-216. Ciampanella believes that water, mud, and spillage were causing the cited rollers to stick. Tr. 216. He testified that the belts are maintained by utilizing people to work on them during breakdown procedures. Tr. 216-217. However, if they start noticing accumulations, then they will attend to them immediately. Tr. 217. Ciampanella testified that his deposition testimony that the mine often waited until the owl shift to change stuck rollers was incorrect.⁵ Tr. 257. Ciampanella does not consider mud building up on the belt a hazard. Tr. 217.

Ciampanella testified that it took nine miners four hours to clean the accumulations at the No. 1 belt because the roof is low in that area. Tr. 217-218. He further explained that the shovel used holds approximately 35 pounds, and the miner has to navigate the weight over his head and onto the belt. Tr. 218. It took approximately 2-3 hours to clean the No. 1 belt. Tr. 258. The mine was under a D order and could not produce coal until the No. 1 belt was cleaned. Tr. 258. He testified that it was possible that heat from a frozen or stuck roller will dry out accumulations surrounding the roller. Tr. 258-259.

d. Citation No. 8114322

Ciampanella testified that he did not believe that the mud was where Bailey said it was because of the placement of the belt line and the sump pumps. Tr. 221. Ciampanella was not with Bailey when Citation No. 8114322 was issued. Tr. 268. He later observed the area from a man-bus. 268-269. He saw mud on each side of the track, but did not measure the mud, and admitted that it could have been 13 inches deep. Tr. 269.

⁵ Ciampanella appeared to contradict his deposition testimony often in his testimony. Tr. 255-265. Ciampanella repeatedly stated that he may have been confused or misunderstood during the deposition. Tr. 257, 264. He also changed his opinion at points in his testimony. Tr. 265-266.

e. Citation No. 8114323

Hazards in the mine are supposed to be reported to Ciampanella, the mine foreman. Tr. 224. Ciampanella testified that he did not think that anyone reported any roller to him, including the five that were cited. Tr. 224.

Ciampanella testified that he does not know who painted the belt frame or placed the ribbons on the roof.⁶ Tr. 222. He testified that the use of ribbons was not a standard practice at the mine, however he stated in the deposition that it was mine policy to flag bad rollers. Tr. 222, 267-268. All the foremen and a few of the miner operators have access to paint, but no one has access to ribbon at the mine. Tr. 222-223, 266. He has no direct knowledge of anyone reporting the specific area where there was paint or ribbons. Tr. 223. However, if he saw paint or ribbon, Ciampanella said that he would stop and look at it. Tr. 224. If the belts were not running, he would get off the man-bus and try the roller by hand to see if it was stuck. Tr. 224.

f. Citation No. 8114324

Ciampanella described the No. 2 belt drive as the wettest belt drive, and said that the air goes straight to the surface. Tr. 225. When the belt comes away from the drive, it is approximately 3 feet off the ground. Tr. 225. For approximately 75-85 feet it elevates itself back to the bottom to where the bottom belt is the highest point out of the spillage. Tr. 225-226. He said that there were wet clusters of wet coal fines and mud underneath the roller, but it takes a long time for them to build up. Tr. 226. Furthermore, the mine occasionally cleans them up. Tr. 226.

g. Citation No. 8114325

Ciampanella designated Graham as the pre-shift examiner on the midnight shift. Tr. 226. Ciampanella instructed Graham to make a pre-shift examination of the mines, but did not tell him to examine the belts. Tr. 226-227. Ciampanella stated that if the belt is idle Graham does not have to concentrate on it. Tr. 227. There was no one scheduled to work on the belt at the beginning of the shift. Tr. 227.

⁶ Ciampanella appeared to change his deposition testimony concerning the mine's policy towards painting the structure when there is a problem with the rollers. Tr. 263-264. At hearing, Ciampanella testified that it is not company policy or practice to paint or hang ribbons. Tr. 264. However, he also said that occasionally they paint the rollers when there is a problem. Tr. 264-265.

Discussion and Analysis

h. Citation No. 8114320

Citation No. 8114320 reads as follows:

The No. 1 underground belt was not being maintained in safe operating condition. Wet, damp, and dry coal has accumulated on the belt for the entire length, 12 crosscuts, resulting in 31 rollers turning or being stuck in the coal. The coal ranged in depths from 4 to 16 inches. At least seven rollers were stuck and at least 6 were warm to the touch. The belt had been running for less than 45 minutes when the condition was observed. The operator recorded for the last week that no violations were observed on the belt. The operator engaged in aggravated conduct constituting more than ordinary negligence, in that this condition was obvious and extensive, and no action was being taken to correct the condition. This is an unwarrantable failure to comply with a mandatory standard. The operator removed the belt from service immediately. Standard 75.1725(a) was cited 1 time in two years at mine 4606265.

The citation was issued pursuant to section 104(d)(1) of the Act for a violation of 30 C.F.R. 75.1725(a). The gravity was assessed as reasonably likely to lead to injury or illness, with such injury or illness reasonably leading to lost workdays or restricted duty. Furthermore, it was cited as Significant and Substantial with 12 persons affected, a high degree of negligence, and an unwarrantable failure.

The citation was terminated approximately five hours later after nine miners spent four hours cleaning the belt. All of the coal was removed from the belt and the rollers were freed, making the belt safe to operate.

The Secretary argues that the conditions described in Citation No. 8114320 violated 75.1725(a), which requires that machinery be maintained in safe condition or removed from service immediately. Inspector Bailey found seven stuck rollers and 24 rollers turning in dry coal accumulations, which presented a frictional heating hazard. He testified that Raw Coal was not operating the No. 1 belt in safe operating condition and that the belt had not been removed from service, thereby violating the two duties imposed by §75.1725(a).

The Secretary further argues that the conditions satisfied the four *Mathies* criteria for determining whether a violation is S&S: (1) the operator violated 75.1725(a), a mandatory safety standard, by operating the No. 1 belt with seven stuck rollers surrounded by coal accumulations and 24 bottom rollers turning in coal accumulations; (2) the violation contributed to the discrete safety hazard of fire and smoke in the track/belt entry resulting from frictional heating leading to an ignition of coal accumulations; (3) a fire or ignition would reasonably likely cause smoke inhalation or burns to miners working underground; and (4) that such inhalation or burns are reasonably serious in nature. The Secretary argues that the conditions were the result of high negligence and aggravated conduct and therefore support a finding of unwarrantable failure.

The Respondent argues that the frozen rollers were not a violation of the regulation because they were approximately 98-100 degrees, and auto ignition of the coal would not occur unless the coal was at 600-700 degrees. Furthermore, the Respondent argues that the rollers that were turning in coal were not a violation of Section 75.1725. In support of this position, the Respondent cites MSHA's Policy Program Manual, which states that frozen or damaged idler rollers "could indicate" that the belt conveyor is not maintained in safe operating condition. The Respondent argues that if the piles of mud were a violation of any regulation, then they should have been cited under Section 75.400. However, in this instance, the inspector likely did not cite them under 75.400 because the coal was so wet so as to not constitute a hazard. The Respondent argues that the Secretary failed to sustain his burden of proving that Citation No. 8114320 was an S&S violation. Further, the Respondent contends that "a remote or speculative likelihood of the cited hazard contributing to an injury will not support a significant and substantial violation." *Resp. Post-Hearing Brief*, 14.

The Respondent also argues that the Secretary failed to sustain her burden of proving that Citation No. 8114320 was caused by high negligence. The Respondent alleges that it conducted proper on-shift examinations for each shift that coal was mined, and that if a hazardous condition was observed it was corrected. Furthermore, pre-shift examinations were conducted on the track entry, while also looking for hazardous conditions on the belt conveyors. The Respondent argues that it had a good faith belief that it was not required to conduct pre-shift examinations during the midnight shift because the belt was not running. This, it argues should be a mitigating factor in assessing negligence. Furthermore, if the belts were not running, the examiner would be unable to determine if rollers were stuck. Furthermore, the Respondent argues that part of the basis for the inspector's determination of high negligence was an incorrect belief that the Respondent failed to record violations in the previous week. It maintains that because the rollers were not worn flat, with only the bottom rollers stuck, one could see that the rollers had not been stuck for an extended period.

The Respondent further argues that the Secretary failed to sustain her burden of proving that Citation No. 8114320 was reasonably expected to cause lost work day injuries to 12 miners. There were 12 miners working underground, and the Respondent contends that it is unreasonable to expect all 12 miners to be injured even if the event were to occur. The Respondent argues that since the air in the belt entries was traveling away from the working sections, and escape from the mine was a short distance, most of the miners would have been able to escape without injury. Furthermore, the mine was equipped with directional life lines, additional SCSRs, a refuge chamber, and other emergency safety protections.

The Conditions Described in Citation No. 8114320 Violated 30 C.F.R. §75.1725(a)

Section 75.1725(a) of the regulations states:

(a) Mobile and stationary machinery and equipment shall be maintained in safe operating condition and machinery or equipment in unsafe condition shall be removed from service immediately.

30 C.F.R. § 75.1725(a). The Commission has held that the standard for determining whether machinery or equipment is in an unsafe operating condition is “whether a reasonably prudent person familiar with the factual circumstances surrounding the allegedly hazardous condition, including any facts peculiar to the mining industry, would recognize a hazard warranting corrective action within the purview of the applicable regulation.” *Alabama By-Products Corp.*, 4 FMSHRC 2128, 2129-2130 (Dec. 1982). The Commission has interpreted §75.1725(a) as imposing two duties upon an operator: “(1) to maintain machinery and equipment in safe operating condition, and (2) to remove unsafe equipment from service. Derogation of either duty violates the regulation. The Commission requires that the unsafe equipment be removed from service immediately.” *Id.* (citations omitted). Accordingly, I find that the frozen rollers and rollers turning in coal constituted a violation of §75.1721(a).

In *Big Ridge, Inc.*, Judge Manning found that frozen rollers surrounded by accumulations violated §75.1725(a). 34 FMSHRC 63, 87 (Jan. 2012) (ALJ). *See also Solar Fuel Co.*, 9 FMSHRC 1966 (Nov. 1987) (ALJ) (finding nine frozen rollers and seven damaged rollers violated §75.1725(a)). Similarly, in *Consolidation Coal Co.*, Judge Koutras found a violation of the frozen rollers and rollers turning in coal to constitute a violation of the regulation. 16 FMSHRC 2522, 2543-2545 (Dec. 1994) (ALJ).

Inspector Bailey issued Citation No. 8114320 for accumulations he viewed at the No. 1 belt. Tr. 23. He saw large accumulations as he was beginning his inspection, and upon further inspection he noticed that seven rollers were frozen. Tr. 22-27. Bailey and Campbell began performing measurements and found that 31 bottom rollers were touching coal, 24 of which were turning in coal and seven of which were stuck. Tr. 24-25, 26. Bailey testified that six of the rollers were warm or hot to the touch, even though the mine’s ambient temperature was approximately 60 degrees. Tr. 25, 30, 133.

The coal accumulations ranged from four to 16 inches deep, and since the belt was so close to the ground, the coal was piled up to the belt in many areas. Tr. 26. The coal was layered, with the bottom portions being wet and the top portions close to the belt being dry. Tr. 26. Bailey testified that this rendered the belt unsafe because it created a frictional heating hazard. Tr. 28, 29-30. When the belt continuously runs atop frozen rollers, the rollers create friction by rubbing along the belt rather than turning with it. Tr. 28. Furthermore, coal is an abrasive substance that increases the friction. Tr. 28. Bailey testified that the frozen rollers can generate enough heat to cause an ignition of the coal they are touching. Tr. 30.

Under these conditions a reasonably prudent person familiar with the factual circumstances would recognize this hazard and that machinery was not maintained in a safe operating condition. In *Highland Mining Co.*, Judge Moran found that “[i]t is undeniable that a bottom roller running in coal creates the hazard of a frictional point. That is, such coal provides the fuel and the friction created by the roller provides the heat.” 33 FMSHRC 657, 685 (March 2011) (ALJ). Similarly, the Commission has held that the “danger posed in underground coal mining by a friction source that will lead to a heat buildup in an area where coal accumulations could occur is obvious. Where such dangers are present due to defects in the operating condition of equipment, that equipment cannot be considered in safe operating condition.” *Alabama By-Products*, 4 FMSHRC at 2131.

The violation affected 12 miners because at the time that Bailey cited the Respondent there were 12 miners working inby the belt. Tr. 33. The belt is near the drift, so miners working inby would have to travel by it either in the primary or alternate escapeway. Tr. 33. Additionally, if a fire rages out of control, it would potentially damage the adjacent intake stopping line, which would short circuit the air and push the belt air to the face or cause smoke to enter the intake. Tr. 33.

The Conditions Described in Citation No. 8114320 were Significant and Substantial

Having found that the conditions described in Citation No. 8114320 violated 30 C.F.R. 75.1720(a), which is a mandatory safety standard, the first prong of the *Mathies* test is satisfied. The second prong requires a determination of whether the violation contributed to a discrete safety hazard. Inspector Bailey testified that the dry and wet coal would result in a frictional heating event on the belt, igniting the coal, and causing a fire in the belt entry. The Commission has similarly stated that damp or wet accumulations remain hazardous because they can dry out slowly through the passage of time or quickly from a fire elsewhere in the mine. *Black Diamond Coal Mining Co.*, 7 FMSHRC 1117, 1121 (Aug. 1985).

The third element of the *Mathies* test – a reasonable likelihood that the hazard contributed to will result in an injury – is usually the most litigated prong. The Commission has made it clear that the “test under the third element is whether there is a reasonable likelihood that the hazard contributed to by the violation...will cause injury.” *Musser Engineering Inc. and PBS Coals, Inc.*, 32 FMSHRC 1257, 1281 (Oct. 2010); *see also Cumberland Coal Resources LP*, 33 FMSHRC 2357, 2365-2369 (Oct. 2011). The Commission emphasized that the Secretary need not “prove a reasonable likelihood that the violation itself will cause injury...” *Id.* Further, the Commission reaffirmed the well-settled precedent that the absence of an injury producing event, where a cited practice occurs, does not preclude an S&S determination. *Id.* (citing *Elk Run Coal Co.*, 27 FMSHRC 899, 906 (Dec. 2005) and *Blue Bayou Sand and Gravel, Inc.*, 18 FMSHRC 853, 857 (June 1996)).

The Respondent here makes a similar mistake to the Operator in *Musser Engineering*, by conflating “violation” with “hazard.” 32 FMSHRC at 1280-1281. Once it is established that the cited violation will contribute to a hazard, the focus shifts from the cited violation to the hazard.

“The Secretary need not prove a reasonable likelihood that the violation itself will cause injury.” *Id.* Here the hazard is a fire and exposure to smoke. Bailey testified that a fire in the haul road was reasonably likely to lead to smoke inhalation and burns. Tr. 34. The No. 1 belt is in the track entry, so all shifts of miners enter and exit the mine traveling past this belt. Tr. 34, 234. Furthermore, a fire in the track entry could cause damage to the adjacent intake stopping line, which would short circuit the air and cause smoke to enter the intake and be circulated in the working section where 12 miners were working. Tr. 33. These potential injuries are serious in nature. Therefore, I find that that there was a reasonable likelihood that the hazard contributed to by the violation would result in serious injuries, and therefore affirm the S&S designation on the citation.

The Conditions Described in Citation No. 8114320 Were the Result of the Operator’s High Negligence and Aggravated Conducts, Making it an Unwarrantable Failure

The evidence establishes that the violation resulted from the operator’s aggravated conduct, characterized by such conduct as “reckless disregard,” “intentional misconduct,” “indifference,” or the “serious lack of reasonable care.” *Emery Mining Corp.*, 9 FMSHRC at 2004. Graham performed the pre-shift examination of the track entry and testified that he did not observe any accumulations at the No. 1 belt. Tr. 169. At that time the belt was not running, and Graham stated that he could therefore not determine if there were any frozen rollers or rollers turning in coal. Tr. 170. However, Graham also testified that during his September 8 pre-shift examination, he was not looking for accumulations on the belt, frozen rollers, or for rollers turning in accumulations. Tr. 191-192. Graham testified that he did not see the accumulations that Bailey viewed at the No. 1 belt because the belt is the last thing on his mind. Tr. 204.

Based on his previous mining experience and his knowledge of this mine, Bailey testified that the conditions at the No. 1 belt existed for at least two days and likely over a week. Tr. 37. Bailey described the accumulations as “excessive and extensive,” noticing problematic coal accumulations at the belt almost immediately and from a distance. Tr. 22-24, 35. In all, there were 31 rollers turning in coal, all on a relatively short belt. Tr. 35. Graham testified that if left unabated, the condition could result in a frictional heating event on the belt, igniting the coal fuel and causing a fire in the belt entry. Tr. 32. The accumulations were so extensive that it took nine miners four hours to shovel and remove them. Tr. 38-39. In addition to Graham, two section foremen traveled through the double doors—the spot from which Bailey saw the accumulations—and past the four belts in the mine, all prior to Bailey’s investigation. Tr. 236-238. In spite of these individuals walking past the accumulations touching the rollers, there was no indication that corrective action was going to be taken. The mine was also on notice that greater compliance was necessary, as it had been cited 3 times in the previous 11 months for similar conditions at the No. 1 belt. *See e.g. Peabody Coal Co.*, 14 FMSHRC 1258, 1263 (1992) (Commission held that use of past violations to show aggravated conduct is not limited to the same regulation as the one at issue). Furthermore, there was no evidence that there were any efforts to abate the condition prior to the issuance of the Citation. I have considered all six factors and find these conditions to constitute an unwarrantable failure.

i. Order No. 8114323

Order No. 8114323 reads as follows:

Five damaged bottom rollers were present on the No. 2 belt. These rollers were all painted and flagged indicating that the operator knew the condition existed. These bad rollers have scrapped coal from the bottom belt resulting in accumulation being present directly under them that would contribute to the hazard that already exists. (see Cit. # 8114324) The operator engaged in aggravated conduct constituting more than ordinary negligence in that this condition had been flagged both on the belt structure and on the mine roof with ribbon and no action was taken to correct the violation before the belt was put in service.

The Order was issued pursuant section 104(d)(1) of the Act for a violation of 30 C.F.R. 75.1731(a). The gravity was assessed as reasonably likely to lead to injury or illness, with such injury or illness reasonably leading to lost workdays or restricted duty. Furthermore, it was cited as Significant and Substantial with 12 persons affected, a high degree of negligence, and unwarrantable failure. The Order was terminated approximately two hours later after the operator replaced five rollers.

The Secretary argues that the conditions described in Order No. 8114323 violated 75.1731(a), which requires that damaged rollers and other belt conveyor components that pose a fire hazard be repaired or replaced immediately. Inspector Bailey observed ribbon hanging from roof bolts and paint on the structure where five damaged rollers on the No. 2 belt were located. He testified that operating the belt with damaged rollers was causing coal to accumulate.

The Secretary argues that the conditions satisfied the four *Mathies* criteria for determining whether a violation is S&S: (1) the operator violated 75.1731(a), a mandatory safety standard, by not replacing or repairing damaged rollers; (2) the violation contributed to the discrete safety hazard of fire or smoke in the track/belt entry resulting from frictional heating leading to an ignition of coal accumulations; (3) a fire, ignition, or smoke would reasonably likely cause smoke inhalation or burns to miners working underground; and (4) that such inhalation or burns are reasonably serious in nature. The Secretary argues that the obviousness of the conditions and the operator's lack of action show that it was the result of high negligence and aggravated conduct and therefore supports a finding of unwarrantable failure.

The Respondent does not appear to argue that the cited rollers were not damaged, or that it did not violate 75.1731(a). The Respondent argues that the Secretary failed to sustain her burden of proving that Order No. 8114323 was an S&S violation with high negligence because no facts were submitted on the actual conditions of the rollers. It argues that the violation had more to do with the paint and ribbon, rather than the actual conditions of the rollers. The Respondent contends that it was the paint and ribbon that were obvious, and not the condition of the seven stuck rollers. Because paint and ribbons were not used to flag rollers at this mine, the

Respondent argues that the condition was not obvious. According to the Respondent, the paint had been present for at least three months, and did not indicate hazardous conditions.

The Conditions Described in Order No. 8114323 Violated 30 C.F.R. §75.1731(a)

Section 75.1731(a) states:

(a) Damaged rollers, or other damaged belt conveyor components, which pose a fire hazard must be immediately repaired or replaced. All other damaged rollers, or other damaged belt conveyor components, must be repaired or replaced.

Judge Paez has described the purpose of §75.1731(a) at length:

In the standard's regulatory history, the Technical Study Panel (“the Panel”) identifies the purpose of the standard as being the “[p]revention of belt fires,” because preventing such fires “is a critical element in improving miners' safety, and proper maintenance and examinations will reduce the likelihood of fires.” Safety Standards Regarding the Recommendations of the Technical Panel on the Utilization of Belt Air and the Composition and Fire Retardant Properties of Belt Materials in Underground Coal Mining: Proposed Rule, 73 Fed. Reg. 35,026, 35,046 (proposed June 19, 2008) (to be codified at 30 C.F.R. 75.1731(a)) [hereinafter “Proposed Rule”]...

Conveyor belts are significant contributors to underground mine fires. Indeed, MSHA has determined that “fires in conveyor belt entries represent about 15 to 20 percent of all underground coal mine fires.” Proposed Rule at 35,028. A belt haulage system such as the one cited in this case is the mechanism by which coal is transported through the mine. Generally, a belt will be hundreds to thousands of feet long and will move along groups of rollers that form a “V” or “U” in the belt every several feet. They prevent coal from slipping off by keeping the coal in the middle of the belt. *See Stillhouse Mining, LLC*, 33 FMSHRC 778, 780 (Mar. 2011) (ALJ). There will also generally be single rollers spread out at wider intervals from each other. *Id.* These belt haulage systems can present an ignition hazard. There are thousands of rollers along the belt, and any number of them could become jammed and stop rotating fluidly or stop rotating altogether, creating friction as the belt travels over the slowed or stopped roller. *See id.* at 810; *Ala. By-Products Corp.*, 4 FMSHRC at 2133. Stuck, malfunctioning, and damaged rollers are not uncommon. The heat generated by the friction between the belt and a defective roller heats up the roller and the belt, creating a potential ignition source. *See Stillhouse*, 33 FMSHRC at 810; *Ala. By-Products*, 4 FMSHRC at 2133. Belt haulage systems are a major source of fires in mines. *Stillhouse*, 33 FMSHRC at 810. According to MSHA's recorded statistics, between 1980 and 2007, “[f]riction at the belt drive and along the belt was the ignition source for 36 percent of the 65 conveyor belt fires reported.” Proposed Rule at 35,028. The Panel identified “[b]elts rubbing stands” and “damaged rollers” as two of the indicators of increased ignition potential for examiners to look out for. *Id.* at 35,046.

San Juan Coal Co., 34 FMSHRC 2280, 2286-2287 (Aug. 2012) (ALJ).

Inspector Bailey saw paint on the structure and ribbon hanging from roof bolts along the No. 2 belt. Tr. 42-43. Bailey described paint and ribbons as being a typical mining practice to identify damaged rollers. Tr. 45-47. When he looked further, he saw visible damage to the five bottom rollers where there was paint and ribbons. Tr. 43. He also saw accumulations, which were causing the rollers to act as scrapers scraping coal off the bottom of the No. 2 belt. Tr. 43. In order to abate the order, the Respondent replaced the five damaged rollers. Tr. 44.

The evidence further indicates that the damaged rollers were not immediately repaired or replaced. The paint and ribbons at the five damaged rollers indicate that the Respondent was aware that they were damaged, and did not repair or replace them. In his deposition, Ciampanella stated that paint is used by a number of individuals at the mine to indicate that a roller needs to be repaired.⁷ GX-A, p.33-34. Furthermore, it is highly improbable that the five non-consecutive rollers that were damaged were coincidentally also the five rollers with paint and ribbon. The violation was found to affect 12 miners for the same reasons described in Citation 8114320, above. Tr. 48-49. Accordingly, I find that the conditions described in Citation No. 8114323 constituted a violation of 30 C.F.R. 75.1731(a).

The Conditions Described in Citation No. 8114323 were Significant and Substantial

Having found that the conditions described in Citation No. 8114323 violated 30 C.F.R. 75.1720(a), which is a mandatory safety standard, the first prong of the *Mathies* test is satisfied. The second prong requires a determination of whether the violation contributed to a discrete safety hazard. The damaged rollers on a running belt cause metal on metal grinding, which gets worse over time, resulting in the rollers getting hot and possibly igniting nearby fuel sources and causing smoke. Tr. 48. Here, there were coal accumulations under each of the five damaged roller, which would serve as a fuel source if there were an ignition. Tr. 48. The coal making contact with the damaged rollers was dry, and the coal at bottom was wet. Tr. 44. However, the presence of some wet or damp coal is not determinative of whether the conditions are S&S, because “damp coal dries in the presence of fire.” *Utah Power & Light Co.*, 12 FMSHRC 965, 971 (May 1990). The evidence taken as a whole indicates that the violation contributed to the possibility of a fire or ignition in the track entry, which is a discrete safety hazard

With regard to the third and fourth prongs of the *Mathies* test, Inspector Bailey testified that a fire or ignition was reasonably likely to cause smoke inhalations or burns to miners working underground. Tr. 49. The No. 2 belt is in the track entry, so that all shifts of miners and foremen who enter and exit the mine travel past this belt. Tr. 48, 234. Furthermore, the track entry is the mine’s alternate escapeway, so that miners working inby might use it for escape in an emergency. Tr. 33. These conditions presented a reasonable likelihood that the hazard contributed to would have resulted in a serious injury.

⁷ At hearing, Ciampanella contradicted his deposition testimony, stating that it was not company policy to paint or hang ribbons at damaged rollers. Tr. 264-265.

The Conditions described in Citation No. 8114323 were the result of the Operator's High Negligence and Aggravated Conduct, making it an Unwarrantable Failure

The evidence presented by the Secretary establishes that this violation resulted from the Respondent's aggravated conduct, characterized as "reckless disregard," "intentional misconduct," "indifference," or the "serious lack of reasonable care." Inspector Bailey testified that the cited conditions existed for at least one day because the paint on the structure was covered in dust and dirt, and not glossy. Tr. 50-51. Furthermore, the fact that the area with the damaged rollers was painted and had ribbons hanging indicates that the mine was aware of the conditions of the rollers and that they were obvious. Tr. 50. Several members of mine management saw the paint and ribbons, which I find were indicative of damaged rollers, and they did nothing to correct the problem. The damage to the rollers was visible to the eye and posed a significant fire hazard. Tr. 43. There was no evidence that there were any efforts to abate the condition prior to the issuance of the Citation. I have considered all six factors and find these conditions to constitute an unwarrantable failure.

j. Citation No. 8114321

Citation No. 8114321 reads as follows:

Loose coal from wet to dry was allowed to accumulate in the belt entry at the No. 3 belt head from 10 to 28 inches deep and for a distance of 36 feet. This coal was touching the bottom of the belt which allowed it to contribute to a frictional heating hazard. This condition is in the alternate escapeway and therefore has the potential to affect all miners inby this point. This belt was removed from service immediately.

The citation was issued pursuant to section 104(a) of the Act for a violation of 30 C.F.R. 75.1731(c).⁸ The gravity was assessed as reasonably likely to lead to injury or illness, with such injury or illness reasonably leading to lost workdays or restricted duty. Furthermore, it was cited as Significant and Substantial with 12 persons affected and a Moderate degree of negligence.

The Secretary argues that the conditions described in Citation No. 8114321 violated 75.1731(c), which prohibits materials in the belt conveyor entry that may contribute to a frictional heating hazard. In the alternative, the Secretary argues that the conditions violate 75.400, which requires an operator to clean coal dust, loose coal, and other combustible materials before they accumulate. In support of both theories, the Secretary notes that Inspector Bailey observed a large pile of coal at the No. 3 belt drive behind the guarding while he was riding on the man-trip towards the working section. Bailey measured the depth of the coal accumulations and determined that the top layer was dry and in contact with the bottom belt, thereby creating a frictional heating hazard.

⁸ This citation was amended to allege in the alternative an S&S violation of 30 C.F.R. 75.400. Tr. 7-8.

The Secretary argues that the conditions satisfied the four *Mathies* criteria for determining whether a violation is S&S: (1) the operator violated either 75.400 or 75.1731(c), a mandatory safety standard, by operating the No. 3 belt while the belt was in contact with accumulations; (2) the violation contributed to the discrete safety hazard of smoke or fire in the track/belt entry resulting from frictional heating leading to an ignition of coal accumulations; (3) a fire or ignition would reasonably likely cause smoke inhalation or burns to miners working underground; and (4) that such inhalation or burns are reasonably serious in nature. The Secretary argues that the operator exhibited moderate negligence because it should have known about the accumulations.

The Respondent argues that the Secretary failed to sustain her burden of proving that Citation No. 8114321 was reasonably expected to cause lost work day injuries to 12 miners. There were 12 miners working underground, and the Respondent contends that it is unreasonable to expect all 12 miners to be injured even if the event were to occur. The Respondent argues that since the air in the belt entries was traveling away from the working sections, and escape from the mine was a short distance, most of the miners would have been able to escape without injury. Furthermore, the mine was equipped with directional life lines, additional SCSRs, a refuge chamber, and other emergency safety protections.

The Respondent argues that the Secretary failed to sustain her burden of proving that Citation No. 8114321 was an S&S violation because it contends that a flame resistant belt would not burn and the coal inside the belt guard would not burn.

The Conditions Described in Citation No. 8114321 Violated 30 C.F.R. §75.1731(c) or 30 C.F.R. §75.400

Section 75.1731(c), which concerns the maintenance of belt conveyors and belt conveyor entries, states:

Materials shall not be allowed in the belt conveyor entry where the material may contribute to a frictional heating hazard.

Section 75.400, which concerns accumulation of combustible materials, states:

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.

Bailey first noticed the large accumulations of coal at the No. 3 belt head as he was riding the mantrip on an imminent danger run. Tr. 52. When Bailey examined the No. 3 belt head, he found a large pile of coal within the drive and extending the 36-foot length of the guarding. Tr. 54. He measured the pile at between 10-28 inches, and testified that there were points where the accumulation was touching the belt. Tr. 54-55, 137-138. The top layer of the coal was dry. Tr.

57. The accumulations in the belt entry could have caused a friction heating hazard because the belt would be running in coal. Tr. 56. The belt is an abrasive surface, so that if it runs in coal it constitutes a frictional heating hazard. Tr. 56.

The mine has flame resistant belts, which means that they will not burn unless a direct flame is applied. Tr. 132, 174. The flame resistant belt causes no less friction than a regular belt and may still ignite the coal beneath it. Tr. 57, 174. The coal accumulations that Inspector Bailey observed at the No. 3 belt drive were violations of both §75.1731(c) and §75.400. However, in order not to cite the Respondent twice for the same violation, I affirm Citation No. 8114321 as originally written.

The Conditions Described in Citation No. 8114321 were Significant and Substantial and 12 Miners were Affected

Having found that the conditions described in Citation No. 8114321 violated either 30 C.F.R 75.1731(c) or §75.400, which are mandatory safety standards, the first prong of the *Mathies* test is satisfied. The second prong requires a determination of whether the violation contributed to a discrete safety hazard. The belt running in coal accumulations is a frictional heating hazard that can lead to fire and smoke at the belt or track entry. Tr. 58. Inspector Bailey testified that as the belt continued to run, additional coal would accumulate, which would further raise the likelihood of a frictional heating hazard. Tr. 85. Furthermore, as coal accumulates, it can lift the bottom belt, causing it to become un-trained and spill more coal. Tr. 85.

With regard to the third and fourth prongs of the *Mathies* test, Bailey testified that a fire or ignition was reasonably likely to cause smoke inhalations or burns to miners working underground. Tr. 59. The No. 3 belt is in the track entry, so that all shifts of miners that enter and exit the mine travel past the belt. Tr. 59. Furthermore, the track entry is the mine's alternate escapeway, so that miners working inby may use it in the event of an emergency. Tr. 33. Bailey testified that 12 miners were affected because there were 12 miners working inby the section. Tr. 32-33, 59. In the event of an ignition or fire, all of these miners would be potentially affected by smoke, fire, and a dangerous escapeway.

The Conditions described in Citation No. 8114321 were the result of the Operator's Moderate Negligence

Bailey determined that Citation No. 8114321 was the result of Respondent's moderate negligence because it should have known about the coal accumulations. Though the coal had been running for approximately 45 minutes on the morning of the citation, Bailey did not believe that the extensive conditions were created during that short period. Tr. 59-60. He estimated that the conditions existed for at least two days. Tr. 60. Bailey designated the violations as resulting from moderate, rather than high, negligence because Campbell told him that the small holes in the guarding can make accumulations difficult to see. Tr. 60-61. I affirm Inspector Bailey's analysis and find that the conditions were the result of the Respondent's moderate negligence.

k. Citation No. 8114322

Citation No. 8114322 reads as follows:

The alternate escapeway was not maintained in a safe condition to always assure passage of anyone, including disabled persons. Thick mud was present in the escapeway at the No. 3 belt drive for a distance of at least 2 crosscuts. This mud was up to 13 inches deep and could result in a miner tripping while walking in the area.

The citation was issued pursuant to section 104(a) of the Act for a violation of 30 C.F.R. 75.380(d)(1). The gravity was assessed as reasonably likely to lead to injury or illness, with such injury or illness reasonably leading to lost workdays or restricted duty. Furthermore, it was cited as Significant and Substantial with one person affected and a Moderate degree of negligence.

The Secretary argues that the conditions described in Citation No. 8114322 violated 75.380(d)(1), which requires escapeways to be maintained in safe conditions such that all persons are assured passage. Bailey observed thick mud stretching from the rib to the No. 3 belt, which he measured at 13 inches deep and extending the distance of two crosscuts. The track/belt entry has a lifeline because it is an alternate escapeway. Bailey testified that this alternate escapeway was unsafe because it posed a slip and fall hazard and created increased difficulty of carrying a stretcher through the area.

The Secretary argues that the conditions satisfied the four *Mathies* criteria for determining whether a violation is S&S: (1) the operator violated 75.380(d)(1), a mandatory safety standard, by allowing thick mud to exist in the alternate escapeway; (2) the violation contributed to the discrete safety hazard of hindering escape from the mine in the event of an emergency; (3) slipping or falling during an escape would slow a miner down, lead to increased exposure to smoke inhalation, and possibly make escape in an emergency impossible; and (4) that such inhalation is reasonably serious in nature. The Secretary argues that the operator exhibited moderate negligence because it should have known about the mud in the alternate escapeway.

The Respondent argues that the Secretary failed to sustain her burden of proving that Citation No. 8114322 was an S&S violation. The Respondent contends that the mud would not have had any significant impact on miners if they needed to escape via rail transportation or by foot.

The Conditions Described in Citation No. 8114322 Violated 30 C.F.R. §75.380(d)(1)

Section 75.380(d)(1), which concerns escapeways, states:

Each escapeway shall be—(1) Maintained in a safe condition to always assure passage of anyone, including disabled persons.

After Inspector Bailey returned from the imminent danger run, he exited the mantrip in order to examine the No. 3 belt drive. Tr. 61-62. At this point he encountered thick solid mud. Tr. 63. There was a pump nearby, but the mud was too thick for the pump to remedy the problem. Tr. 63. Using his footprint, Bailey measured the mud at 13 inches deep in an area that is only five feet high. Tr. 63-64, 176. The mud extended from rib to belt, with the thicker mud to the right of the rail between the rib, as one faced outby. Tr. 64. The mud extended the length of two cross-cuts, which measured approximately 130-150 feet long. Tr. 64. According to Graham, there was always mud at the belt head. Tr. 175. Bailey struggled in the mud and fell several times as he attempted to walk through the area. Tr. 62, 65.

The track entry was an alternate escapeway, with a lifeline in the deepest part of the mud. Tr. 62, 67. The Commission has previously held that when assessing a violation of §75.380(d)(1) in an escapeway, the judge should assess the dangers during an emergency rather than during normal operations. *Maple Creek Mining, Inc.*, 27 FMSHRC 555, 560 (2005).

[T]he test with respect to the use of an escape route is not whether miners have been safely traversing the route under normal conditions, but rather the effect of the condition of the route on miners' ability to expeditiously escape a dangerous underground environment in an emergency.

The American Coal Co., 29 FMSHRC 941, 950 (Dec. 2007). The Commission further held that “of particular importance in determining whether an escapeway is adequate under section 75.380 is the ability of miners to transport an injured miner on a stretcher through it.” *Maple Creek Mining*, 27 FMSHRC at 560. As illustrated by Bailey’s difficulty traveling in the area, these conditions illustrated that the escapeway was not being maintained in a manner that assured passage of all persons, including disabled persons. Tr. 65-66. If an inspector walking through the area under normal conditions found it difficult to traverse without slipping and falling, the escapeway would pose a serious danger to miners—especially an injured miner in a stretcher—during an emergency.

The Conditions Described in Citation No. 8114322 were Significant and Substantial and one Miner was Affected

Having found that the conditions described in Citation No. 8114322 violated 30 C.F.R. 75.380(d)(1), which is a mandatory safety standard, the first prong of the *Mathies* test is satisfied. The second prong requires a determination of whether the violation contributed to a discrete safety hazard. The mud in the alternate escapeway created an inability to escape the mine quickly in the event of an emergency. Tr. 66-67. Inspector Bailey testified that the condition would likely cause miners to slip and fall in the escapeway during normal travel and during an evacuation. Tr. 65-67. Furthermore, since the lifeline was located above the mud, it would be impossible for a miner to use the lifeline and avoid the mud. Tr. 67.

The Respondent argued that miners would be able to use the mantrip in the event of an emergency, and thereby avoid the mud, but Bailey testified that there is no certainty that the mantrip would be available. Tr. 139-140. Indeed, the very purpose of primary and alternate escapeways is to allow miners

to quickly exit an underground mine and that impediments to a designated escapeway may prevent miners from being able to do so. The legislative history of the escapeway standard states that the purpose of requiring escapeways is “to allow persons to escape quickly to the surface in the event of an emergency.” S. Rep. No. 91-411, at 83, *Legislative History*, at 209 (1975).

Mill Branch Coal Corp., 34 FMSHRC 2090, 2123-2124 (Aug. 2012) (ALJ) (emphasis in original).

With regard to the third and fourth prongs of the *Mathies* test, the hazard of slipping and falling, especially during an emergency, could result in one spraining or breaking a leg, knee, back, or wrist, as well as increased exposure to smoke and other hazards. Tr. 66-67. Such an injury would be significant in nature. Even in non-emergency situations, there is a discrete danger of miners slipping and falling down onto the rail or the ground. Tr. 65-66. Such falls could result in serious injuries.

Inspector Bailey cited the violation as affecting one miner, because even if all 12 miners inby were evacuating, it would be likely that most of them would not sustain serious injuries due to a slip or fall. Tr. 70. I credit Bailey’s testimony here and find it to be a reasonable conclusion.

The Conditions described in Citation No. 8114322 were the result of the Operator’s Moderate Negligence

Inspector Bailey testified that the conditions described in Citation No. 8114322 were the result of the Respondent’s moderate negligence because it should have known about the mud in the alternate escapeway, given its extensiveness. Tr. 69. Though no one presented any mitigating evidence, he found that it was not entirely visible from the mantrip, and one had to step in it to become aware of it. Tr. 70. The violation was abated through a combination of miners shoveling the mud and by adding water in order to liquefy it and allow the pump to remove it. Tr. 70-71, 142. I therefore affirm that this citation was the result of moderate negligence.

1. Citation No. 8114324

Citation No. 8114324 reads as follows:

Combustible material in the form of loose coal, wet to dry, was present on the No. 2 belt under 5 bad rollers, and at the drive. This coal ranged from four inches deep under one of the rollers to up to 15 inches deep at the drive. The coal located under the bottom

rollers had a reasonably likely ignition source to ignite the coal exposing all miners inby. This entry is the alternate escapeway. (see Citation #8114323) The coal has been removed from under the damaged rollers. The operator will be allowed additional time to remove the coal at the drive.

The citation was issued pursuant to section 104(a) of the Act for a violation of 30 C.F.R. 75.400. The gravity was assessed as reasonably likely to lead to injury or illness, with such injury or illness reasonably leading to lost workdays or restricted duty. Furthermore, it was cited as Significant and Substantial with 12 persons affected and a Moderate degree of negligence.

The Secretary argues that the conditions described in Citation No. 8114324 violated 75.400, which requires that loose coal and other combustible materials be cleaned up and not be permitted to accumulate. Bailey found coal accumulations under five damaged rollers on the No. 2 belt. The Secretary argues that the conditions satisfied the four *Mathies* criteria for determining whether a violation is S&S: (1) the operator violated 75.400, a mandatory safety standard, by not cleaning up these accumulations; (2) the violation contributed to the discrete safety hazard of fire in the track/belt entry resulting from frictional heating leading to an ignition of coal accumulations; (3) a fire or ignition would reasonably likely cause smoke inhalation or burns to miners working underground; and (4) that such inhalation or burns are reasonably serious in nature. The Secretary argues that the operator exhibited moderate negligence because it should have known about the accumulations under the five damaged rollers.

The Respondent argues that the Secretary failed to sustain her burden of proving that Citation No. 8114324 was reasonably expected to cause lost work day injuries to 12 miners. There were 12 miners working underground, and the Respondent contends that it is unreasonable to expect all 12 miners to be injured even if the event were to occur. The Respondent argues that since the air in the belt entries was traveling away from the working sections and escape from the mine was a short distance, most of the miners would have been able to escape without injury. Furthermore, the mine was equipped with directional life lines, additional SCSRs, a refuge chamber, and other emergency safety protections.

The Respondent further argues that the Secretary failed to sustain her burden of proving that Citation No. 8114324 was an S&S violation. The Respondent contends that the accumulations cited were not in contact with any moving parts or belt rollers. Furthermore, the No. 2 belt was the wettest at the mine.

The Conditions Described in Citation No. 8114324 Violated 30 C.F.R. §75.400

Section 75.400, which concerns accumulations of combustible materials, states:

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.

The Commission has held that a violative “‘accumulation’ exists ‘where the quantity of combustible materials is such that, in the judgment of the authorized representative of the Secretary, it likely could cause a fire or explosion if an ignition source were present.’” *Utah Power & Lighting Co.*, 12 FMSHRC 965, 968 (May 1999), quoting *Old Ben Coal Co.*, 2 FMSHRC 2806, 2808 (Oct. 1980), *aff’d* 951 F.2d 292 (10th Cir. 1991). Citing legislative history and precedent, the Commission was clear that “[t]he standard was directed at preventing accumulations in the first instance, not at cleaning up the materials within a reasonable period of time after they have accumulated.” *Id.* Furthermore, the inspector’s judgment should be reviewed judicially by reference to an objective test of 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 regulation seeks to prevent. *Id.*, citing *Canon Coal Co.*, 9 FMSHRC 667,668 (Apr. 1987).

Inspector Bailey testified that there were five localized piles of coal underneath the damaged rollers at the No. 2 belt. Tr. 71. He further found accumulations within the guarding at the drive. Tr. 71. Upon measuring the piles, he found that the smallest pile was four inches deep and the largest was 15 inches deep, with the coal directly under the rollers dry. Tr. 71. None of the witnesses contradicted this testimony. Tr. 269-270. I find that the Respondent violated §75.400 by permitting the cited accumulations to exist in a manner contrary to the regulation.

The Conditions Described in Citation No. 8114324 were Significant and Substantial and 12 Miners were Affected

Having found that the conditions described in Citation No. 8114324 violated 30 C.F.R. 75.400, which is a mandatory safety standard, the first prong of the *Mathies* test is satisfied. The second prong requires a determination of whether the violation contributed to a discrete safety hazard. Inspector Bailey’s testimony establishes that the violation contributed to the discrete safety standard of a fire in the track or belt entry for the same reason as the accumulations discussed above. Tr. 48. This hazard resulted from the frictional heating hazard caused by the damaged rollers on a running belt, which could ignite coal accumulations or cause smoke. Tr. 48. Assuming normal continued mining operations, Bailey estimated that the belt would run until midnight on September 8, during both of the mine’s production shifts. Tr. 48. This would allow the metal on metal friction, described in citations above, to increase and cause the damaged rollers to get hot enough to ignite the coal accumulations beneath them or cause smoke. Tr. 48.

Bailey’s testimony also satisfies the third and fourth prongs of *Mathies*, which require a reasonable likelihood that the hazard contributed to would result in an injury, and that the injury are reasonably serious in nature. A fire or ignition was reasonably likely to cause burns or lead to smoke inhalations to miners underground. Tr. 49. The No. 2 belt is in the track entry, so all shifts of miners enter and exit the mine traveling past this belt, exposing them to the hazard. Tr. 48, 234. Furthermore, the track entry is the mine’s alternate escapeway, which means that in the event of an emergency miners working inby may need to escape using the track entry. Tr. 33.

The violation affected 12 miners because at the time that Bailey cited the Respondent there were 12 miners working inby the belt. Tr. 33, 74. Additionally, if a fire rages out of control, it would potentially damage the adjacent intake stopping line, which would short circuit the air and push the belt air to the face or cause smoke to enter the intake. Tr. 33.

The Conditions described in Citation No. 8114324 were the result of the Operator's Moderate Negligence

Inspector Bailey testified that the conditions described in Citation No. 8114324 were the result of the Respondent's moderate negligence because it should have known about the coal accumulations located under the five damaged rollers, given that they had existed for at least one day. Tr. 73. The conditions should have been discovered and corrected during the September 8 preshift examination for the day shift, or by the two section foremen who traveled past the No. 2 belt at the start of the September 8 shift. Tr. 73. These facts indicate that the Respondent should have known about the accumulations, and I affirm the citation as resulting from moderate negligence.

m. Order No. 8114325

Order No. 8114325 reads as follows:

The operator conducted an inadequate preshift examination on the belts for the oncoming day shift on this day and several shifts prior to that. Four violations were written on the No. 1, 2, and 3 belts (Citation #'s 8114320, 8114321, and 8114324) during this shift. All violations were deemed S+S by the authorized representative, and two of the four were written as unwarrantable failure to comply with a mandatory standard. The operator has not recorded one hazard or violation on any of the belts for at least 2 weeks going back to 8/2010. These conditions were obvious, extensive, and had existed for a period of time longer than 2 shifts. The operator engaged in aggravated conduct constituting more than ordinary negligence in that the conditions on the belt were obvious, and no examiner made a record of the conditions in the examination book. This is an unwarrantable failure to comply with a mandatory standard.

The Order was issued pursuant section 104(d)(1) of the Act for a violation of 30 C.F.R. 75.360(a)(1). The gravity was assessed as reasonably likely to lead to injury or illness, with such injury or illness reasonably leading to lost workdays or restricted duty. Furthermore, it was cited as Significant and Substantial, with 12 persons affected, a high degree of negligence, and an unwarrantable failure.

The Secretary argues that the conditions described in Order No. 8114325 violated 75.360(a)(1), which requires the operator to conduct pre-shift examinations in areas where persons are scheduled to work or travel. The miners were scheduled to travel the track haulageway, which is in the same entry as the Nos. 1, 2, and 3 belts. Therefore, the Secretary

argues that the conditions that Bailey cited in the Nos. 1, 2, and 3 belts were hazards that the preshift examinations should have recorded.

The Secretary argues that the conditions satisfied the four *Mathies* criteria for determining whether a violation is S&S: (1) the operator violated 75.360(a)(1), a mandatory safety standard, by failing to conduct adequate preshift examinations; (2) the violation contributed to the discrete safety hazard of fire in the track/belt entry resulting from frictional heating leading to an ignition of coal accumulations; (3) a fire or ignition would reasonably likely cause smoke inhalation or burns to miners working underground; and (4) that such inhalation or burns are reasonably serious in nature. The Secretary argues that the conditions were the result of high negligence and aggravated conduct and therefore support a finding of unwarrantable failure.

The Respondent argues that the Secretary failed to sustain her burden that Order No. 8114325 was a violation of Section 75.360(a)(1). The Respondent contends that none of the areas listed under Section 75.360(b) required a pre-shift examination of the belts. It contends that because no work was scheduled on the track/belt entry for the following shift, it was not required to conduct complete pre-shift examinations of the belts. Furthermore, it maintains that on-shift examinations of the belts were being properly conducted. Additionally, the Respondent argues that since it installed “top of the line” rigid metal frames with “life time bearing” in the idler rollers, the belts were kept in line and level, thereby not requiring much maintenance.

The Respondent further argues that the Secretary failed to sustain her burden of proving that Citation No. 8114325 was reasonably expected to cause lost work day injuries to 12 miners. There were 12 miners working underground, and the Respondent contends that it is unreasonable to expect all 12 miners to be injured even if the event were to occur. The Respondent argues that since the air in the belt entries was traveling away from the working sections, and escape from the mine was a short distance, most of the miners would have been able to escape without injury. Furthermore, the mine was equipped with directional life lines, additional SCSRs, a refuge chamber, and other emergency safety protections.

The Conditions Described in Order No. 8114325 Violated 30 C.F.R. §75.360(a)(1)

Section 75.360(a)(1), which concerns preshift examinations at fixed intervals, states:

Except as provided in paragraph (a)(2) of this section, a certified person designated by the operator must make a preshift examination within 3 hours preceding the beginning of any 8-hour interval during which any person is scheduled to work or travel underground. No person other than certified examiners may enter or remain in any underground area unless a preshift examination has been completed for the established 8-hour interval. The operator must establish 8-hour intervals of time subject to the required preshift examinations.

Inspector Bailey issued Order No. 8114325 for failure to conduct an adequate preshift examination as required under §75.360(a)(1) following his finding of violations at the Nos. 1, 2, and 3 belts that led to Citation Nos. 8114320, 8114321, 8114323, and 8114324. Section 75.360(a)(1) requires a preshift examination for every 8-hour interval during which persons are scheduled to work or travel underground. Section 75.360(b)(1) specifies that these preshift examinations must be conducted in roadways, travelways and track haulageways where persons are scheduled to work or travel during the oncoming shift. The plain language of §76.360 is “unambiguous.” *Buck Creek Coal, Inc.*, 17 FMSHRC 8, 15 (Jan. 1995). On its face it is clear in its requirement of a preshift examination in areas where miners are scheduled to work *or travel*. The Respondent’s repeated arguments that preshift examinations are only required for areas where miners are scheduled to work is a misreading of the regulation.

The Commission has recognized preshift examinations as “of fundamental importance in assuring a safe working environment underground.” *Buck Creek Coal*, 17 FMSHRC at 15; see also *Jim Walter Resources, Inc.*, 28 FMSHRC 579, 598 (Aug. 2006). Chairman Jordan and Commissioner Marks have referred to the preshift inspection requirement as “the linchpin of Mine Act safety protections.” *Manalapan Mining Co., Inc.*, 18 FMSHRC 1375, 1391 (August 1996) (Jordan and Marks, concurring and dissenting in part). MSHA requires several layers of examinations, including on-shift, preshift, and weekly examinations, in order to ensure miner safety. “These examinations are designed to create a multi-layer, prophylactic approach to the identification and correction of hazardous or unsafe conditions in the mine.” *Coal River Mining, LLC*, 34 FMSHRC 1087, 1095 (May 2012) (ALJ).

The Commission has clarified that the term “hazardous conditions” in §75.360(b) does not require that the condition be S&S or reasonably likely to result in injury; rather, the term “hazard” denotes a measure of danger to safety or health. *Enlow Fork Mining Co.*, 1997 WL 14346, *7 (1997). “The Commission has approved the definition of “hazard” as “a possible source of peril, danger, duress, or difficulty,” or “a condition that tends to create or increase the possibility of loss.” *Id.*

The Nos. 1, 2, and 3 belts constitute areas where miners are scheduled to travel because the track haulageway is located in the same entry. Tr. 77. Inspector Bailey testified that the conditions he cited at the Nos. 1, 2, and 3 belts were hazards that should have been recorded by the preshift examination records for the September 8, 2010 day shift. Tr. 78, 159-160. Graham, the Respondent’s preshift examiner, agreed that a damaged roller, rollers turning in coal accumulations, and a large accumulation of coal should all be recorded during a preshift examination of the belts. Tr. 189-190, 192-193.

Bailey testified that he reviewed the preshift examination records for the preceding two weeks and did not see any hazards or violations recorded on the Nos. 1, 2, or 3 belts.⁹ Tr. 75-76. As discussed above, Bailey testified that the conditions that he observed on the belts had existed for at least one day, and in some cases up to a week. Tr. 37, 51, 60, 73. Had adequate preshift examinations been performed, these hazards would have been reported.

The crux of Respondent's argument relies on an erroneous reading of §75.360 that only requires preshift examinations for times when persons are scheduled to work. Tr. 209, 241; *Resp. Post-Hearing Brief*, 20-22. However, §75.360(a)(1) is clear in requiring a "preshift examination within 3 hours preceding the beginning of any 8-hour interval during which any person is scheduled to *work or travel* underground." 30 C.F.R. 75.360(a)(1) (emphasis added). Similarly, section (b)(1), which is similarly applicable here, specifies that preshift examinations must be performed in "roadways, travelways and track haulageways where persons are scheduled, prior to the beginning of the preshift examination, to *work or travel* during the oncoming shift." 30 C.F.R. 75.360(b)(1) (emphasis added). Furthermore, section (b)(10) specifies that preshift examinations must be performed in "[o]ther areas where *work or travel* during the oncoming shift is scheduled prior to the beginning of the preshift examination." 30 C.F.R. 75.360(b)(10) (emphasis added). Respondent's interpretation of the regulation is highly selective and unreasonable. The regulation is clear in its requirements of areas where miners *work or travel*.

The Respondent also argues that the belt system was new and the fact that no top rollers were stuck or damaged shows that the belts were being properly maintained. However, this argument misunderstands the regulation at issue. Section 75.360 requires the operator to conduct preshift examinations before shifts where miners are scheduled to work or travel. If the belt system is new and properly maintained, as Respondent asserts, then there should be no hazards to report. However, neither the age of the system nor its maintenance reduce the operator's burden to conduct preshift examinations, and report any hazards discovered.

I find that Graham failed to conduct a proper preshift examination of the belts for the oncoming September 8 day shift. Graham testified that he only looks for obvious hazards, such as a broken piece of belt structure, a roller out of a hanger, or a belt with a rock fallen on it. Tr. 179. Graham testified that he was not looking for large accumulations at the belt, flagged rollers, stuck rollers, or rollers turning in accumulations during his preshift examination on September 8. Tr. 189-190, 192-194.

⁹ Bailey testified that there were hazards reported on the belts 11 days prior to the inspection. Tr. 88, 94. At hearing, Bailey also reviewed the preshift and onshift reports, and testified that most of the entries preceding the inspection were onshift reports, and many of them were written so generally that he did not view them as reports of hazards. Tr. 100, 155-156.

The Conditions Described in Order No. 8114325 were Significant and Substantial

Having found that the conditions described in Order No. 8114325 violated 30 C.F.R. 75.360(a)(1), which is a mandatory safety standard, the first prong of the *Mathies* test is satisfied. The second prong requires a determination of whether the violation contributed to a discrete safety hazard. Inspector Bailey's testimony establishes that the violation contributed to a discrete safety hazard; namely, a fire in the track/belt entry or smoke resulting from the ignition of coal due to the frictional heating hazards cited in Citation/Order Nos. 8114320, 8114321, 8114323, and 8114324. Tr. 82. Each of these individual citations was found and affirmed as S&S above. The details of how each cited condition contributed to a frictional heating hazard, as well as smoke hazard, and how those hazards were reasonably likely to result in a serious injury are discussed above. As such, the failure to perform adequate preshift examinations, which allowed the violations discussed above to persist, is S&S.

The Conditions described in Order No. 8114325 were the result of the Operator's High Negligence and Aggravated Conduct, making it an Unwarrantable Failure

The evidence presented by the Secretary establishes that this violation resulted from the Respondent's aggravating conduct, characterized as "reckless disregard," "intentional misconduct," "indifference," or the "serious lack of reasonable care." The Commission has held that a preshift examiner acts as the agent of the mine operator when he is performing his examinations and his conduct is imputable to the miner operator for unwarrantable failure purposes. *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 195-197 (Feb. 1991).

Inspector Bailey testified that he designated this order as an unwarrantable failure because the conditions cited in Citation/Order Nos. 8114320, 8114321, 8114323, and 8114324 were obvious and extensive. Tr. 108. Nothing in the record contradicts this testimony. There were no mitigating circumstances presented by the Respondent that would lower the negligence involved. The conditions that Bailey cited had existed for at least a day and up to a week, meaning that adequate preshift examinations were also not being conducted for similar lengths of time. Tr. 37, 51, 60, 73. Had adequate preshift examinations been conducted, they would have discovered the hazards cited. There is no evidence in the record that the Respondent attempted to abate the conditions prior to the Order. The Respondent knew or should have known that adequate preshift examinations were not being conducted because visible hazards existed, but the examination book did not reflect this fact. In this particular case, I find that the requirement for preshift examinations is a central concern of the Mine Act and the regulation is abundantly clear. Therefore, though there is no indication that the Respondent received specific notice, I find that the other factors support a finding of unwarrantable failure.

Civil Penalties

The principles governing the authority of Commission administrative law judges to assess civil penalties de novo for violations of the Act are well-established. Section 110(i) of the 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 of 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 affirm Citation No. 8114320 as issued, and find that the Respondent violated 30 C.F.R. 75.1725(a). The citation was correctly designated as being S&S, resulting from high negligence and an unwarrantable failure. Further, it was correctly designated as reasonably likely to lead to injury or illness, with such injury or illness reasonably leading to lost workdays or restricted duty and 12 miners affected. The Citation and penalty of \$6,996.00 were correct as issued and are affirmed.

I also affirm Order No. 8114323 as issued, and find that the Respondent violated 30 C.F.R. 75.1731(a). The Order was correctly designated as S&S, resulting from high negligence and an unwarrantable failure. Further, the Order was correctly designated as reasonably likely to lead to injury or illness, with such injury or illness reasonably leading to lost workdays or restricted duty, with 12 miners affected. The Order and penalty of \$28,800.00 were correct as issued and are affirmed.

I also affirm Citation No. 8114321 as issued, and find that the Respondent violated 30 C.F.R. 75.1731(c) and 30 C.F.R. 75.400. The Citation was correctly designated as S&S and resulting from moderate negligence. Further, the Citation was correctly designated as reasonably likely to lead to injury or illness, with such injury or illness reasonably leading to lost workdays or restricted duty and 12 miners affected. The Citation and penalty of \$2,106.00 were correct as issued and are affirmed.

I also affirm Citation No. 8114322 as issued, and find that the Respondent violated 30 C.F.R. 75.380(d)(1). The Citation was correctly designated as S&S and resulting from moderate negligence. Further, the Citation was correctly designated as reasonably likely to lead to injury or illness, with such injury or illness reasonably leading to lost workdays or restricted duty and one miner affected. The Citation and penalty of \$540.00 were correct as issued and are affirmed.

I also affirm Citation No. 8114324 as issued, and find that the Respondent violated 30 C.F.R. 75.400. The Citation was correctly designated as S&S and resulting from moderate negligence. Further, the Citation was correctly designated as reasonably likely to lead to injury or illness, with such injury or illness reasonably leading to lost workdays or restricted duty and 12 miners affected. The Citation and penalty of \$2,106.00 were correct as issued and are affirmed.

I also affirm Order No. 8114325 as issued, and find that the Respondent violated 30 C.F.R. 75.360(a)(1). The Order was correctly designated as S&S, resulting from high negligence and an unwarrantable failure. Further, the Order was correctly designated as reasonably likely to lead to injury or illness, with such injury or illness reasonably leading to lost workdays or restricted duty, with 12 miners affected. The Order and penalty of \$28,800.00 were correct as issued and are affirmed.

I have fully considered all six statutory penalty criteria and assess a civil penalty in the amount of \$69,348. Raw Coal is a large operator and the parties have stipulated that the penalty will not have any effect on the operator's ability to continue in business. Stip. 8, 11. According to the Mine Data Retrieval System, the Sewell Mine B has a significant history of violations. The negligence in several of the citations and orders considered above was high, and the gravity was affirmed as reasonably likely to lead to injury or illness, with such injury or illness reasonably leading to lost workdays or restricted duty.

ORDER

For the reasons set forth above, the citations are **AFFIRMED** as indicated. Raw Coal Mining Company is **ORDERED TO PAY** the Secretary of Labor the sum of \$69,348.00 within 30 days of the date of this decision.¹⁰

/s/ William S. Steele
William S. Steele
Administrative Law Judge

¹⁰ 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.

Distribution: (Certified Mail)

Cheryl E. Carroll, U.S. Department of Labor, 1100 Wilson Boulevard, 22nd Floor West,
Arlington, VA 22209

James F. Bowman, P.O. Box 99, Midway, WV 25878

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

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June 5, 2013

DOMINION COAL CORPORATION,	:	CONTEST PROCEEDINGS
Contestant,	:	
	:	Docket No. VA 2011-334-R
v.	:	Order No. 8185281; 03/02/2011
	:	
SECRETARY OF LABOR	:	Docket No. VA 2011-549-R
MINE SAFETY AND HEALTH	:	Order No. 8173479; 06/27/2011
ADMINISTRATION (MSHA),	:	
Respondent	:	Mine: No. 36
	:	Mine ID: 44-06759
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. VA 2012-126
Petitioner	:	A.C. No. 44-06759-272556-01
	:	
v.	:	
	:	
DOMINION COAL CORPORATION,	:	Mine: No. 36
Respondent	:	

DECISION

Appearances: Emily K. Hargrove, Esq., & Daniel Povich, Esq., U.S. Department of Labor, Office of the Solicitor, Arlington, VA for the Secretary

Scott Wickline, Esq., Hardy Pence, PLLC, Charleston, WV for Respondent

Before: Judge Steele

STATEMENT OF THE CASE

This civil penalty proceeding is conducted pursuant to the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq.* (2000) (the “Mine Act” or “Act”). This matter concerns Order Nos. 8185281 and 8173479 and Citation No. 8189545. However, at hearing Dominion Coal Corporation (“Dominion” or “Respondent”) asserted that it would no longer contest Citation No. 8189545. (Transcript at 7).¹ Order No. 8185281 was issued under Section 104(d)(1) for failure to comply with 30 C.F.R. §50.10(d). Order No. 8173479 was issued under Section 104(d)(2) for failure to comply with 30 U.S.C. §876(b). Both Orders were served on

¹ Hereinafter references to the transcript will be cited “Tr.” with the page number.

Respondent. The Secretary seeks civil penalties in the amount of \$30,000.00. A hearing was held in Grundy, VA on December 12, 2012 where the parties presented testimony and documentary evidence. After the hearing, the parties submitted Post Hearing Briefs.

STIPULATIONS

The parties have stipulated to the following:

1. Dominion was an “operator” as defined in Section 3(d) of the Mine Act, 30 U.S.C. §803(d), at Mine #36.
2. Respondent’s Mine #36 is a “mine” as that term is defined in Section 3(h) of the Mine Act, 30 U.S.C. §803(h).
3. Operations at Respondent’s Mine #36, where the Orders at issue in this proceeding were issued, are subject to the jurisdiction of the Mine Act.
4. This proceeding is subject to the jurisdiction of the Federal Mine Safety and Health Review Commission and its designed Administrative Law Judges pursuant to §§105 and 113 of the Mine Act, 30 U.S.C. §§ 815 and 823.
5. The total proposed penalty for the Orders in this proceeding will not affect Respondent’s ability to continue in business.
6. The Orders at issue in this proceeding were issued by an authorized representative of the Secretary.

ORDER NO. 8173479

1. Contents of the Order

On June 27, 2011 at 10:20 a.m., Inspector Dennis Shortt (“Shortt”) issued to Respondent Order No. 8173479. Simmons found:

The approved Emergency Response Plan for this mine was not being followed. A communications failure occurred on 6/24/2011 at approximately 6:00 pm. Wireless communication capability was lost from T-1 belt drive up to an including the T section. The plan states that the operator will notify MSHA of a communication system failure that extends longer than 12 consecutive hours. The operators has not reported the failure

Government’s Exhibit 1 (Hereinafter GX-1). Shortt noted that the gravity of this violation was “No Likelihood,” “No Lost Workdays,” and would affect ten persons. *Id.* He further marked that Respondent exhibited “High” negligence with respect to this violation. *Id.* Shortt noted that the respondent terminated the cited condition on June 27, 2011 by reporting the failure. *Id.*

On June 27, 2011 at 1:37 p.m., Shortt issued a modification of the order changing the “Condition or Practice” section to include the following:

The wording in this violation should also state: Management engaged in aggravated conduct constituting more than ordinary negligence in that the operator failed to comply with the Approved Emergency Response Plan. This violation is an unwarrantable failure to comply with a mandatory standard.

Id.

2. Legal Standards

Order No. 8173479 was issued under Section 104(d)(2) of the Mine Act. That provision provides the following:

If a withdrawal order with respect to any area in a coal or other mine has been issued pursuant to paragraph (1), a withdrawal order shall promptly be issued by an authorized representative of the Secretary who finds upon any subsequent inspection the existence in such mine of violations similar to those that resulted in the issuance of the withdrawal order under paragraph (1) until such time as an inspection of such mine discloses no similar violations. Following an inspection of such mine which discloses no similar violations, the provisions of paragraph (1) shall again be applicable to that mine.

30 U.S.C. § 814(d)(2).

The Order deals with an alleged violation of Section 316(b) of the Mine Act (titled “Communication facilities; locations and emergency response plans”). That section provides, in pertinent part, the following:

Accident preparedness and response

(1) In general - Each underground coal mine operator shall carry out on a continuing basis a program to improve accident preparedness and response at each mine.

(2) Response and preparedness plan

(A) In general - Not later than 60 days after June 15, 2006, each underground coal mine operator shall develop and adopt a written accident response plan that complies with this subsection with respect to each mine of the operator, and periodically update such plans to reflect changes in operations in the mine, advances in technology, or other relevant considerations. Each such operator shall make the accident response plan available to the miners and the miners' representatives...

(E) Plan content-general requirements - To be approved under subparagraph (C), an accident response plan shall include the following:

(i) Post-accident communications - The plan shall provide for a redundant means of communication with the surface for persons underground, such as secondary telephone or equivalent two-way communication...

(F) Plan content-specific requirements...

(ii) Post accident communications - Not later than 3 years after June 15, 2006, a plan shall, to be approved, provide for post accident communication between underground and surface personnel via a wireless two-way medium, and provide for an electronic tracking system permitting surface personnel to determine the location of any persons trapped underground or set forth within the plan the reasons such provisions can not be adopted. Where such plan sets forth the reasons such provisions can not be adopted, the plan shall also set forth the operator's alternative means of compliance. Such alternative shall approximate, as closely as possible, the degree of functional utility and safety protection provided by the wireless two-way medium and tracking system referred to in this subpart.

30 U.S.C. §876(b).

3. Summary of Testimony

a. Testimony of Dennis Allen Shortt, Jr.:

Shortt started in the coal industry in 1994. (Tr. 15). He attended college and worked in the industry through a Co-Op program. (Tr. 15). After college he worked in the mines as a maintenance foreman until 2003. (Tr. 15). He was out of the industry until 2005 when he went to MSHA. (Tr. 15). He has worked for MSHA for seven years. (Tr. 14-15).

Shortt is an electrical specialist for MSHA. (Tr. 14). In that capacity, he checks the main power distribution system throughout the mine, starting with the substations. (Tr. 16). He also checks ground faults, cables, pumps, gas, fire suppression systems, and seal marking systems. (Tr. 16). In addition, he reviews emergency response plans ("ERP"). (Tr. 16). For an electrical specialist, the ERP mostly consists of the tracking and communication system. (Tr. 16).²

² The wireless communication system is designed to allow miners to communicate throughout the mine at specific areas while they are working. (Tr. 40). The communication system helps miners escape during an emergency. (Tr. 49).

Shortt went to #36 Mine with Gary Perkins, another electrical specialist, to terminate citations issued by Perkins. (Tr. 17-18). That morning he reviewed the mine file and those citations. (Tr. 18). When he arrived at the mine, he found out that the carbon monoxide system was down. (Tr. 18). He waited to see if they would fix the CO system so he could proceed underground and terminate the citation there, but they did not. (Tr. 18-19).

While he waited, Shortt learned that the communication system was down on the T Section. (Tr. 19). He believed he learned this when he overheard a conversation on the mine page pole (a hard-line communication system). (Tr. 19). Two inspectors, Frankie Sullivan and Wade Taylor, were going to the section and when they arrived at T-1 there was no wireless or hard-line communication. (Tr. 19, 48). The communications were down from T-1 belt drive all the way up to and including T Section. (Tr. 20, 48).

Shortt spoke with Dan Vance (“Vance”), the chief electrician. (Tr. 19-20). Vance was aware and said the wireless system went down the previous Friday. (Tr. 19-20). Vance said there was a high-voltage problem: a miner struck a cable and caused an arc, spark, or surge in the system. (Tr. 20). This caused the power supplies to go out on the wireless system and he had ordered power supplies. (Tr. 20). Vance showed Shortt the purchase order where he had ordered power supply replacements. (Tr. 20).

Vance stated that he did not know that he was required to report the failure. (Tr. 20, 46, 49). He offered no other reasons for the failure to report. (Tr. 21). He was not trying to hide anything. (Tr. 44-45). However, Vance did report the condition before Shortt learned about it from other sources. (Tr. 45). Shortt did not read anything negative into that fact. (Tr. 45).

Vance admitted to Shortt that he had attended a class taught by Jason Lane (“Lane”), an electrical supervisor with MSHA a month earlier. (Tr. 20-21, 47-49). The class was offered because there was confusion about the ERP requirements. (Tr. 21). Respondent voluntarily agreed to have its employees participate and Shortt believes that is a good thing. (Tr. 33). Shortt reviewed Respondent’s ERP that was apparently in effect when the Order was issued (GX-2). (Tr. 21-22). The maintenance requirements on page 5 state, “[t]he operator shall [sic] the MSHA Hotline of a communication system failure that extends longer than 12 consecutive hours at 1-800-746-1553.” (Tr. 22).³ Shortt assumed Lane discussed this section in class. (Tr. 22, 34). Despite the class, Vance did not report the communication outage. (Tr. 48). On cross-examination he conceded that he was not at the class and does not know what was discussed. (Tr. 34-35, 42). He just knows what Lane taught the electrical specialists. (Tr. 35, 49). Lane told Shortt that an outage for any reason was reportable. (Tr. 49).

The ERP says that Respondent must notify MSHA of communication failures lasting longer than 12 hours but it does not say when that notification must take place. (Tr. 42-43). Vance fixed the high voltage problem, but not the communication problem, on Friday because he was waiting for parts. (Tr. 43-44). As far as Shortt knew, Respondent ran coal on the weekend. (Tr. 43). Vance was not working on the system when Shortt arrived on Monday; he was waiting

³ There was an obvious typo in the ERP and Shortt believes it has since been corrected. (Tr. 22).

for parts. (Tr. 44). Shortt did not think it would be reasonable for Vance to wait until the failure was corrected before reporting. (Tr. 45). Shortt believed that if the communication system goes down on Friday at 5:00 pm it must be reported even if no one will be at the mine during the weekend. (Tr. 41). He said this during inspections. (Tr. 41). If there was confusion about the requirements, then the question should have been asked; especially in light of Lane's class. (Tr. 41).

The purpose of the reporting requirements was to help MSHA collect data on the reliability of new systems. (Tr. 35). The wireless system was a new requirement for the mining industry. (Tr. 30-31). There were different manufacturers of different types of wireless systems. (Tr. 31). The mining environment and changing conditions in mining created some unique challenges to wireless systems. (Tr. 31-32). During this period, operators were having some issues with these systems. (Tr. 32). Shortt conceded that this situation was not like the reporting requirement of an accident where MSHA needs to take control of the scene, preserve evidence, and conduct an investigation. (Tr. 35). Time would not be of the essence. (Tr. 35-36).

Shortt recalled that Respondent's wireless system had been up since May 11, 2011, a month before it was cited. (Tr. 31). Respondent and other operators had a lot of questions about the new reporting requirements under the ERP. (Tr. 32). An operator seeking clarification from MSHA is a good sign that it wants to comply. (Tr. 32). Respondent trained its employees, including Vance, on the ERP. (Tr. 32). Shortt felt Respondent did its part in training and getting "ahead of the game" as far as reporting was concerned. (Tr. 33).

Only the T-section was down and to the best of Shortt's understanding, wireless communications at Mine #36 R Section and U section were not down. (Tr. 36-37). The ERP discusses the system as a singular unit. (Tr. 36).

Shortt's notes at Page 6 show that the wireless system was down because of a ground-fault condition, not because of a defect in the wireless system. (Tr. 38). A surge in the high voltage took out the power supplies for the system. (Tr. 39). However, he maintained that the ERP did not limit the reporting requirement to certain conditions. (Tr. 39). He believed reporting was required regardless of cause. (Tr. 40).

Shortt reviewed an MSHA Escalation Report dated June 24, 2011 (GX-3). (Tr. 23). An Escalation Report is a record of communication with MSHA's 1-800 number. (Tr. 23-24). The report stated, "Details provided by customer. The caller is reporting their tracking and communication system is down. The caller stated the system has been down since 9:10 last night 6/23/2011 in section A of the mine." (Tr. 24). Shortt included this in his notes at page 11 because he called Lane to see if any failure had been reported for #36. (Tr. 23). He learned that #36 had not reported a communication failure but #30 had. (Tr. 23, 32-33). There were two sections in #30. (Tr. 24). Tim Thompson, the safety director for Dominion Coal reported this condition. (Tr. 24-25).

Shortt reviewed Order No. 8173479 (GX-1). (Tr. 17). He issued a 104(d)(2) order because Vance was the chief electrician and had been negligent. (Tr. 26). He went to Lane's class and had knowledge of reporting requirements. (Tr. 26). Shortt learned from the mine file

that Respondent was already on the (d) sequence. (Tr. 26). Shortt did not go underground and actually observe the violation. (Tr. 27). He wrote the citation based on information he got from Vance. (Tr. 27).

With modifications, Shortt wrote the Order as no likelihood, no lost workdays, non S&S, and no miners affected. (Tr. 46). He initially marked the Order as “unlikely” because it was just a reporting requirement. (Tr. 25). He later changed it to “no likelihood” after speaking with his supervisors. (Tr. 25). They decided that no people would be affected and therefore there was no likelihood of injury. (Tr. 25-26). That is also why he marked no lost workdays. (Tr. 26).

Shortt marked “High” negligence because Vance knew the system was down from the previous Friday and did not report it. (Tr. 26). Also, the negligence was designated as high, in part because the ERP was approved in December 2009. (Tr. 27-28). On cross examination, Shortt conceded that the cut-off date for implementing the ERP was June 15, 2011. (Tr. 28, 31). Shortt’s deposition at page 51 also conceded this point. (Tr. 29-30). He explained that the plan was approved in 2009 and no changes were made between 2009 and 2011. (Tr. 47). Shortt does not believe there could be an honest mistake about reporting after Lane’s class, which cleared up any gray areas. (Tr. 37). Another mine, #30, received the class and properly reported an outage in one section. (Tr. 37). Shortt did not believe there were any mitigating circumstances. (Tr. 46-47).

The violation was terminated when it was reported, but Shortt does not know when the actual problem was corrected. (Tr. 51-52).

b. Testimony of Ricky Keith Lawson:

Lawson had worked in the coal industry for 33 years. (Tr. 53). He had first-class foreman’s paper, repairmen’s paper, advanced first aid, and a dust card. (Tr. 53). He worked for Dominion for around 14 or 15 years. (Tr. 53). At the time Order No. 8173479 was issued, Lawson was the superintendent at #36. (Tr. 54, 63). A number of people, including Vance, reported to Lawson. (Tr. 63). Lawson reviewed reports on a daily basis. (Tr. 63-64).

Lawson was familiar with Order No. 8173479 (GX-1). (Tr. 54). Lawson was also familiar with the ERP for Mine #36 (GX-2). (Tr. 54-55). Lawson received yearly training by Respondent on this ERP, as did Vance. (Tr. 55, 65). He also received special voluntary training by Lane in May 2011. (Tr. 55-56, 68). Respondent’s superintendents, chief electricians, and anyone dealing with wireless communications attended that training. (Tr. 58). The tracking and communications requirements were about to go into effect and the training covered issues related to that event. (Tr. 56, 65). Those new requirements included a new wireless communication system and reporting duties. (Tr. 56). He could not remember the particulars of that training and was unsure if Lane discussed reporting. (Tr. 68). The reason the training was set up was because people had questions. (Tr. 69). The effective date for the ERP was June 15, 2011. (Tr. 56). Respondent had the wireless system in place at #36 by May 2011. (Tr. 56-57).

There were different manufacturers of wireless systems in the industry. (Tr. 57). The mining environment and the changing conditions in a mine create unique challenges to wireless

communication. (Tr. 57). Lawson described how Respondent had problems with its system. (Tr. 57, 66). On cross examination he conceded that was one of the reasons MSHA wanted to track outages. (Tr. 66). Respondent and other operators had questions about the reporting requirements for communication system failures in the summer of 2011. (Tr. 57-58). The questions dealt with both the communication system and the reporting requirements. (Tr. 58).

The power went down on T Section on Friday June 24, 2011. (Tr. 58-59, 61). This power outage caused problems with the wireless communication, because without power the wireless system cannot work. (Tr. 59, 61). Lawson learned about it on Friday via his home telephone. (Tr. 64-65, 69). There was no problem with the wireless; it was a high voltage problem. (Tr. 61). Vance worked on the power problem. (Tr. 59). He was responsible for reporting outages. (Tr. 59-60). Lawson could not recall if they moved coal on Saturday at the time they only produced every other weekend. (Tr. 70).

Lawson reviewed the Post-Accident Tracking Section on the ERP (GX-2). (Tr. 60). On cross examination he conceded that the ERP was approved in 2010 and the reporting requirement was there in 2010. (Tr. 65). He now knows that if communications go down on a single section he must report the condition. (Tr. 60). However, at the time of the outage this was a “gray area.” (Tr. 60). Similarly, the ERP says that the operator must report communication systems failures that extend longer than 12 consecutive hours but it does not say when to report. (Tr. 62).

Lawson discussed the Order with Vance. (Tr. 67). They did not discuss confusion over reporting, only the power. (Tr. 67). Lawson believed he spoke with Shortt on the day of the Order. (Tr. 66). He was aware that Shortt had issued a (d)(2) Order. (Tr. 66). He could not recall if he told Shortt that he believed he did not have to report the condition because it was only on the T section or because it was a power failure issue. (Tr. 66-67). He could not recall the reasons he gave to not reporting. (Tr. 67). On cross examination Lawson conceded that the communication requirements are in the ERP because in an emergency it is important for the outside to communicate with miners. (Tr. 67). If there was an emergency it would not matter if the power was down in the entire mine. (Tr. 67-68). He agreed that it did not matter what caused an outage in an emergency. (Tr. 68).

Lawson did not know if Respondent’s other mines reported a wireless failure at this time. (Tr. 61). Respondent was not trying to avoid reporting requirements. (Tr. 61).

4. Contentions of the Parties

The Secretary contends that Order No. 8173479 was validly issued, that the violation had no likelihood of resulting in a no lost-workday injury, that no people were affected, that Respondent was highly negligent, that the violation was caused by an unwarrantable failure, and that the proposed civil penalty is, if anything, too low. The Secretary argues that the citation is valid because power and communication went down and there was no report. (*Secretary’s Post-Hearing Brief* at 12-13). The Secretary argues that, with respect to gravity, the violation prevented proper implementation of vital accident preparedness systems. *Id.* at 14. Further, Respondent’s actions were highly negligent and the result of an unwarrantable failure because the area and time of the violation were extensive, the danger was obvious, there was notice to

Respondent of the need to comply, knowledge of the violation, and abatement only occurred after the Order was issued. *Id.* at 16-19. Finally, the Secretary argues that the penalty should be increased to \$16,000.00 in light of the seriousness of the violation. *Id.* at 31.

Respondent contends that Citation No. 8173479 was not validly issued, that it did not exhibit high negligence, that the violation was not the result of an unwarrantable failure, and that the proposed penalty is inappropriate. Respondent argues that the citation was not valid because this was a power failure not a communications system failure, and because the standard did not state a time at which a report to MSHA had to be made. (*Respondent's Post-Hearing Brief* at 4-5). Respondent argues that it was not negligent or guilty of an unwarrantable failure because of several mitigation factors, including their efforts to comply and sincere belief that a report was not necessary in this situation. *Id.* at 9-12.

5. Findings and Conclusions

a. Validity

Pursuant to 30 U.S.C. §876(b) Respondent maintained an ERP. According to page 5 of that Plan, “The operator shall [notify] the MSHA Hotline of a communication system failure that extends longer than 12 consecutive hours at 1-800-1553.” (GX-2).⁴ It is uncontested that on June 24, 2011, at approximately 6:00 pm Mine #36 experienced a power outage that resulted in a failure of the communication system. (Tr. 19-20, 58-59, 61). Further, it is uncontested that Respondent did not report this failure to MSHA until MSHA’s inspection on the following Monday, June 27. (Tr. 19, 43, 67).

Therefore, the only issue that remains to determine whether this Order is Valid is if this outage had to be reported. Respondent argues in its brief that this failure was not reportable because there was no system failure and because there was no time frame within which a system failure must be reported. *Respondent's Post-Hearing Brief* at 4-8.

With respect to the claim that the cited condition was not a system failure, Respondent notes that the communication system was down not as a result of a “system failure” but instead because of a power outage. *Id.* at 4. It argues that power outages, even if they result in loss of communication, are not required to be reported. *Id.* It supports this argument with several claims. First, Respondent cites Shortt’s testimony to the effect that the purpose of the reporting requirement is to allow MSHA to evaluate wireless communication systems in order to determine that a loss of communication due to a power outage, to argue that a power outage does not relate to the reliability of the communication system. *Id.* at 4-5. It argues that the sort of reliability that MSHA wants to evaluate only deals with failure in the internal aspects of the communication system. *Id.* at 5. It goes so far as to say that reporting power outage as communication system failures would cause MSHA to reject communication systems for “failures” when, in fact, the systems functions perfectly. *Id.*

⁴ The evidence established at hearing that there was a scrivener’s error in that plan and that the word “notify” should be included after the word “shall”. (Tr. 22).

I do not find this to be a compelling argument. Respondent speculation as to how MSHA analyzes reported data has no basis in any evidence in the record. There is no reason to believe that MSHA's reporting requirements are different based on the cause of the communication system failure. If one is to speculate on MSHA's use of the reporting data, it is entirely possible that MSHA could glean important information about the reliability of a particular communication system based on the way it performs in the event of a power failure. Perhaps MSHA could determine how a communication system would behave in the event of a mine emergency that results in a power outage. Surely such an event is not beyond the realm of possibility. In fact, in a catastrophic event like a fire or explosion it might be likely. In short, MSHA is in the best position to determine the information it needs to evaluate the effectiveness of various communications systems.

Also, I do not believe that requiring a report in the cited situation will decrease safety by marking a compliant system as a "failure." MSHA requires notification any time a wireless communication system goes down and presumably uses the data it receives in a manner consistent with the regulation's objectives. Information on how systems fare when the power goes out is certainly relevant to the regulation's objective of communicating with miners in the event of an emergency. Further, Respondent presented no evidence to support its contention that MSHA regards all system failures as equal. It is possible that MSHA considers the reasons for a failure in its evaluation so that an otherwise stellar system would not be rejected solely because it fails during a power outage.

Respondent also claims that the wording of subpart (a) and subpart (b) of the ERP indicate that a "power outage" or the system "being down," should not be considered a system failure. Specifically, Respondent argues that subpart (a) on page 5 of the ERP describes what should be done in the event of a "communication loss," which it argues is applicable to any loss of communication in a broad sense. *Respondent's Post-Hearing Brief* at 6, FN 4. It further argues that subpart (b), the part at issue here, refers to a "system failure" not a communication loss, showing that this section has a narrower meaning that only deals with communication losses caused by internal communication system failures. *Id.*

Once again, Respondent's argument is not compelling. The entire focus of the section, entitled "Survivability Requirements," is the operation of the communication system. There is no indication that some subparts of that section are talking about broader or narrower issues. Respondent does not explain why subpart (a) would be broader than the rest of the section. Subpart (a) states, "In the event that communication is lost, the operator shall begin repairs to the *system* immediately..." (Emphasis added). If this section were talking about a broader conception of communication as a whole rather than just the internal system, it would make little sense for the first step in repairing lost communication to be to repair "the system." If anything, these two subparts show that the ERP treats "lost communications" and "system failure" synonymously. A loss of communication is system failure and there is no reason to believe ERP contemplates different reporting or repairing requirements based on the cause of that failure. As a result, the loss of communication in the cited situation, even though it was caused by a power outage, was a reportable system failure under the ERP.

Respondent's next argument is that it was not required to report the cited condition because there was no time frame within which a system failure must be reported. *Id.* at 6. Respondent notes that ERP page 5, Subpart (b) states a system failure, "[t]hat extends longer than 12 consecutive hours," be reported, but is silent as to when that report must be made. *Id.* at 6-7. Respondent states that MSHA learned about the condition about 52 hours later but that there is no way to know if it would have been a violation at 51 hours or after an 8 hour shift. *Id.*

There is perhaps some truth to that. However, taken to its logical conclusion, Respondent's position would mean that it would never have to report a system failure. If 52 hours is absolutely permissible, then why would 52 days or 52 years not be absolutely permissible? Of course, such a result would be absurd. In the absence of a set deadline, the only way to read a reporting requirement is that a report be made within a reasonable time. *See Steele Branch Mining*, 15 FMSHRC 597, 601-602 (Apr. 1993) ("Where a standard is silent as to the period of time required for compliance, the Commission has imputed a reasonable time.") *citing Penn Allegh Coal Co.*, 3 FMSHRC 2767, 2771 (Dec 1981); *Monterey Coal Co.*, 5 FMSHRC 1010, 1019 (June 1983); and *Old Ben Coal Co.*, 3 FMSHRC 608, 610-611 (March 1981); *see also Cyprus Emerald Resources Corp.*, 20 FMSHRC 790, 798-799 (Aug. 1998).

I do not need to define what a reasonable amount of time for delay would have been in this case. Suffice it to say that a delay of over two days after the system failure is not reasonable in light of the goal of quickly providing MSHA with information to allow evaluation of communication systems.⁵ This is especially true in light of the fact that Respondent did not report the failure to the proper hotline, but was instead cited by Shortt. There is no indication that Respondent would have ever reported the failure had Shortt not issued the Order.

Finally, with respect to all of Respondent's arguments regarding the validity of this order, it cites to no authority and simply appeals to my "common sense." However, I do not believe that common sense dictates the finding urged by Respondent. As a result, I find that this Order was validly issued.⁶

⁵ However, it is significant that the number Respondent was to call, 1-800-746-1553, is the same number used for reporting accidents. That section states that "[t]he operator shall immediately contact MSHA at once without delay and within 15 minutes," when an accident occurs. 30 CFR § 50.10. The fact that the number given in the ERP was for a fast-response hotline with expertise in serious, even deadly, accidents indicates that the report should have been made rapidly.

⁶ At hearing, Respondent's witness raised the issues that communication system here was down in only one section and that it was only required to report system-wide failures. (Tr.66-67). As with the argument that it was not required to report communication failures caused by power outages, there is no reason to believe there is a distinction between communication loses in one area or in the entire mine. As Lawson conceded, it would not matter in an emergency if power was down in one area of the entire mine. (Tr. 67-68). Furthermore, Respondent did not brief this issue. Therefore, I find it is not a mitigating factor.

b. Gravity

The Secretary presented evidence that there was no likelihood of a lost workday injury and that no miners were affected. (Tr. 25-26, 46). This means this violation is merely a paperwork violation. Respondent did not contest these determinations in its Post-Hearing Brief. Therefore, I find that the Secretary proved the gravity in the Order by a preponderance of the evidence.⁷

c. Unwarrantable Failure and Negligence

Order No. 8173479 was marked as an unwarrantable failure and high negligence. The Commission has recognized the close relationship between a finding of unwarrantable failure and a finding of high negligence. *San Juan Coal Co.*, 29 FMSHRC 125, 139 (Mar. 2007) (remanded because a finding of high negligence without a corresponding finding of unwarrantable failure was “seemingly at odds.”). *Emery Mining Corp.*, defines an unwarrantable failure, as “aggravated conduct constituting more than ordinary negligence.” *Emery Mining Corp.*, 9 FMSHRC 1997, 2002 (Dec. 1987). The Commission formulated a six factor test to determine aggravating conduct. *IO Coal Co., Inc.*, 31 FMSHRC 1346, 1350-1351 (Dec. 2009).⁸ Before discussing the high negligence designation, I will consider each of those factors in turn:

1. **Extent of the violative condition**

According to the evidence presented at hearing, this condition affected the entirety of the T-Section. (Tr. 20). This was one of only three active working sections of the mine and therefore constituted a large area of the working area of the mine. Respondent presented no evidence that would suggest this outage was less extensive.

2. **The Length of Time of the Violation Existed**

According to the evidence presented at hearing, the communication system went down at approximately 6:00 p.m. on June 24 and was still down, and unreported, on Monday morning when Shortt arrived. This means that the extensive communication failure existed for more than 50 hours before MSHA learned of the condition.

⁷ The Secretary argues that there was some higher degree of gravity in this violation, even arguing that it could be S&S. Secretary’s Post-Hearing Brief at 14-15. However, this contradicts the opinion of the inspector; an opinion that is entitled to considerable deference. MSHA inspectors are entitled to a certain level of deference as to their findings and opinions. See e.g. *Harlan Cumberland Coal Co.*, 20 FMSHRC 1275, 1278-79 (Dec. 1998) and *Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 135-36 (7th Cir. 1995). As a result, I will not disturb the gravity cited in the Order.

⁸ While an administrative law judge may determine, in his discretion, that some factors are not relevant, or may determine that some factors are much less important than other factors under the circumstances, all of the factors must be taken into consideration and at least noted by the judge. *IO Coal*, 31 FMSHRC at 1351

Respondent presented no evidence that would suggest the violation existed for a shorter time. However, it argued that the length of time in this case is immaterial because the standard contained no deadline for reporting the condition. *Respondent's Post-Hearing Brief* at 12. However, as discussed earlier, the absence of a set deadline cannot be used to ignore the reporting requirement entirely. This was an unreasonably long delay in reporting the cited condition. Therefore, I cannot find the lack of a set deadline in the ERP to be a mitigating factor with respect to the unwarrantable failure determination.

3. Whether the violation is obvious or poses a high degree of danger

As already discussed with respect to gravity, this particular violation did not pose a high degree of danger. However, the complete failure of the communication system in 1/3 of the active working sections of the mine was readily apparent. In fact, Respondent actually knew about the condition almost immediately, on Friday evening and did not report it.

4. Whether the operator had been placed on notice that great efforts were necessary for compliance or on notice that this was an issue.

This factor is the most heavily contested in this case. The Secretary argues that Respondent voluntarily agreed to participate in training with MSHA and therefore should have known the reporting requirements. *Secretary's Post-Hearing Brief* at 17-18. Furthermore, Respondent's other conversations with MSHA indicate that Respondent was on notice. *Id.* at 18. Respondent counters, citing the same conversations and training to assert that it was attempting to be proactive in compliance with the rules and that its assumption that the power outage was not a reportable "system failure" was reasonable. *Respondent's Post-Hearing Brief* at 10-11. Also, Respondent notes that Shortt was not present for the training conducted by Lane and therefore cannot attest to whether this particular issue was discussed. *Id.* at 10. Finally, Respondent argues that the requirements had only become effective nine days before the power outage and therefore they lacked experience with respect to whether this was an issue. *Id.* at 11.

I do not believe that the factors cited by the Respondent mitigate the fact that Respondent was on notice that it was required to report the cited condition. Vance, Respondent's official responsible for reporting outages, knew or should have known that this was a reportable condition. The fact that Respondent spoke with MSHA about the ERP and requested training is admirable, but it does not mitigate this particular violation. If anything, it shows that MSHA was available to speak with Respondent about any "gray areas" that existed in the enforcement of the ERP and was willing to work with Respondent to ensure compliance. Respondent's decision to assume that it was not required to report the outage, in light of the fact that it has admitted that it was confused about the requirements, was not reasonable. The prudent course of action would be to err on the side of caution and report the condition to MSHA. Respondent's conduct is best seen as a break from its previous proactive attitude with respect to the communication system.

Similarly, I do not believe it is relevant that Shortt was not present for Respondent's training. It is not important whether Respondent's employees were specifically told that they were required to report a communication system failure under any circumstances. Instead, it is

important that Respondent knew that MSHA would be focusing on these new communication systems and that MSHA was willing to answer questions to assist in compliance. There is no evidence to suggest that Respondent was not aware of these facts.

Finally, the fact that the standard was new is not a mitigating factor. The Secretary presented evidence showing that the ERP had been in effect for a considerable amount of time, even if it had not yet been mandatory. Perhaps even more importantly, the legal requirement to follow the ERP did not contain a grace period. It would not have mattered if the power outage had occurred on the day the law became effective, Respondent was responsible for following the law. Again, if there was any legitimate confusion, MSHA was available for consultation.

5. The operator's efforts in abating the violative condition

Respondent only reported the wireless outage when directed to do so by Shortt. There is no evidence to suggest Respondent's agents would have reported the outage of their own accord.

6. Operator's knowledge of the existence of the violation

Well-settled Commission precedent recognizes that the negligence of an operator's agent is imputed to the operator for penalty assessments and unwarrantable failure determinations. *See Whayne Supply Co.*, 19 FMSHRC 447, 451 (Mar. 1997); *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194-197 (Feb. 1991); and *Southern Ohio Coal Co.*, 4 FMSHRC 1459, 1463-1464 (Aug. 1982). An agent is "any person charged with responsibility for the operation of all or part of a...mine or the supervision of the miners in a...mine." 30 U.S.C. §802(e). A supervisor's knowledge and involvement is an important factor in an unwarrantable failure determination. *See Lopke Quarries, Inc.*, 23 FMSHRC 705, 711 (July 2001) *citing* (*REB Enterprises, Inc.*, 20 FMSHRC 203, 224 (Mar. 1998) and *Secretary of Labor v. Roy Glenn*, 6 FMSHRC 1583, 1587 (July 1984). In this case, it is undisputed that both Lawson and Vance were aware that wireless communications were unavailable and did not report the condition.

Respondent does not contest the supervisory status of the Mine Superintendent (Lawson) and Chief Electrician (Vance). Instead, it argues that they did not have knowledge because that this sort of event was reportable. *Respondent's Post-Hearing Brief* at 12. As previously stated, even if Respondent did not know of the requirements it should have known or at least known to ask about the proper actions to take. This is not a mitigating circumstance.

Further, high negligence exists where the operator knew or should have known of the violative condition or practices and there are no mitigating circumstances. 30 C.F.R. § 100.3(d).⁹ The Secretary presented extensive evidence that Respondent's conduct exhibited high negligence. Specifically, Vance knew the system was down from the previous Friday and did not report it. (Tr. 26). The ERP was approved on December 2009 and MSHA had conducted classes to ensure that Respondent was aware of its requirements. (Tr. 27-28, 37). Shortt did not believe there were any mitigating circumstances. (Tr. 46-47).

Respondent argues that there are several mitigating circumstances. The list of mitigating factors provided by Respondent include many of the same arguments it used in defending against the unwarrantable failure designation. Specifically, it argued its failure to report was a reasonable mistake (especially in light of the fact that the standard was new), that there was no deadline for making a report, that the employees were not trained to know this was a reportable event, and the fact that that Respondent was proactive in installing the communication system. For the same reasons described above, these are not mitigating circumstances.

Respondent also provided several other possible mitigating factors. *Respondent's Post-Hearing Brief* at 12, FN 12. Those possible mitigating factors are irrelevant. Specifically, Respondent argues its negligence in failing to report the condition was mitigated by the fact that the gravity was low, because it ordered pieces to fix the power outage, and because the purpose of the reporting requirement was to test reliability rather than deal with an immediate safety concern. *Id.* None of these are relevant to the question of whether Respondent knew or should have known it was required to report the outage and are not mitigating factors.

Considering the six factors of the *Emery Mining Corp.* test, the Secretary has proven by a preponderance of the evidence that this violation was an unwarrantable failure. Furthermore, none of the factors discussed at the hearing or in Respondent's brief mitigate Respondent's negligence or undermine the unwarrantable failure designation.

⁹ Under Commission precedent and promulgated standards, negligence "is conduct, either by commission or omission, which falls below a standard of care established under the Mine Act to protect miners against the risks of harm." 30 C.F.R. § 100.3(d). "A mine operator is required to be on the alert for conditions and practices in the mine that affect the safety or health of miners and to take steps necessary to correct or prevent hazardous conditions or practices." *Id.* Low negligence exists when "[t]he operator knew or should have known of the violative condition or practice, but there are considerable mitigating circumstances." *Id.* Moderate negligence is when "[t]he operator knew or should have known of the violative condition or practice, but there are mitigating circumstances." *Id.* High negligence exists when "[t]he operator knew or should have known of the violative condition or practice, and there are no mitigating circumstances." *Id.* Finally, an operator exhibits reckless disregard where it acts without the slightest degree of care. 30 C.F.R. § 100.3(d). Mitigating circumstances may include, but are not limited to, actions taken by the operator to prevent or correct hazardous conditions or practices. *Id.*

d. Penalty

Under the assessment regulations described in 30 CFR §100, the Secretary proposed a penalty of \$4,000.00 for Order No. 8173479. However, in his *Post-Hearing Brief*, the Secretary requested the penalty be increased to \$16,000. In light of the operator's history (16 violations of Section 316(b) at this mine since 1/17/2012 (GX-2)), its size, its negligence, its ability to stay in business, the gravity of the violation, and the abatement, I do not believe an increase in the penalty is appropriate. Instead, I affirm the originally assessed penalty of \$4,000.00.

ORDER NO. 8185281

1. Contents of the Order

On March 2, 2011 at 9:20 a.m., Inspector Cornelius M. Simmons issued to Respondent Order No. 8185281. Simmons found:

The operator of this mine has failed to contact MSHA immediately upon discovery of accident unplanned roof fall. A roof fall occurred in the #2 entry of the CJ&L intake of this mine within fifty feet of the surface. In the weekly examiner takes and records an air reading in this portal. In the record of the weekly examination the air reading stated "a movement of air". The surface of the #2 entry has been covered with dirt by using an end loader. The teeth marks from the loader bucket are visible in the dirt. It is obvious that the weekly examiner was aware of the unintentional roof fall and it was not reported as required since the fall was above the anchorage horizon of the roof bolts. The operator of this mine has engaged in aggravated conduct because they knew this fall had occurred and did not report it. This violation is an unwarrantable failure to comply with a mandatory standard.

Government's Exhibit 1 (Hereinafter GX-1). Simmons noted that the gravity of this violation was "No Likelihood," "No Lost Workdays," and would affect one person. *Id.* He further marked that Respondent exhibited "Reckless Disregard" with respect to this violation. *Id.* However, on March 3, 2011 Simmons issued a modification, changing the negligence from "Reckless Disregard" to "High." *Id.*

2. Legal Standards

Order No. 8185281 was issued under Section 104(d)(1) of the Mine Act. That provision provides the following:

If, upon any inspection of a coal or other mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard, and if he also finds that, while the conditions created by such violation do not cause imminent danger, such violation is of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard, and if he finds such violation to be caused by an

unwarrantable failure of such operator to comply with such mandatory health or safety standards, he shall include such finding in any citation given to the operator under this chapter. If, during the same inspection or any subsequent inspection of such mine within 90 days after the issuance of such citation, an authorized representative of the Secretary finds another violation of any mandatory health or safety standard and finds such violation to be also caused by an unwarrantable failure of such operator to so comply, he shall forthwith issue an order requiring the operator to cause all persons in the area affected by such violation, except those persons referred to in subsection (c) of this section to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated.

30 U.S.C. § 814(d)(1).

The Order deals with an alleged violation of 30 C.F.R. §50.10(d) (titled “Immediate notification.”). That section provides the following:

The operator shall immediately contact MSHA at once without delay and within 15 minutes at the toll-free number, 1–800–746–1553, once the operator knows or should know that an accident has occurred involving:

(d) Any other Accident

30 C.F.R. §50.10(d).

3. Summary of Testimony

a. Testimony of Cornelius Mack Simmons:

Simmons started in the coal industry in 1974. (Tr. 72). He worked at Dominion #36 from 2003 to 2007. (Tr. 72-73). He ran equipment and did repair work. (Tr. 73). He did not have any examination duties and was not a foreman, although he does have foreman papers. (Tr. 73). Simmons had been a coal mine inspector for MSHA for about six years. (Tr. 71-72). As an inspector, Simmons duties include finding violations in coal mines. (Tr. 73).

At the time of issuance, Simmons had inspected #36 for two or three inspection periods. (Tr. 73-74). He was familiar with the CJ&L intake entryway. (Tr. 74). He had inspected it twice before the issuance of Order No. 8185281 on March 2. (Tr. 74). The CJ&L air intake was used to ventilate the mine, remove harmful gasses and/or render them harmless, and to help carry dust away from working miners. (Tr. 74). There were three entries into CJ&L. (Tr. 74). Simmons sketched a map of the CJ&L (GX-3). (Tr. 74-76). He labeled the entries 1, 2, and 3. (Tr. 76). The circles on the map are timbers. (Tr. 79). There were timbers across all three entries. (Tr. 118). The entries were approximately 20 feet wide and four feet tall. (Tr. 76). The distance from the entryway, out by the timbers, to the surface was about 100 feet. (Tr. 76-77).

Under 30 C.F.R. §75.364(b)(1) Respondent is required to travel one of the entries in its entirety weekly to record hazards (including bad top and harmful gases), methane accumulations, and air tank leaks. (Tr. 74, 77, 97, 118). “Traveling in its entirety” means traveling from start to finish. (Tr. 78). There were no signs directing the examiner which entry to travel. (Tr. 118). It was not necessary to actually travel out of the portal. (Tr. 113-114). Respondent had to record their findings in a weekly record. (Tr. 77).¹⁰ It also had to take air readings in each of the three entries. (Tr. 77-78, 97). Entry #1 contained an old fan housing that would allow travel outside. (Tr. 97-98). On cross examination, he conceded that if an examiner traveled the entirety of the #1 Entry weekly but not the #2 Entry, then the examiner complied with 30 C.F.R. 75.364(b)(1) (Tr. 98, 114). Respondent was not cited for a violation of that standard. (Tr. 98).

On March 2, 2011 Simmons went to #36. (Tr. 80). He went into the mine office and reviewed the weekly book. (Tr. 80, 83). The report for #2 entry did not contain a normal air reading but instead said there was a movement of air. (Tr. 80).¹¹ The measurements showed that the amount of air moving dropped from 30,000 to 50,000 feet per minute to 60 feet per minute. (Tr. 81, 90-92). This signified an air blockage. (Tr. 81). Below 50 feet per meter the blades on the anemometer will not turn. (Tr. 91). On cross examination, Simmons conceded that Respondent was not required to maintain any specific cubic feet of movement or any specific velocity in #2 entry and was not cited for failure to maintain air velocity. (Tr. 96). Further, the CJ&L intake was supplemental ventilation for the mine. (Tr. 96). By the time of the hearing the CJ&L was sealed. (Tr. 96).

At some point he traveled underground with T.J. Howington (“Howington), a weekly mine examiner. (Tr. 83). Simmons and Howington traveled all three entries in their entirety and had done so in the past. (Tr. 78-79). He had not seen dangers in these areas before. (Tr. 79). Simmons asked why there was no air reading and Howington told him there had been a roof fall a few weeks earlier, after February 11, 2011. (Tr. 81, 83). Howington said it had occurred right after there was a gas inundation on T Section. (Tr. 83). Simmons asked Howington if anyone had reported the roof fall. (Tr. 82). Howington did not answer so Simmons asked again. (Tr. 82). Howington said he did not know what Lawson had done. (Tr. 82).

At the #2 Entry, Simmons and Howington saw downed timbers, a sign of danger. (Tr. 84). There were no danger signs on the timbers. (Tr. 85). Timbers are used to support the roof. (Tr. 87). Timber does not necessarily mean the area is dangered off; in some cases people can travel through timbers. (Tr.87). It was possible to travel through the timbers here. (Tr. 87-88).

There was a roof fall in the area. (Tr. 84). Some rocks fell and pulled the heads off of the bolt. (Tr. 84). Inby there was so much rock that the bolts were not visible. (Tr. 84, 85). The

¹⁰ Respondent records weekly examination results in the weekly books. (Tr. 82). The books cannot be altered and they must be kept for one year. (Tr. 82). The weekly reports contain air readings, locations traveled, hazards, and corrections. (Tr. 82).

¹¹ A “movement of air” is not enough to be measured by an anemometer. (Tr. 81, 90). An anemometer is a tool used to measure air. (Tr. 90). It measures air velocity and is used to determine the quantity of air passing through an area. (Tr. 90).

bolts were probably covered; likely more than the length of the bolts that had fallen out. (Tr. 85). The top of the fall was at least five feet tall. (Tr. 84-85, 95,100, 118). However, he would have exposed himself to danger by looking, so it may have been higher. (Tr. 84-85). In his deposition he stated that the material was as high as the entry or higher. (Tr. 101, 108). On cross examination he conceded that the entry was around four feet before it fell, though his notes say five feet. (Tr. 101, 108). However, he stated that when the fall occurred, it pulled some material from the bolts, broke the heads off, and left these bolts sticking down from the top. (Tr. 102). Beyond that point, more fell in, so there was at least five feet in the fall. (Tr. 102). The fall was as wide as the entry, but thicker in the middle than at the sides. (Tr. 85, 102). He could not walk through the entryway and could not get beyond the fall. (Tr. 85).

Respondent had reported unplanned roof falls at Dominion #36 to MSHA in the past. (Tr. 98-99). Simmons does not know why Respondent would not report this roof fall, but they still may have had an incentive he did not know about. (Tr. 99-100).

Simmons and Respondent disagreed on whether the #2 entry was dangered-off. (Tr. 114). Examiners know not to travel in a dangered-off area. (Tr. 115). If #2 Entry had been dangered-off and the examiners knew it then the area would not be a place where miners were normally required to work and travel. (Tr. 115-116). As a result, an unplanned roof fall, even above the anchorage, would not be reportable. (Tr. 116).

Simmons was familiar with the mud seam that ran from Entry #3 to Entry #1. (Tr. 89). The CJ&L had mud seams depositing loose material on the mine floor in all three entries through roof cracks. (Tr. 90, 102-103). There were mounds of dirt, about a foot high, where material had fallen. (Tr. 89, 102-103). It was possible to walk over that material and Simmons had done so. (Tr. 90). There was mud between the portal and the dual row of timbers in #2 entry that had dribbled down. (Tr. 103). He could not see what was inside this pile of debris. (Tr. 103-104). A mud seam can deposit material on the mine floor from up into the mountain above the entry. (Tr. 103, 111). The amount of deposits can vary depending on climate conditions and rain. (Tr. 103). The roof fall had rocks in it. (Tr. 90, 105). Simmons did not see any way to differentiate between material that fell from the mud seam and how much came from a rock fall. (Tr. 104). There was some material from the mud seam with rock on top. (Tr. 104-105).

Simmons reviewed Citation No. 8186555, which was issued on August 15, 2011 and stated that mud accumulated in the CJ&L up to half the entry. (Tr. 106, 117). The inspector did not indicate seeing any roof bolts pulling down near the mud seam in this citation. (Tr. 117). The citation was beyond the timbers. (Tr. 117). Mud depositing is not an unplanned roof fall. (Tr. 108). Respondent was not cited for an unplanned roof fall on August 15. (Tr. 108).

With Respect to Order No. 8185281, if a mud seam deposited two and a half feet of material, it would not be an unplanned roof fall absent other evidence the fall was above the anchorage. (Tr. 108-109). The evidence that this fall was above the anchorage was that there were four-foot bolts and a five-foot entry. (Tr. 110). Simmons testified that if two and a half feet came from a mud seam and two and a half feet came from a rock fall then it would still be an unplanned roof fall. (Tr. 110-111). However, he admitted that the fact alone that there was a mud seam depositing material is not evidence of a roof fall above the anchorage. (Tr. 111-112).

Good evidence of a roof fall above the anchorage would be more material falling out and roof bolts. (Tr. 112). Simmons testified that he had seen unplanned roof falls with roof bolts in the material. (Tr. 112, 118). He did not see a single roof bolt in the material here. (Tr. 113). However, if the fall is deep the roof bolts will not be seen. (Tr. 118-119). The bolts break off in the top and stayed there. (Tr. 119). This is because they had been there so long and the heads of the bolts pulled off. (Tr. 119). This just leaves the bolts sticking in the top hanging down. (Tr. 119). The bolts had to be buried in the material. (Tr. 119).

In the CJ&L Simmons could not take an air reading because, as he learned when he went outside, Respondent had used an end loader to push dirt from outside. (Tr. 85-86). Therefore he does not know if the fall would have blocked the air. (Tr. 85). Howington said that when Stacy found the rock fall they had covered it up. (Tr. 86). He did not know whether the dirt was causing the air restriction or if it was the material in the #2 Entry. (Tr. 116). All portals had a “do-not-danger” sign on the screen so no one would enter from the outside. (Tr. 114).

Simmons issued Order No. 8185281 (GX-1) for failure to report an unplanned roof fall at or above the anchorage zone. (Tr. 94). On cross examination, Simmons admitted that the fact that the fall was above the anchorage zone was the only support he gave for the Order. (Tr. 95). Further, he admitted that nothing in the inspection notes, the Order, or the deposition testimony says that travel or ventilation was impeded. (Tr. 95-96).

Simmons marked Order No. 8185281 with no likelihood of an injury. (Tr. 88, 113). This was because the fall already occurred; this was just a failure to report. (Tr. 88). That is the same reason it was marked no lost workdays. (Tr. 88). The Order was not S&S because Simmons did not expect people other than possibly weekly examiners to travel through the #2 entry. (Tr. 113). It was a paper violation. (Tr. 113).

Simmons marked Order No. 8185281 as reckless disregard. (Tr. 88). However, he later talked to Stacy and his supervisors and decided it should be high negligence. (Tr. 88-89). Several foremen knew of the fall and did not report it as he should have. (Tr. 89).

b. Testimony of Greg Ratliff:

Ratliff worked for Respondent as a production manager and had worked in the mines for 27 years. (Tr. 121-122). A production manager helps with production, cut cycles, and mining. (Tr. 121-122). He worked as a belt shoveler, electrician, section foreman, maintenance foreman, chief electrician, mine foreman, and superintendent. (Tr. 122). He began with Respondent in 1988 and worked at #36 as superintendent from roughly 2000-2008. (Tr. 122-124, 135). He then left that mine. (Tr. 135).

As superintendent, he had been through the mine and knew its intake entries, including the CJ&L. (Tr. 124). The CJ&L intake provides extra air for the mine. (Tr. 124). Ratliff reviewed a map of the CJ&L intake entries (RX-1). (Tr. 125). One of the entries, #3, has a fan house. (Tr. 125). The map appeared accurate. (Tr. 125). On cross examination he conceded it was only accurate as of 2009, he did not know if it was accurate for March 2, 2011. (Tr. 137).

Respondent conducted a weekly examination of the CJ&L wherein an examiner checked the roof conditions, the travel ways, and the air course. (Tr. 125). Only one entry had to be examined in its entirety. (Tr. 125-126, 139). He did not believe that they ever had to check for hazards in all three entries. (Tr. 139). However, if an examiner is traveling and sees a hazard, he is still required to report it in the weekly book, regardless of the entry. (Tr. 140). Further, air readings were taken at each entry. (Tr. 140). The only people who travel in the CJ&L intake were certified examiners. (Tr. 141).

Entry #3 had a path of travel where examiners could traverse the full length of the entry. (Tr. 129). To travel the entry in its entirety, an examiner would walk down the entry on the right rib to the fence portal and go out the fan door. (Tr. 129).

Since 2009 it had not been possible to conduct the examination in Entry #2. (Tr. 126). In that year a state inspector issued a violation because the roof bolt plates deteriorated, so Respondent dangered it off. (Tr. 126). The area was dangered off outby the dual row of timbers and inby the portal, about 20 feet by 70 feet of space. (Tr. 126, 138, 142). The area remained unchanged from the time it was dangered off to March 2. (Tr. 143). Ratliff does not recall two rows of timbers also across Entry #1 and #3. (Tr. 138). To prevent people from entering the #2 Entry from outside, Respondent put up a chain-link fence and conducted regular security patrols. (Tr. 127). These fences were placed on all three portals, though Ratliff did not recall if there were danger signs on all three. (Tr. 138).

Ratliff knew that the area was dangered off because he personally placed the timbers. (Tr. 127). He also placed a “danger-do-not-enter” sign on one of the timbers. (Tr. 127). Respondent also wrote in chalk on the timbers and painted the ribs. (Tr. 127-128). The date board in the #2 Entry was near the center, on one of the timbers. (Tr. 130). Respondent did not authorize anyone to enter the dangered-off area. (Tr. 128). The weekly examiners were aware that the #2 Entry was dangered off. (Tr. 128). Ratliff never traveled into the dangered-off area after placing the timbers. (Tr. 129).

There is a difference between dangered off areas and dangered off spots. (Tr. 128). To danger off an entire area, Ratliff would place a double row of timbers and a “do not enter” sign. (Tr. 128). To danger off a small spot he would just place some timbers or cribs that had “danger” written on them. (Tr. 128). It is possible to travel around such spots. (Tr. 128). There were danger spots in Entry #1 and #3. (Tr. 128).

Ratliff knew Howington as a contract belt examiner. (Tr. 129). Weekly examiners were trained that the #2 Entry was dangered off. (Tr. 130). David Addair (“Addair”) was a weekly examiner of the CJ&L intake before Howington. (Tr. 130). Addair showed Howington the area and told him it was dangered off. (Tr. 130). No examiners were authorized to remove the danger sign in the #2 Entry. (Tr. 131). He believed that the Entry remained dangered off after he ceased to be superintendent. (Tr. 131). He also believed that Howington knew that this area was dangered off. (Tr. 131). However, on cross examination Ratliff conceded that he did not work at the mine when Howington conducted the examinations. (Tr. 137).

There is a difference between material from a mud seam and a roof fall. (Tr. 131-132). Ratliff never saw an unplanned roof fall in the dangered-off area of Entry #2. (Tr. 132). Simmons notes indicate that Ratliff found a roof fall there in February 2011 are inaccurate. (Tr. 133). However, he saw material from the mud seam there. (Tr. 132). Depending on the weather, mud or draw rock can build up quickly. (Tr. 132-133). Ratliff did not believe that the seam would weaken the roof, but it was an adverse condition. (Tr. 138-139).

When mining a new portal, it is standard practice to use bolts at least a foot longer than the normal bolts within 150 feet of the portal. (Tr. 133-134). The dangered off area in Entry #2 was within 150 feet of the portal. (Tr. 134). However, Ratliff was not able to confirm that longer bolts were used there. (Tr. 134). He did not know what type of bolts were required by the roof control plan. (Tr. 139).

Ratliff was not in the CJ&L intake when Order No. 8185281 was issued. (Tr. 130). He had no idea what the area looked like on the day of the Order or between 2009 and March 2011. (Tr. 136-137). However, he was in the CJ&L intake both before and after the issuance. (Tr. 130-131). On cross examination he discussed his deposition testimony wherein he stated he was not in the area on the day of the citation and could not recall the last time he was there before the Order. (Tr. 136-137). However, on re-direct examination he noted that in his deposition that he had been in the area of Entry #2 within the last year. (Tr. 141). He did not recall the exact time in his deposition, though he guessed around June 2011. (Tr. 141-142). This deposition testimony refreshed Ratliff's recollection; he was in the #2 entry of the CJ&L intake in the summer of 2011. (Tr. 142).

c. Testimony of Timothy Harold "T.J." Howington, Jr.:

Howington did not speak to Respondent's counsel or the Secretary before the hearing. (Tr. 158). Howington had been in the coal industry for 12 years. (Tr. 145). In March 2011, he worked for Abby contractor at #36. (Tr. 146). He had done so for about two years starting in 2009 or 2010. (Tr. 146). Before that, he had worked for a time at #36 as an outby boss. (Tr. 146). As outby boss he examined belts, pre-shifted the mine, assigned work to care for and clean drives, and checked for hazardous conditions and corrected them. (Tr. 146-147). If he could not correct it, he would danger it off. (Tr. 147). To do this he would build something or set timbers and put up a sign. (Tr. 147). He would also talk to the superintendent to correct a condition. (Tr. 147). Hazardous conditions were recorded in a book. (Tr. 147). There were many belt books at #36 including the main book and the books for Sections U and T. (Tr. 147).

Howington was familiar with the CJ&L. (Tr. 148). He was responsible for taking three air readings and drift amounts for the each of the three entries there. (Tr. 148). There were timbers in each entryway of the CJ&L. (Tr. 148). At #2 Entry, where he took an air reading, there were eight timbers set. (Tr. 148). The area was dangered off behind the timbers. (Tr. 149). He was told never to go beyond the timbers. (Tr. 162). On a weekly basis, the examiner would be in the CJ&L and that person knew not to go beyond the dual row of timbers in the #2 entry. (Tr. 160). Entry #2 was not an active working area of the mine. (Tr. 166). He did not believe there were timbers in the #1 Entry. (Tr. 149). There were two rows of timbers and an old fan in the #3 Entry. (Tr. 149). The timbers were placed evenly across the 18-20 foot entries

and spaced four feet apart. (Tr. 149-150). He did not think there were dangers signs on the timbers or the word “danger” written on the rib in Entry #2 or #3. (Tr. 151). Howington knew Addair, another miner who took him through the CJ&L and showed him how to do a weekly exam. (Tr. 159). Addair showed him where the area was dangered off with eight timbers. (Tr. 159). Addair might have showed him a danger sign. (Tr. 159). Addair told him that the entries were dangered off from access because the bolts had rotted, creating unsupported top. (Tr. 160).

Howington was required to check for hazardous conditions in the CJ&L intake. (Tr. 150). He looked to see if there were hazardous conditions in each entry. (Tr. 150). He would look behind the timbers for hazardous conditions. (Tr. 150). He went behind the timbers in the #3 entry where the fan housing was located. (Tr. 150). However, there was a safe path in the #3 entry to allow weekly examination. (Tr. 160).

Howington recalled traveling with Simmons in the CJ&L at least one time, in March 2011. (Tr. 151, 153). He went to do his weekly examination and Simmons went with him. (Tr. 153). When they started Howington told Simmons there had been a roof fall. (Tr. 153). Simmons asked if it had been reported and Howington said he was sure Respondent did. (Tr. 153). They went to the area and looked at the fall. (Tr. 153).

Howington learned about the roof fall from someone else but could not remember who. (Tr. 154-156). He learned about it when the mine had flooded and they had to pump out the CJ&L. (Tr. 155). He did not see it then because the mine was idle and only bosses were present, but Stacy and Ratliff had run water line in Entry #3. (Tr. 155-156). The fall happened sometime in a two-week period between an examination (where he did not see the condition) and the water situation. (Tr. 165). On the third week he saw the fall. (Tr. 165). His best guess was that it occurred between January 2 and March 2. (Tr. 165-166).

There was a mud seam in the CJ&L intake that deposited material on the bottom in the #2 entry and the whole area. (Tr. 160-161). Depending on weather conditions a lot of material could be deposited. (Tr. 161-162). If mud fell from the deposit it would not have been a roof fall. (Tr. 163). However, Howington believed that the material behind the timbers was where the roof had given way. (Tr. 161-163). All of the material was from the top. (Tr. 163). That is why it was dangered off. (Tr. 162). He could see the bolts hanging down. (Tr. 164). The fact that the bolts were out was an indication of how much had fallen. (Tr. 164). He could see the bolts with the glue packed around it. (Tr. 164). He could not remember if there were bolts at the bottom in addition to the bolts at the top. (Tr. 164). The bolts at the top were still anchored. (Tr. 164).

Howington did not recall discussing the previous day’s air readings with Simmons. (Tr. 154). He had recorded a finding of “air movement” in a weekly record book. (Tr. 156). This means that there is enough air for the blades of the anemometer to move but not enough to get a good reading. (Tr. 156).

During the examination, Howington and Simmons walked to the portals in each entry but he could not recall going beyond the timbers. (Tr. 151). The portals were where the entries opened to the surface. (Tr. 152). All three portals were fenced off from outside. (Tr. 152). It is

only possible to reach the outside through a door in the fan housing. (Tr. 152). None of the portals had danger signs. (Tr. 152). He recalled exiting out the #3 Entry. (Tr. 152). He could not remember if he went to the fence in #2 Entry. (Tr. 142-153). They went outside. (Tr. 157). There they saw dirt pushed up against the outer entry of #2. (T. 157). He did not know why this was done or who did it. (Tr. 157).

d. Testimony of David Addair:

Addair worked as a mine foreman for Respondent and had been in the mines for about 32 years. (Tr. 169). He had worked as an outside man, a scoop man, miner operator, and foreman. (Tr. 169). He started with Respondent in January 2006 and was a full time employee starting in 2008. (Tr. 169-170). He is a certified foreman, electrician, shop foreman, dust sampler, and is certified in first aid. (Tr. 170).

He worked at #36 from January 2006 to October 2010 as a belt examiner. (Tr. 170). He also examined the CJ&L. (Tr. 171). The CJ&L provides extra intake of air. (Tr. 171). There were three entries to the CJ&L, examined weekly. (Tr. 171). Only certified examiners entered the CJ&L. (Tr. 173). To examine CJ&L, he would take air readings, put on the date, initials, and check for hazardous conditions. (Tr. 171). He did not travel all three entries, he just traveled one in its entirety, usually #3. (Tr. 171-172, 177). Entry #3 had the door to get outside in the fan housing. (Tr. 172). He took air readings in all three entryways, including #2. (Tr. 176). He did this even though it was dangered off but did not know why. (Tr. 177). However, he did not go beyond the double row of timbers to take air readings. (Tr. 181-182).

He had to check for hazardous conditions. (Tr. 177). If he saw a hazardous condition he would take care of it. (Tr. 178). While he only traveled up one entry, he would look in the others. (Tr. 178). If he saw a hazardous condition he would fix it or danger it off. (Tr. 178). However, he never found any hazardous conditions in his weekly reports that he could not fix. (Tr. 179). He would not know about a hazardous condition in an entry if he did not travel it. (Tr. 182). All weekly reports were in the foreman's office. (Tr. 180). He filled them out and the superintendent countersigned. (Tr. 180).

Addair did not go down #2 Entry after they set the timbers. (Tr. 172). Entry #2 was dangered off with a piece of belt with "danger" written on it. (Tr. 172-173). It was hanging in the center of the first row of timbers on the inby side. (Tr. 173). Employees were not supposed to go beyond the dual row of timbers. (Tr. 173). There were areas where danger was written in chalk in #1 and #3 Entries. (Tr. 173). However, there was a path on the right side of #3 to walk. (Tr. 174). On cross examination, he conceded that there were two rows of timbers and danger signs across all three entries. (Tr. 179). He crossed the timbers in the #3 Entry. (Tr. 179). Sometimes they would travel #1 up to the portal. (Tr. 179). He crossed timbers that had "danger" on them. (Tr. 179).

The last three months he was a belt examiner, Howington took over examining the CJ&L. (Tr. 170-171, 174). Addair walked Howington through the CJ&L and told him how to do the exam. (Tr. 174-175). Addair told Howington the #2 Entry with the dual rows of timbers were dangered off. (Tr. 175). He was not sure that he told Howington not to go beyond the dual row

of timbers, but he knew what the timbers meant. (Tr. 175). When he showed Howington the area, the danger sign was there. (Tr. 175). Addair left #36 in October of 2010 and had not been doing examinations of the area for three months prior to his departure. (Tr. 180). He did not know anything about the conditions after Howington took over. (Tr. 180-181).

There was a mud seam in the CJ&L. (Tr. 175). The mud seam deposited material in the dangered-off area. (Tr. 175). The amount depended on the weather. (Tr. 175-176).

When driving a new portal entry, within 150 feet of the portal, it is proper procedure to use bolts a foot longer than usual. (Tr. 176). The dangered off area in #2 was within 150 feet of the portal. (Tr. 176).

4. Contentions of the Parties

The Secretary contends that Order No. 8185281 was validly issued, that there was no likelihood that the violation would result in a no lost-workday injury, that one person was affected, that Respondent was highly negligent, that the violation was caused by an unwarrantable failure, and that the proposed civil penalty is, if anything, too low. The Secretary argues that the citation is valid because a roof fall above the anchorage in a working section of the mine occurred and was not reported. (*Secretary's Post-Hearing Brief* at 22-26). The Secretary argues that the Respondent's actions were highly negligent and the result of an unwarrantable failure because the area and time of the violation were extensive, the danger was obvious, there was notice to Respondent of the need to comply, knowledge of the violation, and abatement only occurred after the Order was issued. *Id.* at 28-29. Finally, the Secretary argues that the penalty should be increased to \$14,000.00 in light of the seriousness of the violation. *Id.* at 31.

Respondent contends that Citation No. 8185281 was not validly issued, that it did not exhibit high negligence, that the violation was not the result of an unwarrantable failure, and that the proposed penalty is inappropriate. Respondent argues that the citation was not valid because the alleged violation did not occur in a working section and did not occur above the anchorage. (*Respondent's Post-Hearing Brief* at 17-25). Respondent argues that it was not negligent or guilty of an unwarrantable failure because of several mitigation factors including their lack of knowledge and sincere belief that a report was not necessary in this situation. *Id.* at 26-28. Further, Respondent contends that Howington was not an agent of Respondent. *Id.* at 29.

5. Findings and Conclusions

Order No. 8185281 was issued for an alleged violation of 30 C.F.R. §50.10(d), requiring an operator to contact MSHA within 15 minutes of several specific dangers or "Any other Accident." The regulations further define an "Accident" as, among other things, "An unplanned roof fall at or above the anchorage zone in active workings where roof bolts are in use; or, an unplanned roof or rib fall in active workings that impairs ventilations or impedes passage." 30 C.F.R. §50.2(h)(8). Therefore, the threshold issue in determining if this standard applies is whether the alleged roof fall occurred in active workings. If the cited condition did not occur in active workings then it is not necessary to determine whether the alleged fall occurred above the

anchorage zones, impaired ventilation, or impeded passage because the alleged fall would not be reportable.

Both the Mine Act and the Secretary's regulations define active workings as "any place in a coal mine where miners are normally required to work or travel" 30 U.S.C. § 878(g)(4) and 30 C.F.R. § 75.2. In this case, the Secretary argues that the #2 Entry, where the cited condition was found, was an active working section where miners were normally required to work and travel. Specifically, Simmons testified that Respondent was required to travel one of the entries in its entirety to conduct inspections. (Tr. 74, 77, 97, 118). The Commission has held that areas that are required to be inspected are active workings. See e.g. *Consolidation Coal Company*, 22 FMSHRC 340, 348 (Mar. 2000) and *Emerald Mines*, 7 FMSHRC 437, 440-41 (Mar. 1985).

Respondent countered that the Plan only required Respondent to inspect one of the entries in the CJ&L, that it always inspected the entry with the fan housing, and that the #2 Entry was dangered-off such that no one was required to enter the area. It is undisputed that Respondent was only required to inspect one of the three entries; even Simmons testified that this was the case. (Tr. 98, 114, 139, 171-172, 177). Respondent's witnesses testified that they always chose to inspect the entry with the fan housing because it had an unobstructed path to inspect in its entirety. (Tr. 129, 171-172, 177). Howington also testified that while the entries were dangered-off, there was a clear path in the fan house entry allowing it to be inspected in its entirety. (Tr. 160). Simmons was the only witness who testified that anyone inspected Entry #2 in its entirety. Specifically, he claimed that he and Howington had done so on more than one occasion. (Tr. 78-79). Howington did not recall that event. (Tr. 151).

Respondent claims that it did not inspect the #2 Entry because that entry was dangered-off. This is the crux of the issue here. The Commission has held that when an area has been dangered-off it is no longer an active working. *Cyprus Empire Corporation*, 12 FMSHRC 911 (May 1990). Even Simmons conceded during cross-examination, if the #2 Entry had been dangered-off and the examiners were aware of that fact the area would not be an active working. (Tr. 115-116). Respondent presented evidence to show that the area was dangered-off. (Tr. 126, 177). Further, Ratliff testified that everyone was aware that the #2 Entry was dangered off. (Tr. 128). Howington confirmed that the #2 Entry was dangered off and that this was known by the examiners. (Tr. 149, 160). Ratliff, Howington, and Addair disagree about how the #2 Entry was dangered off, but all agree that no one was supposed to enter the area.

The only witness who testified that the miners were regularly required to enter the #2 Entry was the one witness, Simmons, who did not work there. (Tr. 85-88). In addition to Simmons testimony, the Secretary provided three arguments in his brief explaining why this area was not dangered-off. First, the Secretary argued that the timbers did not indicate that the area was dangered off. Specifically, he pointed to Simmons testimony that timbers were designed to allow people to enter the area and that Simmons, Howington, & Addair did so. *Secretary's Post-Hearing Brief* at 24. However, I note that the Secretary's argument that Simmons, Howington, and Addair traveled beyond the timbers is not based on the record. *Id.* It is true that Simmons testified he and Howington went past the timbers into the area. (Tr. 78-79). However, The Secretary cites to page 151 of the transcript for the proposition that Howington confirmed that assertion. On that page of the transcript, Howington specifically stated that he did not travel

beyond the timbers with Simmons. In fact, he also stated that he knew never to go beyond the timbers and stated he could not recall traveling to the portal in the #2 Entry. (Tr. 152-153, 160). Further, the Secretary cites to page 179 for the proposition that Addair stated he traveled beyond the timbers. However, that page deals with Entry #1, not Entry #2. (Tr. 179). Addair never said he traveled beyond the timbers in Entry #2; in fact he was emphatic that the area was dangered-off. (Tr. 172-173). The Secretary did not prove by a preponderance of the evidence that the timbers were placed in Entry #2 to allow miners to travel in that area or that miners regularly worked or traveled there. I do not believe inspector's entrance into a dangered-off area can, on its own, transform a dangered-off area into an active working section.

The Secretary also argues that there is a conflict in the in the testimony about what measures were taken to danger off Entry #2. *Secretary's Post-Hearing Brief* at 25. The Secretary therefore asserts that the area was not actually dangered off. Specifically, some witnesses testified that there were timbers across all three entries. *Id.* Some witnesses testified that there were danger signs at Entry #2 (or all of the Entries) while others did not. *Id.* The Secretary's argument confuses appearance for substance. The Secretary is correct that the three witnesses who worked at the mine differed on how the area was dangered off.¹² Furthermore, it is true that some of the witnesses testified that there were signs and/or timbers across all of the entries. (Tr. 114-115). However, Ratliff, Howington, and Addair all testified unequivocally that the #2 Entry was dangered off with timbers and that they knew not to enter the area. (Tr. 126, 128, 149, 160, 177). Further, they all testified that while there were timbers and blocked off areas in the other entries, there was an open travel path in Entry #3. (Tr. 129, 160, 174).¹³ Clearly the miners who worked at #36 were aware of the active and inactive status of the various entries. Simmons was the only witness who was not aware that it was impermissible to enter the #2 Entry. Simmons' belief was likely the result of confusion or misunderstanding and not because the area was active.

Finally, the Secretary argues that, as long as the CJ&L was open, Respondent was required to maintain and examine the area. The Secretary asserts that before the alleged fall the examiners could have traveled any of the entries and nothing would stop them from continuing to do so after the fall. As previously stated, it is clear that the miners who worked at #36 were aware of the conditions in the CJ&L and that they were not permitted to go beyond the timbers in the #2 Entry. The Secretary provides no evidence to support his claim that the determination that this area was not active was made only for the purposes of the hearing or that miners regularly entered the area behind the timbers in Entry #2.

¹² Ratliff testified that he placed timber to block the #2 Entry, wrote in chalk on the rib, and place a "do-no-enter" sign. (Tr. 127-128). Howington testified that there were timbers across the entry. (Tr. 159). Addair testified that there was a piece of belt with the word "danger" written on it. (Tr. 172-173).

¹³ I find that Howington's testimony on these points particularly probative because he no longer works for the Respondent and was even subpoenaed by the Secretary to testify.

I do not find any of the Secretary's arguments to be compelling. In light of the evidence, I find that the #2 Entry was dangered-off and therefore not an active working. As a result, 30 C.F.R. §50.10(d) does not apply in this matter as there was no reportable accident as defined in 30 C.F.R. §50.2(h)(8). Therefore, I find that the Secretary has not proven by a preponderance of the evidence that a violation has occurred. This Order is **DISMISSED** and no civil penalty will be levied.

ORDER

In light of the affirmation of Order No. 8173479 and the dismissal of Order No. 8185281, Respondent, Dominion Coal Corporation, is hereby **ORDERED TO PAY** the Secretary of Labor the sum of \$4,000.00 within 30 days of the date of this decision.¹⁴

/s/ William S. Steele
William S. Steele
Administrative Law Judge

Distribution: (U.S. Certified Mail)

Emily K. Hargrove, Esq. & Daniel D. Povich, Esq., U.S. Department of Labor, Office of the Solicitor, 1100 Wilson Blvd., 22nd Floor West, Arlington, VA 22209.

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¹⁴ Payment should be sent to: MINE SAFETY AND HEALTH ADMINISTRATION, U.S. DEPARTMENT OF LABOR, PAYMENT OFFICE, P. O. BOX 790390, ST. LOUIS, MO 63179-0390

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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June 6, 2013

SECRETARY OF LABOR,	:	TEMPORARY REINSTATEMENT
MINE SAFETY AND HEALTH	:	PROCEEDING
ADMINISTRATION (MSHA),	:	
on behalf of DARRICK PIPER,	:	Docket No. KENT 2013-751-D
Complainant	:	MSHA Case No.: MADI-CD 2013-16
	:	
v.	:	
	:	
KENAMERICAN RESOURCES, INC.,	:	Mine: Paradise #9
Respondent	:	Mine ID: 15-17741

DECISION AND ORDER
REINSTATING DARRICK PIPER

Appearances: Donna E. Sonner, Esq., U.S. Department of Labor, Office of the Solicitor, Nashville, Tennessee, representing the Secretary of Labor (MSHA) on behalf of Darrick Piper

Todd C. Myers, Esq., Rajkovich, Williams, Kilpatrick & True, PLLC, Lexington, Kentucky, representing KenAmerican Resources, Inc.

Before: Judge Andrews

Pursuant to section 105(c)(2) of the Federal Mine Safety and Health Act of 1977 (“Act”), 30 U.S.C. § 801, *et. seq.*, and 29 C.F.R. §2700.45, the Secretary of Labor (“Secretary”) on May 14, 2013, filed an application for temporary reinstatement of Darrick Piper (“Piper” or “Complainant”) to his former position with KenAmerican Resources, Inc., (“KenAmerican” or “Respondent”) at the Paradise #9 Mine pending final hearing and disposition of the case.

On February 1, 2013, Piper filed a Discrimination Complaint alleging that his December 31, 2012 termination was motivated by his protected activity.¹ The Secretary filed an application for temporary reinstatement on March 19, 2013. On April 5, 2013, the Secretary

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

submitted an unopposed motion to dismiss the application, and an Order granting the dismissal was issued on April 8, 2013.

On March 27, 2013, Piper filed a second Discrimination Complaint based upon KenAmerican's failure to recall him after layoff.² The Secretary initiated a second investigation and filed a renewed application for temporary reinstatement on May 14, 2013. In the Secretary's application, he represents that the complaint was not frivolously brought, and requests an Order directing Respondent to reinstate Piper to his former position as a shuttle car driver at the Paradise #9 Mine.

Respondent filed a request for hearing on May 22, 2013. An expedited hearing was held in Madisonville, Kentucky on May 30, 2013. The Secretary presented the testimony of the Complainant, and the Respondent had the opportunity to cross-examine the Secretary's witness, and present testimony and documentary evidence in support of its position. 29 C.F.R. §2700.45(d).

Respondent also filed a Motion to Dismiss just prior to the hearing with a brief on the issue of whether Piper was a "miner" at the time of the alleged discrimination. In his pre-hearing brief, the Secretary opposed the motion. At the hearing, the parties restated their positions on the issue. As will be explained in greater detail herein, the Motion to Dismiss should be, and is, **DENIED**.

For the reasons set forth below, I grant the application and order the temporary reinstatement of Piper.

Temporary Reinstatement

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).

With respect to temporary reinstatement, section 105(c)(2) provides, "if the Secretary finds that such complaint was not frivolously brought, the Commission, on an expedited basis upon application of the Secretary, shall order the immediate reinstatement of the miner pending final order on the complaint." 30 U.S.C. 815(c)(2). In adopting section 105(c), Congress

² The terms "recall" and "rehire" are used throughout the decision synonymously.

indicated that a complaint is not frivolously brought if it “appears to have merit.” S. Rep. No. 181, 95th Cong., 1st Sess. 36-37 (1977), *reprinted in* Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong. 2nd Sess., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 624-25 (1978). In addition to Congress’ “appears to have merit” standard, the Commission and the courts have also equated “not frivolously brought” to “reasonable cause to believe” and “not insubstantial.” *Sec’y of Labor on behalf of Price v. Jim Walter Res., Inc.*, 9 FMSHRC 1305, 1306 (Aug. 1987), *aff’d*, 920 F.2d 738, 747 & n.9 (11th Cir. 1990).

Temporary Reinstatement is a preliminary proceeding, and narrow in scope. The plain language of the Act states that “if the Secretary finds that such complaint was not frivolously brought, the Commission, on an expedited basis upon application of the Secretary, shall order the immediate reinstatement of the miner pending final order on the complaint.” 30 U.S.C. § 815(c)(2). The judge must determine whether the complaint of the miner “is supported substantial evidence and is consistent with applicable law.”³ *Sec’y of Labor on behalf of Peters v. Thunder Basin Coal Co.*, 15 FMSHRC 2425, 2426 (Dec. 1993). Neither the judge nor the Commission is to resolve conflicts in testimony at this stage of the case. *Sec’y of Labor on behalf of Albu v. Chicopee Coal Co.*, 21 FMSHRC 717, 719 (July 1999). A temporary reinstatement hearing is held for the purpose of determining “whether the evidence mustered by the miners to date established that their complaints are nonfrivolous, not whether there is sufficient evidence of discrimination to justify permanent reinstatement.” *Jim Walter Resources*, 920 F.2d at 744. “Congress intended that the benefit of the doubt should be with the employee, rather than the employer, because the employer stands to suffer a lesser loss in the event of an erroneous decision since he retains the services of the employee until a final decision on the merits is rendered.” *Sec’y of Labor, on behalf of Curtis Stahl v. A&K Earth Movers Inc.*, 22 FMSHRC 233, 237 (ALJ)(Feb. 2000).

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

However, in the instant matter, Piper need not prove a *prima facie* case of discrimination with all of the elements required at the higher evidentiary standard needed for a decision on the merits. Rather, a similar analytic framework is considered within the “reasonable cause to believe” standard. Thus, there must be “substantial evidence” of both the applicant’s protected activity and a nexus between the protected activity and the alleged discrimination. The

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

Commission has acknowledged that it is often difficult to establish a “motivational nexus between protected activity and the adverse action that is the subject of the complaint.” *Secretary of Labor on behalf of Baier v. Durango Gravel*, 21 FMSHRC 953, 957 (Sept.1999). To establish the nexus, the Commission has identified these indications of discriminatory intent: (1) hostility or animus toward the protected activity; (2) knowledge of the protected activity; and (3) coincidence in time between the protected activity and the adverse action. *Secretary of Labor on behalf of Lige Williamson v. CAM Mining, LLC*, 31 FMSHRC 1085, 1089 (Oct. 2009). The Commission has further considered the disparate treatment of the miner in analyzing the nexus requirement. *Secretary of Labor on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2510 (Nov. 1981), *rev'd on other grounds*, 709 F.2d 86 (D.C. Cir. 1983).

The evidence⁴

On March 27, 2013, Piper filed a Discrimination Complaint, which included a brief Discrimination Report, which stated:

I was laid off on 12/31/12 due to Excessive Absenteeism. Some of [the] absences were due to work related injuries that were being handled by Workers Compensation and were counted against me in the Excessive Absenteeism program and should not have been. Since the time of my lay off others that were laid off at the same time as I was, for the same reason (Excessive Absenteeism) have recently been called back to work. I was told on March 27, 2013 that the Company could not talk to me about this and that I would not be recalled due to the fact that I have filed a previous 105c Complaint against the Company. At this time I am requesting temporary reinstatement and back pay from the date of lay off.

GX-5.

Following the filing of the complaint, the Secretary performed an investigation and determined that the Complaint was not frivolously brought. On May 14, 2013, the Secretary filed an Application for Temporary Reinstatement of Darrick Piper. GX-2.

Submitted with the Application for Temporary reinstatement was the May 6, 2013 Declaration of Special Investigator Curtis R. Hardison. The Declaration, in pertinent part, is as follows:

⁴The findings of fact are based on the record as a whole, including exhibits admitted, and witness testimony. Any failure to provide detail as to each witness’s testimony, any admitted exhibit, or other evidence of record is not to be deemed a failure on my part to have fully considered it. The fact that some evidence is not discussed does not indicate that it was not considered. *See Craig v. Apfel*, 212 F.3d 433, 436 (8th Cir. 2000)(administrative law judge is not required to discuss all evidence and failure to cite specific evidence does not mean it was not considered).

1. I am a Special Investigator employed by the Mine Safety and Health Administration, United States Department of Labor, and I am assigned to the District 10 Office in Madisonville, Kentucky.
2. As part of my responsibilities, I investigate claims of discrimination filed under Section 105(c) of the Mine Act. In this capacity, I have reviewed and gathered information as part of an ongoing investigation arising from a complaint filed by Darrick Piper. My findings as a result of this investigation disclosed the following:
 - a. Darrick Piper began working for KenAmerican in 2007.
 - b. On December 31, 2012, Piper was laid off.
 - c. Piper filed a discrimination complaint with MSHA on February 1, 2013. An application for Temporary Reinstatement was filed on March 19, 2013. That Application was subsequently withdrawn.
 - d. Since the time of Piper's layoff, other employees who were laid off at the same time for the same reason have been called back to work. The other miners who were called back do not have as many miner credentials as he has obtained. He has MET Training, Fire Brigade Training, and can operate the continuous miner, scoop, roof bolter and shuttle car.
 - e. On or about March 27, 2013, Mr. Piper called Ron Winebarger at KenAmerican and asked when was going to get his job back. Winebarger told him he filed a case against KenAmerican and he could not speak to him. Mr. Piper then filed a discrimination complaint on March 27, 2013.
3. Based upon my investigation of these matters, I have concluded that Piper engaged in a protected activity when he filed his initial discrimination complaint on February 1, 2013 and that his March 27, 2013 complaint of discrimination was not frivolously brought.

GX-2.⁵

Darrick Piper has 23 years of underground and surface mining experience. Tr. 18-19. He first worked at Beech Creek Energy in Beech Creek, Kentucky for four years, operating the track hoe and dozer at the strip mine. Tr. 19. He then hauled coal for Ray Jones Trucking for 15 years, between 1992 and 2007. Tr. 19.

Piper started working for KenAmerican in 2007. Tr. 20. His first jobs with the company involved shoveling belts and working on the units. Tr. 20. Piper then operated the Fletcher roof bolter, the scoop, the shuttle car, and the miner. Tr. 20. Piper has fire brigade training and Mine Emergency Technician (MET) training. Tr. 21. Out of over 300 miners at the mine, Piper was one of 22 on the fire brigade. Tr. 22.

⁵ The Declaration by the Special Investigator is part of GX-2, however it is also stamped "Exhibit 'A'" on the bottom.

Piper has knee problems and has sustained injuries at work that caused him to take time off. Tr. 40-41. In October 2012, Piper reported to Mine Foreman Jeremy Carroll that he believed that his face boss was using drugs.⁶ GX-2, *Decl. Kirby Smith*. In Piper's February 1, 2013, discrimination complaint, the Special Investigator found that as a result of Piper's complaint he was transferred from the shuttle car to the scoop, a job that exacerbated his knee problems. GX-2, *Decl. Kirby Smith*. Furthermore, Piper's November 2012 evaluation was modified from twos and threes (out of a scale of one to three) to ones and twos. GX-2, *Decl. Kirby Smith*.

Piper was laid off on December 31, 2012, and filed a discrimination complaint on February 1, 2013.⁷ Tr. 23. At the time, 10 other employees were laid off for reasons that Respondent claims were related to economic conditions. Tr. 52, 58. On January 1, 2013, Piper ran into the director of Human Resources, Ronald Winebarger, at a store called Uncle Lee's.⁸ Tr. 34, 53. Winebarger was with his daughter, and Piper asked if the two of them could speak privately. Tr. 53. Winebarger complied and Piper asked Winebarger about his layoff. Tr. 53. Winebarger responded that the primary criterion that was used in his layoff was his excessive absenteeism. Tr. 53. Piper asked about being recalled to work and Winebarger told Piper to check back with him in a couple of weeks. Tr. 34.

⁶ GX- followed by a number refers to a Government Exhibit. RX- followed by a number refers to a Respondent's Exhibit.

⁷ When Piper was laid off, his benefits and compensation were terminated. Tr. 51. Piper received unemployment benefits, which terminated on April 9, 2013 after he got another job. Tr. 37. Piper currently operates a dozer and track hoe for Pollard & Son. Tr. 37. He earns \$16 per hour, with no benefits. Tr. 38. Prior to his layoff, Piper was making at KenAmerican \$22.50 per hour, with an additional three to four hours per day of overtime at \$32.25 per hour. Tr. 42-43. He had health insurance, a 401(k), and other benefits. Tr. 43.

⁸ Ronald D. Winebarger is the director of Human Resources at KenAmerican and he testified at the hearing. Tr. 48. In his capacity as director of Human Resources, Winebarger hires and terminates employees, handles benefits, helps employees understand the handbook, administers discipline, and generally helps employees with the day-to-day understanding of the operations of the mine. Tr. 48.

Winebarger has a master's degree in business administration from the Oakland City University. Tr. 49. He is a certified underground and surface miner and mine foreman, with over 20 years of underground coal mining experience. Tr. 49. He has run all of the underground equipment and has participated in all aspects of underground mining. Tr. 49-50.

Winebarger is both an underground and surface instructor. Tr. 49. He is a mine emergency technician and instructor, as well as a certified CPR instructor. Tr. 49. He is certified in dust sampling calibration and maintenance and an impoundment inspector and instructor. Tr. 49.

In February, Piper went to KenAmerican and spoke with the general manager, Randy Wiles. Tr. 34-35. Wiles told Piper, “you may be the best miner man that we have down there,” and told him that “there’s a good chance that you will get your job back.” Tr. 35. Wiles told Piper that the layoffs were due to the economic conditions and that the first to get laid off were the individuals with excessive days off. Tr. 36. Piper also spoke with Winebarger, and Winebarger described the conversation as being similar to the one they had at Uncle Lee’s. Tr. 54.

Winebarger testified that there was a hiring freeze for a few months after the layoff. Tr. 57. After there was enough attrition through layoff or voluntary quits, KenAmerican lifted the hiring freeze at the end of February. Tr. 57. The general manager approached Winebarger and told him that they needed to start rehiring, and to first consider the individuals that were laid off. Tr. 58. Winebarger reviewed the 10 files of the individuals that were laid off, including Piper’s. Tr. 58. Piper never filed a formal application for reemployment with KenAmerican. Tr. 37. He then took the files to Joe Manning, the general mine foreman, and they went through each file together, looking primarily at the individual’s record of excessive absenteeism. Tr. 58-59. If they felt individuals would not continue to have absenteeism problems, then they invited those individuals in to talk with them. Tr. 58-59. The individuals called in were Bobby Morris, Tony Young, Billy Lear, Lawrence Bowman, James Duncan, and Justin Bennett. Tr. 59-61. Winebarger did not have counsel present when he talked with these individuals. Tr. 64. He testified that he would contact counsel to be present if he needed to contact Piper. Tr. 64.

Those individuals came and spoke with Winebarger and Manning. Tr. 59. They were asked general questions about what they were doing, whether they had found other employment, and about their feelings towards reemployment at KenAmerican. Tr. 59. Winebarger offered reemployment to Morris, Young, Lear and Duncan. Tr. 60. Morris, Lear, and Young accepted the offer of reemployment and came back to work at KenAmerican. Tr. 60. Morris was a roof bolt operator, Young was a shuttle car and scoop operator, and Lear was a shuttle car operator. Tr. 61. These other employees did not have fire brigade or MET training, nor did they have the same experience in operating the roof bolters, scoops, or miner. Tr. 25.

Other individuals with excessive absenteeism were laid off and recalled. Tr. 64. None of those individuals filed discrimination complaints. Tr. 64. Winebarger testified that this was because Piper had a history of absence problems stretching back to 2009, and they became worse in the end of 2012. Tr. 65.

KenAmerican had two absenteeism policies. Tr. 66. An employee is found to be in violation of the first policy if he has three or more occurrences of absenteeism and has an absence rate above 2.5%.⁹ Tr. 66-67. An employee is found to be in violation of the second absenteeism program if he has two unexcused absences within a 60-day period. Tr. 67. When

⁹ Winebarger testified that an “occurrence” is defined as “either one absence by itself or a group of absences due to a single event.” Tr. 66.

that occurs, the employee is labeled an “irregular worker” and retains the designation unless six months pass without an additional absence. Tr. 67. Winebarger testified that at the time of the layoff, Piper was in violation of both policies. Tr. 67. Some of these absences were due to a work-related knee injury, which Piper explained to HR at the time of the absences. Tr. 40-41.

Billy Lear, who was laid off at the same time as Piper and subsequently recalled, was also in violation of both policies. Tr. 67. He was recalled over Piper because he had no absences in the prior 12 months and was close to the one-year anniversary of his two unexcused absences. Tr. 68. The two other workers that accepted the offer of recall were not in violation of either policy. Tr. 68. The worker who declined the offer of recall was in violation of the absenteeism policy, but he did not have an absence in the previous 12 months. Tr. 68.

On March 27, 2013, after hearing that three of the individuals that were laid off with Piper were recalled, Piper called Winebarger. Tr. 23. Winebarger told Piper that he could not speak to him because Piper had filed a complaint against the company.¹⁰ Tr. 23. Winebarger testified that he responded in this manner because KenAmerican counsel have previously advised him to have counsel present when speaking with anyone that is a party to litigation against the mine. Tr. 55. Piper understood Winebarger’s comment to mean that he was being “blackballed.” Tr. 41-42:

Q. When you had the conversation with Mr. Winebarger on or about March 27th, I know there’s been a discussion as to your summary of that conversation and this complaint.

When he told you that he couldn’t talk to you, what did you—since you had filed a complaint against them, what did you think that that meant?

A. Well, at that time, in that given time, it just really devastated me at that time, you know, saying that you had filed a lawsuit against the company and now we can’t even communicate with each other, now what have I done, you know?

Q. And if you can’t communicate, can you get your job back?

A. No. You cannot do that. So at this period of time, I thought, well, they don’t want to talk to me because I have drawn a lawsuit against them, so then that made me feel like I was being blackballed.

Tr. 41-42.

¹⁰ Winebarger testified that he told Piper the following: “I can’t talk to you right now. You have a discrimination complaint against us, and I can’t talk to you about this right now.” Tr. 55. Winebarger denied ever saying that Piper would never be recalled because of his complaint. Tr. 56.

After speaking with Winebarger, Piper filed a discrimination complaint with MSHA on March 27, 2013. Tr. 24; GX-5.

Contentions of the Parties

The Secretary argues that the scope of a temporary reinstatement hearing is limited to a determination of whether the complaint was frivolously brought. Under that standard, the Secretary maintains that Piper should be reinstated to his previous position at KenAmerican. The Secretary further argues that Piper was a “miner” for the purposes of his discrimination complaint under the Act. The Secretary connects the several complaints that Piper made, referring to them as “directly and inextricably linked,” and argues that but for his initial complaint he would have been recalled to work. *Sec. Pre-Hearing Brief*, 10-11. The Secretary argues that in order to effectuate the safety purposes of the Act, the term “miner” in 105(c) must include a miner who is not currently working in the mine.

The Respondent argues that Piper was not a “miner” under the Act, but rather an applicant for employment, and therefore is not entitled to temporary reinstatement. Citing *Young v. Lone Mountain Processing, Inc.*, 20 FMSHRC 927, the Respondent maintains that temporary reinstatement is not an available remedy. Piper’s lay off meant he was a former employee and had lost his status as a “miner” when he filed the March 27, 2013 discrimination complaint. Therefore, according to Respondent, the Act only allows for a full discrimination hearing.

Findings and conclusions

Protected activity and “miner” status

Piper engaged in protected activity when he filed a discrimination complaint with MSHA on February 1, 2013. GX-1. Section 105(c)(1) prohibits discrimination against a miner in exercising his statutory rights. 30 U.S.C. §815(c)(1). Furthermore, it specifically prohibits discrimination based on a miner having “instituted or caused to be instituted any proceeding under or related to this chapter...or because of the exercise by such miner, representative of miners or applicant for employment on behalf of himself or others of any statutory right afforded by this chapter.” *Id.* See also *Secretary on behalf of Strattis v. ICG Beckley, LLC*, 32 FMSHRC 614, 616 (June 2010)(ALJ)(holding that filing a 105(c) discrimination complaint is a protected activity for which operators are barred from retaliating).

In the instant case, Piper also engaged in protected activity when he complained about his fire boss using drugs and when he missed work due to injuries. GX-2, *Decl. Kirby Smith*. See *James Eldridge v. Sunfire Coal Company*, 5 FMSHRC 408, 464 (March 1983)(miner’s work refusal protected when he refused to work beyond his normal shift because of his communicated concerns that he was “too tired and exhausted” to continue working). What followed was a series of protected activities and resulting adverse employment actions that each relate back to the former. Piper was laid off and filed a Section 105(c) complaint alleging that

the layoff was discriminatory. Tr. 23. Then, as a result of his filing a discrimination complaint, Piper was not recalled when other miners with lesser experience or credentials were recalled. These protected activities cannot be viewed in isolation, as the Respondent insists, because each flows from the previous one.

The Respondent argues that since Piper's second discrimination complaint concerning his not being recalled was filed after he was laid off, then Piper was not a "miner," and therefore not entitled to temporary reinstatement. Respondent argues that Piper was an "applicant for employment," and cites to *Secretary of Labor, obo Ray Young v. Lone Mountain Processing*, 20 FMSHRC 927 (Sep. 1998), for the proposition that applicants for employment are not entitled to temporary reinstatement. In *Lone Mountain Processing*, the Commission held that an applicant for employment is not entitled to temporary reinstatement. *Id.* at 930. However, the facts in *Lone Mountain* are significantly different than the facts at hand, making the case inapposite to Piper's situation. In *Lone Mountain*, the complainant was employed at one mine that was not party to the proceedings and he was an applicant at a second mine. *Id.* at 927-928. His protected activity occurred during the application process at the second mine, where he had never worked. *Id.* With regard to this second mine, there was no question that the complainant was an applicant for employment, as he had no previous employment relationship. I specifically find that *Lone Mountain* is distinguishable; hence it does not control the outcome in this case.¹¹

¹¹ Even under the holding in *Lone Mountain*, Piper is not precluded from pursuing temporary reinstatement. However, it may be worthwhile, upon presentation of an appropriate case or controversy, to revisit the holding in *Lone Mountain*. Former Commissioner Marks argued in his dissent, and the undersigned agrees, that the intent of Congress in Section 105(c)(2) is ambiguous. 20 FMSHRC at 934-935. Commissioner Marks noted that though the text of the Section alternates between "any miner or applicant for employment or representative of miner" and "miner," the text repeatedly uses the term "such" to relate back to previous sentences:

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

30 U.S.C. 815(c)(2)(emphasis added). The combination of the alternating subject and the use of "such" to continuously relate back creates a significant ambiguity in the text. As such,
(continued...)

In the instant case, Piper was a “miner” within the definition of the Mine Act when he began engaging in the protected activities that set the chain of claimed discrimination and adverse actions in motion.¹² His second discrimination complaint of March 27, 2013 is inextricably linked to his employment at Respondent’s mine and his first discrimination complaint, which Piper filed for the alleged discrimination suffered while employed at Respondent’s mine. GX-5. Indeed, the subject of Piper’s second discrimination complaint concerned his not being recalled following what he believed to be a discriminatory layoff. GX-5. Under these circumstances, it would make little sense to analyze Piper’s second discrimination complaint in isolation from the chain of events that led to the instant discrimination complaint. As long as this complaint of discrimination relates back to when Piper was a “miner,” then he is eligible for temporary reinstatement. Under Respondent’s argument, miners could too easily be stripped of their status as “miners” and therefore lose a significant protection that is at the heart of the Mine Act.¹³

Adverse Action

The Commission has defined “adverse action” as:

“[A]n action of commission or omission by the operator subjecting the affected miner to discipline or a detriment in his employment relationship.” 601 F.3d at 428 (quoting *Sec’y on behalf of Jenkins v. Hecla-Day Mines Corp.*, 6 FMSHRC 1842, 1847-48 (Aug. 1984)). At the same time, the Commission has recognized that, while “discrimination may manifest itself in subtle or indirect forms of adverse action,” at the same time “an adverse action ‘does not mean any action which an employee does not like.’” *Hecla-Day Mines Corp.*, 6 FMSHRC at 1848 n.2 (quoting *Fucik v. United States*, 655 F.2d 1089, 1096 (Ct.

¹¹ (...continued)

deference should be accorded to “an agency’s interpretation of the statute it is charged with administering when that interpretation is reasonable.” *Energy West Mining Co.*, 40 F.3d 457, 460 (D.C. Cir. 1994)(citing *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984)). However, it is understood and emphasized that the majority opinion in *Lone Mountain* now stands as precedent.

¹² “Miner” is defined generally in Section 3(g) as “any individual working in a coal or other mine.” 30 U.S.C. 802(g).

¹³ 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).

Cl. 1981)). Consequently, where the action alleged to be adverse against the miner is not self-evidently so - such as a discharge or suspension would be - the Commission will closely examine the surrounding circumstances to determine the nature of the action. *Id.* at 1848. “Determinations as to whether an adverse action was taken must be made on a case-by-case basis.” *Id.* at 1848 n.2.

Secretary of Labor, obo Lawrence L. Pendley v. Highland Mining Co., 34 FMSHRC 1919, 1930 (Aug. 2012). Under this definition, the Respondent’s failure to recall, or even seriously reconsider, Piper was an adverse action. Piper was among 10 employees that were laid off on December 31, 2012. Tr. 52. When the hiring freeze was lifted in late February, the general manager told Winebarger that the company needed to start rehiring and that he should begin with the miners that were laid off. Tr. 58. Six of the 10 laid off employees were called in for an interview, and Piper was not among them. Tr. 59-61. None of the individuals invited for interview had filed discrimination complaints. Tr. 64. Winebarger testified that the interviews were informal and he did not have counsel present. Tr. 59, 64. However, if he had invited Piper for an interview, he would have had counsel present for the meeting. Tr. 64. Of these six individuals invited to interview, four were offered their jobs back, and three accepted the offer. Tr. 60. These employees did not have fire brigade or MET training, as Piper did. Tr. 25. They also did not have the same experience as Piper in operating the roof bolters, scoops, or miner. Tr. 25.

Winebarger testified that the primary reason that Piper was not considered for recall was because he was in violation of both of the operator’s absenteeism policies. Tr. 67. However Billy Lear, the employee recalled as a shuttle car driver (which was also Piper’s position), was also in violation of both of the absenteeism policies. Tr. 67. Winebarger explained that Lear’s record of absenteeism was improving when he was laid off and Piper’s was getting worse. Tr. 65, 68. However, Piper explained that the absences prior to his layoff were the result of his work-related knee injury. Tr. 40-41.

Piper began working for Pollard & Son on April 9, 2013, and is currently earning \$16 per hour, with no benefits, at his job operating the track hoe and dozer. Tr. 37. Had Piper been recalled to his position operating the shuttle car at KenAmerican, he would be earning \$22.50 per hour (plus an additional three to four hours per day of overtime at \$32.25 per hour) and would have health insurance, a 401(k) plan, and other benefits.¹⁴ Tr. 42-43. The Respondent’s

¹⁴ There is some inconsistency over Piper’s rate of pay. At hearing, Piper testified that he earned \$22.50 per hour in regular pay and \$32.25 per hour in overtime pay. Tr. 42-43. In his February 1, 2013 Discrimination Complaint, Piper reported that he earned \$21.50 per hour in regular pay and \$33.00 per hour in overtime pay. GX-1. In his March 27, 2013 Discrimination Complaint, Piper reported that he earned \$21.00 per hour in regular pay and \$32.25 per hour in overtime pay. GX-5. The precise amount is not essential to the holding because each amount is significantly more than his current rate of pay.

failure to recall Piper was a significant detriment in his employment relationship and therefore constituted an adverse action.¹⁵

Nexus between the protected activity and the alleged discrimination

Having concluded that Piper engaged in protected activity, the examination now turns to whether that activity has a connection, or nexus to the subsequent adverse action, namely the failure to recall Piper for employment at KenAmerican.

The Commission has recognized that a nexus between protected activity and a subsequent adverse action is rarely supplied exclusively by direct evidence. *Phelps Dodge Corp.*, 3 FMSHRC at 2510. More often, the determination of nexus is made by the trier of fact drawing an inference from circumstantial evidence. *Id.* In the instant case, inferences may be drawn from the evidence presented. The Commission has identified several circumstantial indicia of discriminatory intent, including: (1) hostility or animus toward the protected activity; (2) knowledge of the protected activity; and (3) coincidence in time between the protected activity and the adverse action. *CAM Mining, LLC*, 31 FMSHRC at 1089. The Commission has also stated that it is appropriate for the judge to look at instances of disparate treatment of the complainant. *See, e.g., Phelps Dodge Corp.*, 3 FMSHRC at 2510. It is not necessary, however, to establish all four indications of discriminatory intent. For example, where there is knowledge of the protected activity and coincidence in time between the protected activity and the adverse action, a causal connection is supported. *Sec’y of Labor, on behalf of Yero Pack v. Cimbar Performance Minerals*, 2012 WL 7659706, *4 (ALJ)(Dec. 2012).

Knowledge of the protected activity

Winebarger testified that he had knowledge of Piper’s protected activity of filing the discrimination complaint against KenAmerican. Tr. 55. Indeed, it was because of his knowledge of the complaint that Winebarger refused to speak with Piper on the phone on March 27, 2013. Tr. 55.

Hostility or animus towards the protected activity

“Hostility towards protected activity—sometimes referred to as ‘animus’—is another circumstantial factor pointing to discriminatory motivation. The more such animus is specifically directed towards the alleged discriminatee’s protected activity, the more probative weight it carries.” *Secretary of Labor on behalf of Chacon v. Phelps Dodge Corporation*, 2 FMSHRC 2508, 2511 (Nov. 1981)(citations omitted). I find significant animus towards the protected activity in Winebarger’s phone conversation with Piper. Prior to filing his complaint, Winebarger told Piper to keep checking in with him about the possibility of being recalled. Tr.

¹⁵ That Piper did find other employment is not a bar to reinstatement and the income is not relevant in the context of temporary reinstatement. *Sec’y of Labor v. North Fork Coal Corp.*, 33 FMSHRC 589, 592 (March 2011).

34. However, after filing the February 1, 2013, discrimination complaint, Winebarger told Piper that he could not speak to him because he filed a discrimination complaint. Tr. 23, 55-56. Winebarger testified that since Piper filed a complaint against the company, he meant that he could not speak with Piper without counsel present. Tr. 55. However, Winebarger did not relay the need for counsel. Tr. 55. Instead, Winebarger simply stated that he could not speak to Piper. Tr. 55. Winebarger is the individual at the company responsible for all employment decisions. Tr. 48. Having refused to speak to Piper, it was not clear how it would be possible for Piper to be recalled to work. Tr. 41-42. Therefore, Piper's conclusion that he was being blackballed from the mine for bringing a discrimination complaint was reasonable. Tr. 41-42.

I also find circumstantial evidence of animus in Winebarger's decisions not to call Piper in for an interview or recall him. Piper had more certifications, training, and experience than the other miners that were called in for interview and the miners that received offers of reemployment. Tr. 25. Several of these miners were in violation of one or both of the absentee policies, just like Piper. Tr. 64, 68. However none of the miners called in for interview or eventually recalled had filed discrimination complaints. Tr. 64. Therefore, I find the failure of the Respondent to interview and recall Piper to be circumstantial evidence of animus towards his protected activity.

Coincidence in time between the protected activity and the adverse action

With regards to coincidence in time between the protected activity and the adverse action, the Commission has noted, "[a] three week span can be sufficiently close in time", especially when there is evidence of intervening hostility, animus or disparate treatment. *CAM Mining, LLC*, 31 FMSHRC at 1090. Likewise, in *All American Asphalt*, a 16-month gap existed between the miners' contact with MSHA and the operator's failure to recall miners from a layoff; however, only one month separated MSHA's issuance of a penalty resulting from the miners' notification of a violation and that recall failure. *Sec'y of Labor on behalf of Hyles v. All American Asphalt*, 21 FMSHRC 34 (Jan. 1999). Similarly, in *Pamela Bridge Pero v. Cyprus Plateau Mining Corp.*, the Commission found a five-month gap to constitute close temporal proximity between the protected activity and the adverse employment action. 22 FMSHRC 1361, 1365 (Dec. 2000). The Commission stated "We 'appl[y] no hard and fast criteria in determining coincidence in time between protected activity and subsequent adverse action when assessing an illegal motive. Surrounding factors and circumstances may influence the effect to be given to such coincidence in time.'" *Sec'y of Labor on behalf of Hyles v. All American Asphalt*, 21 FMSHRC 34, 47 (Jan. 1999)(quoting *Hicks v. Cobra Mining, Inc.*, 13 FMSHRC 523, 531 (Apr. 1991).

In the instant case, the protected activity occurred on February 1, 2013 when Piper filed his first discrimination complaint. Tr. 23. The hiring freeze was lifted in late February, and the adverse action of not inviting him for an interview and not recalling him began at that time. Tr. 57. I find that this several-week span between the protected activity and adverse action is sufficiently close in time.

Disparate Treatment

“Typical forms of disparate treatment are encountered where employees guilty of the same, or more serious, offenses than the alleged discriminatee escape the disciplinary fate which befalls the latter.” *Secretary of Labor on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2512 (Nov. 1981). In the instant case, I find evidence of disparate treatment in the fact that other miners with lesser qualifications and records of absenteeism who had not filed discrimination complaints were invited for interview and recalled, while Piper was not. Tr. 25, 64, 68.

Conclusion

At all times relevant to this decision, Complainant was a “miner” for the purpose of section 105(c) of the Act. The Discrimination Complaint of March 27, 2013 appears to have merit, and the Secretary has carried his burden of showing that Piper’s complaint was not frivolously brought. I find that temporary reinstatement of Piper is warranted. No inferences should be drawn regarding the ultimate disposition of the complaint in any subsequent proceeding on the merits.

ORDER

Based on the above findings, the Secretary’s Application for Temporary Reinstatement is granted. Accordingly, KenAmerican Resources is **ORDERED** to provide immediate reinstatement to Darrick Piper, at the same rate of pay for the same number of hours worked, and with the same benefits, as at the time of his discharge.

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

/s/ Kenneth R. Andrews
Kenneth R. Andrews
Administrative Law Judge

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June 6, 2013

UNITED MINE WORKERS OF AMERICA, : DISCRIMINATION PROCEEDING
(UMWA), on behalf of MARK A. FRANKS, :
Complainant, : Docket No. PENN 2012-250-D
: PITT-CD 2012-04
v. :
: :
EMERALD COAL RESOURCES, LP, : Emerald Mine No. 1
Respondent, : Mine ID 36-05466
: :
UNITED MINE WORKERS OF AMERICA, : DISCRIMINATION PROCEEDING
(UMWA), on behalf of RONALD HOY, :
Complainant, : Docket No. PENN 2012-251-D
: PITT-CD 2012-05
v. :
: :
EMERALD COAL RESOURCES, LP, : Emerald Mine No. 1
Respondent. : Mine ID 36-05466

AMENDED DECISION¹

Appearances: Laura Karr, United Mine Workers of America, Triangle, Virginia, for
Complainants
R. Henry Moore, Jackson Kelly, PLLC, Pittsburgh, Pennsylvania, for Respondent

Before: Judge Miller

These cases are before me on complaints of discrimination brought by United Mine Workers of America (“UMWA”), on behalf of Mark A. Franks (“Franks”) and Ronald Hoy (“Hoy”), against Emerald Coal Resources, LP (“Emerald”), pursuant to Section 105(c) of the Federal Mine Safety and Health Act of 1977, as amended, 30 U.S.C. § 815(c) (the “Act”). The parties presented testimony and documentary evidence at a hearing beginning on Wednesday, April 10, 2013 in Pittsburgh, Pennsylvania.

¹ The original decision in this matter was issued on June 3, 2013. Due to an oversight, Respondent was ordered to make payment to the Complainants, post this decision and the associated notice, and remove mention of the discipline from the employees personnel files within “ten” days of the date of that decision. This Amended Decision corrects these errors and orders that Respondent make payment, post the decision and notice, and remove all references to and reasons for the reprimand within “thirty” days. June 3, 2013 remains as “date of decision” or “date of order” for any calculation of time that relies upon the date the decision was issued.

I. BACKGROUND

Emerald Coal Resources (“Emerald”) operates Emerald Mine No. 1, an underground coal mine in Green County, Pennsylvania. Jt. Stip. ¶ 1. Emerald is a large operator, who is subject to the jurisdiction of the Act. At the time relevant to this case, September through November of 2011, Emerald employed Mark Franks and Ronald Hoy as beltmen at Mine No. 1.

On November 10, 2011 Franks and Hoy filed separate discrimination complaints with the U.S. Department of Labor’s Mine Safety and Health Administration (“MSHA”). In the complaints, the miners stated that Emerald had “targeted”/“singled them out” “for participating and cooperating in a 103(g) Complaint investigation conducted by MSHA.” Complaint of Discrimination, Ex. A pp. 2, 4. Both alleged that they had been “harassed” and “suspended for seven calendar days for cooperating” with MSHA during a 103(g) Hazard Complaint investigation. *Id.* Franks and Hoy seek to be compensated for the seven calendar day suspension, including regular, overtime and holiday pay. Both miners seek to have any reference of this matter removed from their work records and an order entered requiring the mine to stop harassing employees who participate in MSHA investigations. Following the submission of the complaints to MSHA, the matters were investigated by an MSHA special investigator who determined that violations of 105(c) had not occurred. *Id.* at Ex. B pp. 1-4. On April 23, 2012, pursuant to 30 U.S.C § 105(c)(3), the United Mine Workers of America, acting on behalf of Franks and Hoy, filed the instant complaint of discrimination with the Commission.² For the reasons set forth below, I conclude that both Hoy and Franks have demonstrated a *prima facie* case of discrimination and that the defense set forth by the mine operator is pretextual.

II. FINDINGS OF FACT

The findings of fact are based on the record as a whole and my careful observation of the witnesses during their testimony. In resolving any conflicts in testimony, I have taken into consideration the interests of the witnesses, corroboration, or lack thereof, and consistencies or inconsistencies in each witness’s testimony and between the testimonies of witnesses. In evaluating the testimony of each witness, I have relied on his or her demeanor. Any failure to provide detail on each witness’s testimony is not to be deemed a failure on my part to have fully considered it. The fact that some evidence is not discussed does not indicate that it was not considered. *See Craig v. Apfel*, 212 F.3d 433,436 (8th Cir. 2000) (administrative law judge is not required to discuss all evidence and failure to cite specific evidence does not mean it was not considered).

The complaint filed on behalf of Franks and Hoy, along with the joint stipulations filed by the parties and the testimony of Franks and Hoy, demonstrate that, on or about September 22, 2011, an anonymous 103(g) complaint was made to MSHA. Jt. Stip. ¶ 12. The 103(g)

² The single complaint filed with the Commission was done on behalf of both Franks and Hoy. While both Franks and Hoy initially filed separate individual complaints with MSHA, given that their complaints are essentially identical, they are both being addressed in this single decision.

complaint alleged, in part, that a fireboss had not conducted an adequate inspection of a beltline. Following the filing of the anonymous hazard complaint, an MSHA inspector conducted a hazard complaint investigation at Mine No. 1. Jt. Stip. ¶¶ 12-14; Jt. Ex. 1. During the investigation into the hazard complaint, the MSHA inspector spoke to, and took statements from, approximately 34 miners and supervisory personnel, including Franks and Hoy. Jt. Stip. ¶¶ 14-15, 29, 31-33, 38.

The stipulations of the parties, along with the testimony, explain that, on or about September 28, 2011, Franks was approached by MSHA inspector Thomas Bochna, who questioned him about the fireboss issue contained in the hazard complaint. Jt. Stip. ¶ 14. Franks responded that he knew the name of the fireboss who had failed to perform the examination. *Id.* On the same shift, Franks was called into an office with Bochna, Bochna's supervisor, David Severini, the Emerald Compliance manager, William Schifko, an Emerald management trainee, Adam Strimer, the UMWA local president, Anthony Swetz, and the miners' representative, Bruce Plaski. Jt. Stip. ¶¶ 15, 16. Franks was asked if he was comfortable with everyone being in the room, and was informed that Bochna had told Severini that Franks knew the name of the person who had allegedly failed to conduct an adequate beltline inspection. Jt. Stip. ¶¶ 18, 19. Franks refused to provide the name of the person during that meeting, and also refused to do so during a follow-up meeting later that same day and again on the following day. Jt. Stip. ¶¶ 20, 22, 24, 26.

On October 4, 2011, Hoy's supervisor asked Hoy, who was not present for the earlier interviews, to go to Schifko's office. Jt. Stip. ¶ 29. There, Hoy met with, among others, Schifko, MSHA Inspector Severini, MSHA Inspector Tony Setaro, and UMWA Mine Committeeman Douglas Scott, who arrived after Hoy asked for union representation. Jt. Stip. ¶ 33. Severini informed Hoy, as he had Franks, that the mine could not retaliate against Hoy for meeting with MSHA or providing information. *Id.* In response to a question from Severini, Hoy explained that he had observed several occasions when an examiner had not properly examined the conveyor belts, however, Hoy refused to provide the name of the examiner who allegedly had not properly performed the examinations. Jt. Stip. ¶¶ 34, 35.

Hoy testified that, before being called into a meeting with the MSHA investigator and mine management, he had provided the name of the fireboss to the safety committee representative, David Moore. (Tr. 18-19, 20, 21). Hoy understood that, by giving the name to the safety committee representative, he was following the steps required by the union. (Tr. 43). He believed it was up to Moore to follow through, determine if there was a problem, and advise mine management. (Tr. 42, 43). MSHA conducted approximately 34 interviews in which they questioned the adequacy of the inspection on the beltline, but did not include Moore in those interviews. (Tr. 130). As a result of the interviews and the investigation into the 103(g) complaint, MSHA found that the allegation concerning the examinations of the beltline was unfounded. Jt. Stip. ¶¶ 37, 38; Jt. Ex. 2. After MSHA completed its investigation on October 4, 2011, Emerald began its own investigation into the allegations contained in the 103(g) complaint. Jt. Stip. ¶ 39.

On October 20, 2011, Hoy, accompanied by UMWA Committeeman Douglas Scott, met with Schifko, Swetz, and Emerald Human Resources Manager Chris Hayhurst. Jt. Stip. ¶ 42.

Franks met with the group the same day. Jt. Stip. ¶ 40, 41. During their respective meetings, Franks and Hoy again declined to provide the name of the examiner that they believed was responsible to conduct the examination. Jt. Stip. ¶¶ 40, 42. Both repeated that he had provided the information to the safety representative, David Moore, and that they were not required to give further information, as they were protected by the 103(g) complaint. (Tr. 19, 20, 21, 38, 46, 49, 50, 52, 58). Hoy told Schifko that the questions constituted harassment and he would be filing a complaint of discrimination under Section 105(c) of the Act. On October 24, 2011, in the presence of Schifko, Hayhurst and Swetz, Franks again declined to name the individual. Jt. Stip. ¶ 43. On November 9, 2011 Franks and Hoy were summoned to yet another meeting with Schifko and Emerald mine management. Both Franks and Hoy again declined to provide a name of a fireboss who may have conducted an inadequate inspection. Jt. Stip. ¶¶ 45, 48. Hoy recalls that Schifko already knew the name of the fireboss who was accused of not making an examination because he was told by Mark Cole, a beltman at the mine. (Tr. 22). At no time were Franks and Hoy advised that any disciplinary action would follow if they failed to provide a name of a fireboss. (Tr. 23, 40). However, at the end of their respective meetings, Franks and Hoy were each handed a memorandum that stated they had been suspended for seven days for “failure to provide information [he had] . . . concerning serious allegations of safety violations.” Jt. Stip. ¶¶ 46, 49; Jt. Exs. 3 and 4.

Franks and Hoy both credibly testified regarding the events leading up to the suspensions. The facts stated above are, for the most part, undisputed and subject to stipulation. There is a dispute of fact, however, related to the incidents that occurred prior to the 103(g) complaint and are raised by the Respondent’s witness, David Moore, a member of the union safety committee. Franks, Hoy, and David Baer, a UMWA member, all testified that Hoy approached Moore to complain about an examination of the E1 belt in July. (Tr. 61). Hoy remembered speaking to Moore again on August 17 at the beginning of the midnight shift and once more on August 29. (Tr. 24-25). Hoy testified that Moore told Hoy he already knew which fireboss Hoy was talking about and was already looking into it. While Moore agreed that Hoy mentioned a problem with a fireboss in July, he denied that Franks and Baer were present and denied further discussions in August. (Tr. 123). According to Moore, when he spoke with Hoy in July, Hoy told him that there was a problem on the E1 longwall belt and asked Moore if he saw the fireboss. (Tr. 123). Moore responded that he was off the beltline when the fireboss went through, but that he had seen the dates, times and initials, so he didn’t think there was a problem. (Tr. 123-124). Moore testified that he told Hoy that he would speak to the firebosses to make sure they were all doing the mandated belt inspections. (Tr. 124). Moore agreed that he knew what Hoy was referring to, but stated that Hoy did not give him a name and Moore did not ask. Moore denied having any other conversations with Hoy after that day. (Tr. 125). Moore testified that he was in Beckley on August 17 at the time Franks and Hoy allege they approached him a second time with the complaint about a fireboss. (Tr. 122). Moore also explained that Franks and Hoy are not limited to bringing safety complaints to him, and that they can also speak to the company about a problem if they see one. (Tr. 126).

I resolve the dispute of fact in favor of Franks and Hoy. I do not find Moore to be a credible witness. His answers were opaque and evasive. He insisted that he only spoke to Hoy once, yet Franks, Hoy and Baer remember Hoy speaking to Moore about the issue at least twice, and also remember that Hoy gave Moore the information to identify the fireboss. The fact that

Hoy may have remembered or written down the incorrect day in August does not change my assessment. All agree that Moore spoke to Hoy in July, and Franks and Hoy also agree they spoke to Moore at the end of August. Both times, the miners expected that the information they provided to Moore would be checked out and given to the appropriate safety committee or management. While, on one hand, Moore testified that he didn't know who Hoy was talking about, he also testified that he was aware of a time in July when someone mentioned the fireboss neglecting his job and Moore checked for the dates, times and initials and believed the examination was completed. (Tr. 127-128). Clearly Moore was made aware of who was being accused, not only by Hoy, but by other miners. I also find that both Franks and Hoy believed they were following the UMWA normal procedure by providing information to Moore as their safety representative, and that, by doing so, they were following UMWA rules and protecting themselves from company retaliation. Finally, I find it unusual that Moore was not among the 34 persons interviewed by MSHA about the fireboss issue that was contained in the 103(g) complaint, since he did have some information about the matter. Moore accompanied the inspector for at least part of the investigation that resulted from that complaint, and he was interviewed by the company after MSHA had determined that the 103(g) complaint was unfounded.

David Baer, a member of the UMWA, provided further evidence that Franks and Hoy, not Moore, remember the events as they occurred. Baer was present in August when Franks and Hoy talked to Moore. (Tr. 64). Baer remembers that Hoy told Moore he wanted to make a complaint about a fireboss and Moore asked Hoy if he was talking about Gary Cortland. (Tr. 64). Moore said that he already knew about it. (Tr. 64-65). Hoy asked Moore to look into it to see if the fireboss was doing his job. (Tr. 65). On August 29, Baer observed Hoy ask Moore if Moore had followed up and looked into it, and Moore said he was still looking into it. (Tr. 65). Baer assumed they were talking about the same individuals during both encounters. (Tr. 66). Baer agreed that Franks and Hoy were correct in bringing the matter to Moore's attention, since he is a member of the safety committee. (Tr. 68-69). In Baer's view, if there is a serious safety matter, it is best to go to the safety committee and follow their instructions. (Tr. 68-69, 71). William Schiffko and David Moore disagree and instead submit that miners do not necessarily have to bring an issue to a safety committee member, but they may take it directly to management. (Tr. 93).

William Schiffko, a member of Emerald's safety department, was present when Franks and Hoy met with MSHA regarding the 103(g) complaint. (Tr. 73-74). Schiffko was also involved in the company's investigation into the examinations of the belt and re-interviewed the miners questioned by MSHA as well as some additional personnel. (Tr. 91). Schiffko opined that it is important for the mine to know the names of persons accused of not doing their jobs because the company must have sufficient evidence to take action against them. He explained that the mine conducted its own investigation after MSHA's so that the mine could "dig a little deeper" into the merits of the complaint. (Tr. 76). One of the persons interviewed by MSHA, and by Schiffko separately, was Mark Cole. (Tr. 77). According to Schiffko, Cole seemed nervous when he spoke with MSHA, and it was apparent that Cole was confused. (Tr. 77-78, 90). Cole gave two dates for alleged incomplete belt examinations, both in July, but no documentation, and no name of the fireboss who failed to conduct the examinations. (Tr. 77). When Cole was re-interviewed by Schiffko, he changed his testimony from the earlier interview

with MSHA and told mine management that “he didn’t see anything.” (Tr. 78). Schifko interpreted Cole’s behavior and statements to mean that Cole had been “coerced” by others to provide information in the initial interview. (Tr. 78-79). While his testimony on the issue was a bit unclear, Schifko repeated that, as of the time of the hearing, he still didn’t have a name. (Tr. 81). However, he did agree that once he received information concerning the date and shift of the alleged failed beltline inspection, he could determine who was responsible to conduct the examinations. (Tr. 81). So, in fact, Schifko had a good idea which fireboss was being accused and he agreed that he told Hoy that he had an idea of who it was. (Tr. 81). However, Schifko insisted that he must have a name from Franks and Hoy in order to take any action. (Tr. 82). I find Schifko to be a polished but disingenuous witness. He asserts that none of the 34 miners who provided information to MSHA during the 103(g) investigation were disciplined. However, when pressed, he acknowledged that only three people made allegations about the fireboss; Franks, Hoy, and Cole. (Tr. 97). Cole recanted and Franks and Hoy were suspended. (Tr. 99).

The UMWA local president, Anthony Swetz agreed that Franks and Hoy should not have withheld the names of the firebosses that they accused. (Tr. 143). However, he did not address the behavior of Moore and his failure to support Franks and Hoy and provide the information to MSHA and the mine operator. Swetz testified that the mine has discharged employees for not conducting adequate examinations, but explained that the mine must have solid information to do so. (Tr. 140-143). He opined that miners are not required to take safety complaints to their union representative and that they may take the complaints directly to mine management. (Tr. 145, 148). Swetz agreed that he would expect the safety committeeman to investigate and, if there was some validity to the complaint, then go to management. (Tr. 145). Swetz testified that the miners’ rights were explained to Franks and Hoy by MSHA, and they were asked if they were comfortable with everyone being present during the interviews, to which they both answered that they were. (Tr. 146, 147, 149). Swetz did not think it was his obligation to explain their rights any further since Franks and Hoy, like all UMWA members, were aware of their rights. (Tr. 147, 151-152).

III. ANALYSIS³

Section 105(c)(1) of the Act, 30 U.S.C. § 815(c)(1), provides that, a miner cannot be discharged, discriminated against, or interfered with in the exercise of his statutory rights because: (1) he “has filed or made a complaint under or related to this Act, including a complaint . . . of an alleged danger or safety or health violation[;]” (2) he “is the subject of medical

³ Complainants, through the UMWA, spent much of their post-hearing brief arguing that the Respondent “interfered” with their rights under the Act. The brief separates the interference into three alleged acts: (1) Interference with the Complainant’s Mine Act rights by the presence of Emerald managers at the Complainant’s meetings with MSHA inspectors; (2) Interference with Complainant’s Mine Act rights by interrogating Complainants regarding details of the safety hazard complaints made to MSHA; and (3) Interference with Complainant’s Mine Act rights by discriminating against them in violation of Section 105(c)(1) by suspending them from work. While I do not necessarily dispute the alleged separate acts of “interference,” I address them together as one.

evaluations and potential transfer under a standard published pursuant to section 101[;]" (3) he "has instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in any such proceeding[;]" or (4) he has exercised "on behalf of himself or others . . . any statutory right afforded by this Act."

In order to establish a prima facie case of discrimination under Section 105(c)(1), a complaining miner must show: (1) That he engaged in protected activity; and (2) that the adverse action he complains of was motivated at least partially by that activity. *Driessen v. Nevada Goldfields, Inc.*, 20 FMSHRC 324, 328 (Apr. 1998); *Sec'y on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803 (Apr. 1981); *Sec'y on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786 (Oct. 1980), *rev'd on other grounds sub nom Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3d Cir. 1981).

The operator may rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was in no part motivated by the protected activity. . . . If the operator cannot rebut the prima facie case in this manner, it nevertheless may defend affirmatively by proving that it was also motivated by the miner's unprotected activity and would have taken the adverse action for the unprotected activity alone.

Driessen v. Nevada Goldfields, Inc., 20 FMSHRC 324, 328-329 (Apr. 1998) (citations omitted). Factors to be considered in assessing whether a prima facie case exists include the operator's knowledge of the protected activity, hostility or "animus" towards the protected activity, timing of the adverse action in relation to the protected activity, and disparate treatment. *Sec'y on behalf of Chacon v. Phelps Dodge Corporation*, 3 FMSHRC 2508 (Nov. 1981).

a. *Protected Activity*

The Act's discrimination provisions provide miners with protections against reprisal for certain protected activities in the hope that miners will be willing to aid in the enforcement of the Act and, in turn, improve overall safety. While section 105(c)(1) does not include the term "protected activity," Commission cases have nevertheless found that the section defines certain protected activities. An individual covered by the Section engages in protected activity if (1) he "has filed or made a complaint under or related to this Act, including a complaint . . . of an alleged danger or safety or health violation[;]" (2) he "is the subject of medical evaluations and potential transfer under a standard published pursuant to section 101[;]" (3) he "has instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in any such proceeding[;]" or (4) he has exercised "on behalf of himself or others . . . any statutory right afforded by this Act." 30 U.S.C. § 815(c)(1).

The legislative history of the Mine Act states that that Congress intended "the scope of the protected activities be *broadly interpreted* by the Secretary, and intends it to include not only the filing of complaints seeking inspection under Section 104(f) or the participation in mine inspections under Section 104(e), but also the refusal to work in conditions which are believed to be unsafe or unhealthful and the refusal to comply with orders which are violative of the Act or

any standard promulgated thereunder, or the participation by a miner or his representative in any administrative and judicial proceeding under the Act.” S. Rep. No. 95-181 at 35 (1977) (emphasis added). Moreover, the history notes that “the listing of protected rights contained in . . . [what eventually became section 105(c)(1)] is intended to be illustrative and not exclusive[, and that the section should] be construed expansively to assure that miners will not be inhibited in any way in exercising any rights afforded by the legislation.” *Id.* The Commission and Courts have recognized the “illustrative” as opposed to “exclusive” nature of the list provided in Section 105(c)(1) by adopting the “work refusal doctrine,” which is not explicitly addressed in 105(c)(1). *Simpson v. FMSHRC*, 842 F.2d 453 (D.C. Cir. 1988); *Sec’y on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786 (Oct. 1980); *Sec’y on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803 (Apr. 1981).

In order to sustain a discrimination complaint, Franks and Hoy must first demonstrate that they have engaged in an activity or activities that are protected by Section 105(c) of the Mine Act. The record before me clearly establishes that they both engaged in a protected activity when they made a safety complaint to David Moore, a member of the UMWA safety committee, when they provided information to MSHA during the course of the 103(g) investigation, and when they provided information to Emerald during the mine’s follow up investigation. I have found that, on at least two occasions, Franks and Hoy made the complaint to Moore with the more than reasonable expectation that the UMWA representative would take care of the complaint. In addition, Franks and Hoy were not required to provide information directly to the company or to MSHA that they had already provided to the safety representative. The fact that they spoke with MSHA inspectors and then participated in an investigatory meeting with MSHA, with Emerald present, is also a protected activity. In addition, the fact that they were asked by company management to address the allegations contained in the 103(g) complaint, after MSHA had found no violation, is further protected activity. Emerald insists that the involvement of Franks and Hoy in the two investigations may not be considered protected activity because Franks and Hoy refused to give the name of the fireboss accused of failing to conduct an inspection of the beltline. I find Emerald’s claim to be without merit and instead, address it as an affirmative defense.

b. Adverse Action

As a result of their involvement in the 103(g) complaint, Franks and Hoy each received a seven day suspension. The parties agree that the suspension is an adverse action. The parties have further agreed to the amount of back pay that may be due as a result of both miners being suspended.

c. Discriminatory Motive

The connection between the protected activities and the adverse action is the more difficult issue. The Commission has determined that the hostility or “animus” towards the protected activity, timing of the adverse action in relation to the protected activity, and disparate treatment may all be considered in determining the existence of a connection between the protected activity and the adverse action. *Sec’y on behalf of Chacon v. Phelps Dodge Corporation*, 2 FMSHRC 2508 (Nov. 1981).

Having found that Franks and Hoy engaged in protected activity, and that they were subject to adverse actions on the part of Emerald, it is necessary to determine whether Emerald was motivated, at least in part, by those protected activities to issue disciplinary action in the form of a seven day suspension. The Commission has recognized that direct evidence of actual discriminatory motive is rare. Short of such evidence, illegal motive may be established if the facts support a reasonable inference of discriminatory intent. *Sec'y on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2510–11 (Nov. 1981), *rev'd on other grounds sub nom. Donovan v. Phelps Dodge Corp.*, 709 F.2d 86 (D.C. Cir. 1983); *Sammons v. Mine Services Co.*, 6 FMSHRC 1391, 1398–99 (June 1984). As the Eighth Circuit analogously stated with regard to discrimination cases arising under the National Labor Relations Act in *NLRB v. Melrose Processing Co.*, 351 F.2d 693, 698 (8th Cir.1965):

It would indeed be the unusual case in which the link between the discharge and the (protected) activity could be supplied exclusively by direct evidence. Intent is subjective and in many cases the discrimination can be proven only by the use of circumstantial evidence. Furthermore, in analyzing the evidence, circumstantial or direct, the [NLRB] is free to draw any reasonable inferences.

Franks and Hoy credibly testified that the adverse action was close in time to the protected activity. In fact, the parties agree to the facts that establish a timeline of the complaints made, involvement in both the MSHA and Emerald investigations, all culminating in the suspension of the two miners.

I find that credible evidence supports that Franks and Hoy suffered hostility as a result of their actions, and were treated differently than other miners. A part of the circumstantial indicia of discriminatory intent by a mine operator against a complaining miner includes hostility towards the miner because of his protected activity and disparate treatment of the complaining miner by the operator. *Sec'y on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC at 2510. The mine demonstrated hostility toward Franks and Hoy when mine personnel repeatedly called the complainants into the office as part of an investigation and demanded that they turn over the name of the fireboss about whom they complained. Given that Moore was not asked for the name, and that Schifko was seemingly aware of the miner about whom the complaint was made, it is reasonable to infer that Emerald's continued questioning and harassment of Franks and Hoy amounted to hostility toward them for making accusations against a fireboss. In addition, Hoy explained that he was told by a co-worker that he had a target on his back after making the complaint about the examinations of the beltline. (Tr. 33, 51). Moreover, after Franks and Hoy explained that they had followed the UMWA procedure and provided the fireboss' name to the safety committee representative, the mine failed to speak with Moore and ascertain from him the name of the fireboss. Finally, both Franks and Hoy were under the impression that the mine was aware of the fireboss named because another miner, Cole, had reported his name. The mine refused to acknowledge the right of Franks and Hoy to go through the safety committee representative and harassed them for employing that protection. The miners utilized the avenue open to them, making a complaint through a safety representative, to avoid the very thing that

happened to them, constant harassment and finally retaliation for expressing concern over what they believed to be a fireboss' failure to carry out his duties.

Emerald asserts that Franks and Hoy were not treated differently from other miners. It asserts that 34 miners were interviewed by MSHA, and even more by the mine, but that none of those miners received any adverse action. The mine argues that Franks and Hoy would have been treated likewise had they been willing to provide the name of the fireboss accused of failing to make a belt examination directly to management instead of through the safety representative. I find it telling that Schifko acknowledged that only three complaints were made, and one of those was recanted. The two that stayed true to their complaint, Franks and Hoy, were the two who were disciplined. (Tr. 99). I find that the circumstantial evidence points to the fact that Franks and Hoy were disciplined, not for failing to provide information, but for making a safety complaint and participating in the 103(g) investigation.

While it may be true, as Emerald asserts, that Franks and Hoy could have refused to provide information to MSHA with mine management present, or that they could have brought the complaint about the fireboss to mine management directly, or even that they could have provided the information privately to MSHA, it does not negate the fact that they made a complaint and, as a result, were disciplined. Given the specific circumstances discussed above, I find that Franks and Hoy have demonstrated a nexus between the adverse action and the protected activity and, therefore, have proven a prima facie case of discrimination.

d. Affirmative Defenses

Having found that Franks and Hoy have established a prima facie case of discrimination, I must now consider whether Emerald disciplined both miners for unprotected activity and "would have taken the adverse action for the unprotected activity alone." *Sec'y on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 817-818 (Apr. 1981); *Sec'y on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2799-2800 (Oct. 1980).

The Commission has enunciated several indicia of legitimate non-discriminatory reasons for an employer's adverse action. These include evidence of the miner's unsatisfactory past work record, prior warnings to the miner, past discipline consistent with that meted out to the complainant, and personnel rules or practices forbidding the conduct in question. *Bradley v. Belva Coal Co.*, 4 FMSHRC 982, 993 (June 1982). The Commission has explained that an affirmative defense should not be "examined superficially or be approved automatically once offered." *Haro v. Magma Copper Co.*, 4 FMSHRC 1935, 1938 (Nov. 1982). In reviewing affirmative defenses, the judge must "determine whether they are credible and, if so, whether they would have motivated the particular operator as claimed." *Bradley v. Belva Coal Co.*, 4 FMSHRC at 993. The Commission has stated that "pretext may be found . . . where the asserted justification is weak, implausible, or out of line with the operator's normal business practices." *Sec'y on behalf of Price v. Jim Walter Res., Inc.*, 12 FMSHRC 1521, 1534 (Aug. 1990).

Emerald argues that the failure of a fireboss to conduct a mandated examination is a serious safety issue, and that Franks and Hoy were disciplined solely for failing to provide mine management the name of the fireboss whom they accused of not conducting an examination of

the belt. Emerald attempts to analogize the situation in *Sec'y on behalf of Pack v. Maynard Dredging Co.*, 11 FMSHRC 168 (Feb. 1989) to the case at hand. Emerald asserts that, in *Pack*, the Commission “upheld the discharge of a miner for failing to report a serious safety violation to the operator.” Cemex Br. 12. However, *Pack* is easily distinguished. In *Pack*, unlike in the present matter, both the judge and Commission relied upon that mine’s “established policy” requiring mine personnel to report safety and health hazards to their “supervisor.” 11 FMSHRC at 171. In the case at hand, it is clear that Emerald had no such policy that required all personnel to report safety and health hazards exclusively to their supervisors. Rather, it was accepted practice at the mine to report safety and health hazards to mine management or members of the safety committee. Here, I have already found that the complainants not only alerted Moore, a member of the safety committee, of the issue, but also identified the fireboss.

There are no allegations that Franks and Hoy had an unsatisfactory work performance history, or were given prior warnings or discipline. The mine asserts that Franks and Hoy violated the company policy by refusing to provide the name of a fireboss whom the Complainants alleged did not conduct a required belt examination. I find the argument to be without merit. First, I have already found that Franks and Hoy did provide the name, albeit through the safety representative for the UMWA. Moreover, both Franks and Hoy learned that Cole had provided the name to Schifko and Schifko acknowledged that, based upon the date and the shift information he received, he was aware of the name of the fireboss who allegedly missed the examination. There were two names of possible firebosses mentioned at hearing, and both were interviewed by MSHA and mine management. Even so, the mine questioned Franks and Hoy and demanded that they directly provide the name of the fireboss they accused, and continued to do so even after MSHA left the mine after it found that the allegation regarding the belt examinations was without merit.

Instead of closing the matter, based upon the many interviews and the findings of MSHA, Emerald re-interviewed each witness, added more witnesses to the list, and continued to demand names from Franks and Hoy. Emerald insists that it did so with a valid justification; to determine if a fireboss had committed a serious infraction by not making a required belt examination. If the information was so critical, I see no reason why MSHA could not have questioned the UMWA safety representative who was given the information by Franks and Hoy. It appears that the mine questioned the union representative, Moore, but there was no discussion at hearing regarding what information was sought or provided by him. In fact, Moore testified that he knew who Franks and Hoy were complaining about, and he had already checked the dates, times and initials to see if the examination had been done, and was satisfied that it had been. In the end, Franks and Hoy were the only miners to make the complaint about the fireboss and, tellingly, were the only miners who were disciplined. Cole originally made a similar complaint, but it was withdrawn and he was saved from disciplinary action.

Based upon all of these facts, I cannot agree that Emerald has demonstrated a legitimate business purpose for the discipline. I find that the stated business purpose is not credible, and is instead a pretext to punish Franks and Hoy for making a complaint about a fireboss. While I agree that it is important for the mine to discover whether or not a fireboss is conducting required examinations, the mine had several opportunities to discover who was accused and, in my view, based upon information gained from others, including information about the date and the shift,

the mine did know which fireboss was accused. Moreover, both MSHA and the state inspector conducted thorough investigations and found no reason to believe that the fireboss had not acted properly. There could be no other reason to continue to harass Franks and Hoy about a name, except for the purpose of retaliating against them for complaining about the fireboss. After carefully considering the credibility of all witnesses, I find that Emerald did not have a legitimate business reason to terminate Franks and Hoy, and that the mine's affirmative defense is without merit.

IV. PENALTY

The cases for Franks and Hoy were brought by them individually with the assistance of the UMWA and, therefore, no penalty has been proposed by the Secretary. Pursuant to Commission Procedural Rule 44(b), 29 C.F.R. § 2700.44(b), a copy of this decision is being sent to the Secretary for the assessment of a civil penalty against Emerald Coal Resources.

V. ORDER

Emerald Coal Resources is **ORDERED** to pay back pay to Mark Franks in the amount of \$1,168.68, and to Ronald Hoy in the amount of \$1,963.93, with interest at 8% from the date it was due.⁴ Such payments shall be made within thirty days of the date of this order. Emerald shall, within thirty days of the date of this order, post this decision along with a visible notice on a bulletin board that is accessible to each and every employee, explaining that the company has been found to have discriminated against an employee, that such discrimination will be remedied, and that it will not occur in the future. The notice shall inform all employees of their rights in the event they believe they have been discriminated against. All reference to the reprimand received by Franks and Hoy, and the reasons therefore, shall, within thirty days of the date of this order, be removed from their respective personnel files or other employment records. Such reprimand will be removed and shall not be used or considered as a basis for any future action against Franks or Hoy. This case is referred to MSHA for assessment of a civil penalty.

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

⁴ The back pay calculation is based upon the calculations in Respondent's Exhibit 1, agreed to by the parties.

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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June 12, 2013

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. SE 2010-351
Petitioner,	:	A.C. No. 01-01401-205059
	:	
v.	:	
	:	
JIM WALTER RESOURCES, INC.	:	Mine: No. 7 Mine
Respondent.	:	

DECISION

Appearances: Sophia Haynes, United States Department of Labor, Office of the Solicitor, Atlanta, GA, for Petitioner.

John B. Holmes, III and Josh Bennett, Maynard, Cooper & Gale, P.C., Birmingham, AL, for Respondent.

Before: Judge L. Zane Gill

This case deals with a single 104(a)¹ citation issued by an inspector for the Mine Safety and Health Administration (“MSHA”) on October 26, 2009, involving the mine property identified above.² Citation Number 7699497 alleges a violation of the mandatory standard found at 30 C.F.R. § 75.380(d) (1). Counsel for the Secretary of Labor made a motion during the hearing to amend the citation to allege a 104(d) violation, citing Federal Rule of Civil Procedure 15, and Commission Procedural Rule 2700.10.

The case was heard on April 10, 2012 in Birmingham, Alabama.

For the reasons discussed below, I deny the Secretary’s Motion to Amend and conclude that Respondent was in violation of 30 C.F.R. § 75.380(d) (1), as originally alleged, and impose the civil penalty originally proposed in the Secretary’s Petition.

Findings of Fact

¹ Section 104(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., (1994) (the “Act” or “Mine Act”).

² Various other citations related to and consolidated with this case were settled prior to this trial.

Stipulations

The parties submitted the following stipulations at the hearing, (*See Ex. S-7*):

1. Respondent, Jim Walter Resources, also known as JWR, is subject to the Mine Safety Health Act of 1977, as amended.
2. The Administrative Law Judge has jurisdiction to hear and decide this case pursuant to Section 105 of the Act of 1977.
3. On October 26, 2009 MSHA Inspector Gregory Willis was acting in his official capacity when he issued to Respondent JWR Citation No. 7699497.
4. Citation No. 7699497 contained in this docket was served on JWR or its agent as required by the Act.
5. Citation No. 7699497 contained in this docket is authentic and may be admitted into evidence for purposes of establishing its issuance but not for the purpose of establishing the accuracy of any statements asserted therein.
6. The Administrative Law Judge has the authority to assess the appropriate civil penalty under Section 101(i) of the Act if he finds that the citations at issue state a violation of the Act and the regulations.
7. The operator demonstrated good faith abatement of Citation No. 7699497.
8. The area coursing from the North Mains to the 7-11 escape hoist shaft cited by Inspector Gregory Willis in Citation No.7699497 was an alternate escapeway for JWR No. 7 Mine on October 26, 2009.
9. JWR No. 7 Mine was subject to spot inspections for methane under Section 103(I) of the Mine Act on October 26, 2009.
10. JWR timely contested Citation No. 7699497 contained in this Docket and timely served a corresponding answer to the Proposal of the Secretary of Labor and MSHA for Assessment of Civil Penalty.
11. Respondent JWR is a large coal operator reporting 3,187,772 tons of coal in 2008.

Fact Summary

The Jim Walter Resources (“JWR”) No. 7 Mine (“the mine”) produces bituminous coal. (Tr. 16:6-8) On October 26, 2009, MSHA Coal Mine Inspector Greg Willis (“Willis” or “Inspector Willis”) conducted a regular inspection of the mine. (Tr. 16:24-17:1) Before entering the mine, Willis reviewed the record books at the surface. (Tr. 17:23-18:3) His inspection focused on the secondary escapeway/return aircourse of the North Mains. (Tr. 18:4-7) He was accompanied by a JWR supervisor, Ricky Parker, and a union representative, Mr. Ross. (Tr. 18:10-13) Willis went to the No. 3 section, right side, and entered the return air course. (Tr. 18:20-19:4) There he inspected the ventilation and general condition in the entry, including the condition of the escapeway and lifeline. (Tr. 19:5-13) At the time of the inspection, the alternate escapeway was approximately 4,700 feet long, 20 feet wide, and 7 to 10 feet high. (Tr. 102:21-103:1, 25:3-8) The accumulation of water was located some 3,500 to 4,000 feet outby and approximately 700 to 1,200 feet from the escape hoist at the end of the escapeway. (Tr. 105:6-13). Willis observed a 52 foot section of escapeway that was covered rib-to-rib by water ranging from 1 to 11 inches in depth. (Tr. 25:9-26:6) The water was clear; the bottom was clearly visible. (Tr. 20:1-3, 25:9-26:6) The bottom was otherwise smooth and good. (Tr. 66:9-67:2) There were no slip or trip hazards under the water. (Tr. 66:9-67:2, 106:3-19) A pump line was present in the area to be used when and if necessary. (Tr. 107:7-8)

Willis and Parker testified that they followed the lifeline through the water accumulation and never encountered water at or over the tops of their 14 to 16 inch high boots. (Tr. 26:4-24, 69:25-70:15, 108:8-21) The men slowed down as they waded through the pool. Parker testified that he had no problem walking through it. (Tr. 109:5-25) Willis stated that he slowed down, but that he usually goes slowly when he conducts an inspection. (Tr. 27:11-21, 75:3-20)

Willis concluded that the water accumulation constituted a hazard. (Tr. 26:21-27:1) He told his companions that he would cite JWR under 30 C.F.R. § 75.380(d) (1) (Tr. 20:4-25), which covers maintenance of escapeways in bituminous and lignite mines. (Tr. 22:11-17)³ In Willis’ opinion, the flooding created a slip or trip hazard that could cause sprains, strains, or pulled muscles. (Tr. 46:21-25) The water in the escapeway was the only basis for the citation. Willis alleged moderate negligence based on his understanding that return air passages must only be inspected relatively infrequently—every seven days—which he considered a mitigating factor. (Tr. 51:7-52:3) He assumed that the water had been in the condition he observed for up to three days. (Tr. 52:17-25) He saw no indication that JWR had done anything to remove the water (Tr. 53:1-4) and concluded that the hazard was extensive and obvious. (Tr. 52:4-16) Willis was aware that JWR had been cited for violating the same mandatory standard before and factored that into his assessment of the violation. (Tr. 53:5-13) JWR abated the violative condition within a few hours by installing a pump and removing the water from the escapeway. (Tr. 54:21-55:3, 73:7-9)

³ “Each escapeway shall be--(1) Maintained in a safe condition to always assure passage of anyone, including disabled persons.” 30 C.F.R. § 75.380(d).

Willis rated this hazard as unlikely to cause injury. (Tr. 75:21-24, Ex. S-1) Willis' supervisor reviewed and approved the citation without change. (Tr. 59:19-61:1)

At hearing, JWR called Scott Hannig as a witness.⁴ Hannig testified that clear water at such a depth would neither hinder the passage of four miners carrying another miner on a stretcher nor come into contact with the stretcher. (Tr. 89:11-20) Hannig stated that there is no official regulation as to how much water accumulation is necessary before it constitutes a hazard, however, he is aware of a rule-of-thumb used in mine rescue exercises that anything less than knee deep is considered passable. (Tr. 87:8-25) Hannig testified that accumulated water below boot-top level over an obstruction-free bottom would not hinder the evacuation of a section crew or a disabled miner. (Tr. 89:11-20)

Evidence Relating to the Secretary's Motion to Amend

Willis had less than one year of experience when he wrote Citation Number 7699497. (Tr. 45:8-11) He testified that he made a mistake when he wrote the citation because he should have written it as a 104(d) violation. Willis evaluated what he observed without fully factoring in the emergency circumstances under which miners would need to use the secondary escapeway. (Tr. 45:2-16) Under the stress and panic of an emergency, anything that could hinder a safe and effective evacuation takes on greater significance. (Tr. 32:17-33:14, 35:10-13) In retrospect, Willis feels that he should have elevated the likelihood of injury, increased the negligence assessment, alleged a Significant and Substantial ("S&S") violation, and written the citation under section 104(d). (Tr. 31:25-32:12)

The Citation

Citation Number 7699497 reads as follows:

The alternate escape way coursing from the North Mains to the 7-11 escape hoist shaft is not being maintained to assure passage of anyone, including disabled persons. Between spads 16706 and 16685 there is an accumulation of water that measures 52 feet long by 20 feet wide (rib to rib) by 11 inches deep. This accumulation of water impedes travel along the alternate escape way. (Ex. S-1)

The citation was written as a Section 104(a) (1) violation. The gravity was assessed as "unlikely." The potential injury severity was assessed as "lost workdays or restricted duty" and

⁴ When the citation was issued in 2009, Hannig was a JWR mine foreman and captain of the mine's rescue team. (Tr. 84:12-18) At that time Hannig also had 14 to 15 years of experience in mine rescue that included directing evacuations, determining passability of escapeways, and evacuating disabled persons in mock evacuations. (Tr. 85:7-87:7)

affecting only one person. The operator's negligence level was assessed as "moderate" and the proposed fine was \$127.00.⁵ (Ex. S-1)

The Standard

30 C.F.R. § 75.380(d) (1) provides:

Each escapeway shall be maintained in a safe condition to always assure passage of anyone including disabled persons.

Discussion and Analysis

Motion to Amend

The Secretary elicited testimony from Inspector Willis at the hearing that he had erred when he issued the citation as he did. Willis testified that, in hindsight, he should have issued a 104(d) citation, alleging moderate negligence, affecting ten people, resulting from an unwarrantable failure to comply, and with the S&S designation. (Tr. 30:4-17, 45:2-16, 49:7-13) Based on that testimony, the Secretary made a Motion to Amend the petition to align it with Willis' revised assessment, pursuant to Commission Procedural Rule 2700.10 and Federal Rule of Civil Procedure 15. (Tr. 55:4-58:1) Counsel for JWR opposed the amendment. (Tr. 30:4-14, 31:14-32:15)

The grant or denial of a motion for leave to amend is within the sound discretion of the court and will be reversed only for an abuse of discretion. *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 330 (1971); *Foman v. Davis*, 371 U.S. 178, 182 (1962). Federal Rule of Civil Procedure 15(a) mandates that leave to amend "shall be freely given when justice so requires." *Wyo. Fuel Co.*, 15 FMSHRC 1107, 1108 (June 1993).

The court can refuse to grant leave to amend a pleading only where it will result in undue delay, [results from] bad faith or a dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, [results in] undue prejudice to the opposing party by virtue of allowing the amendment, or for reasons of futility of amendment.

Dennis v. Dillard Dept. Stores, Inc., 207 F.3d 523;(8th Cir. 2000).

⁵ If the Motion to Amend were granted, the proposed penalty would increase to \$2,000.00, the minimum penalty associated with an unwarrantable failure. (Sec'y Post Hr'g Br., Sec. III(5)).

The Commission has held that Federal Rule of Civil Procedure 15 is an appropriate guide for changes of pleadings. *Cyprus Empire Corp.*, 12 FMSHRC 911, 916 (May 1990).⁶ Rule 15(b) (1) deals with motions to amend raised during a trial. This rule allows—and even encourages—the court to grant a motion to amend so long as doing so facilitates a full adjudication of the merits of the case and the opposing party fails to show prejudice. Rule 15(b) (2) applies when evidence supporting a motion to amend is entered into the record either by the express or implied consent of the non-moving party.

Rule 15(b) (1) contemplates a situation where the non-moving party is aware of the intent of the moving party to amend and has an opportunity during the hearing to convince the court not to grant the motion. Rule 15(b) (2) deals with a situation where evidence that could support an amendment of the pleadings enters the record without objection by the non-moving party either: (1) because the party becomes aware of the potential for amendment and explicitly consents that the pleadings be conformed and amended to the actual evidence and argument presented; or (2) the non-moving party does not explicitly consent to the amendment, but the evidence and argument are presented in such a way that his/her consent to the amendment can be implied.

JWR objected to the Secretary's evidence that she used to justify her oral Motion to Amend the Pleadings. As a result, Rule 15(b) (1) applies:

If, at trial, a party objects that evidence is not within the issues raised in the pleadings, the court may permit the pleadings to be amended. The court should freely permit an amendment when doing so will aid in presenting the merits and the objecting party fails to satisfy the court that the evidence would prejudice that party's action or defense on the merits. The court may grant a continuance to enable the objecting party to meet the evidence.

Fed. R. Civ. P. 15(b) (1).

However, Rule 15 should not be read in isolation, particularly when the issue is prejudice to the opposing party and dilatory motive. Commission Procedural Rule 53 gives the parties a mechanism to seek court approval of any amendments to their pleadings in a pre-hearing conference and/or statement. 29 C.F.R. § 2700.53. In addition, Commission Procedural Rule 10(c) obligates a party who intends to make a motion to amend its pleadings—or any other motion made in writing prior to the hearing—to make reasonable efforts to confer with the opposing party first. 29 C.F.R. § 2700.10(c). The purpose of this rule is to avoid surprise motions at trial that could unnecessarily complicate the hearing process or create the potential of prejudice against

⁶ Commission Procedural Rule 1(b) provides that on any procedural question not otherwise regulated by Commission Procedural Rules, the Mine Act, or the Administrative Procedure Act, “the Commission and its Judges shall be guided so far as practicable by the Federal Rules of Civil Procedure.” 29 C.F.R. § 2700.1(b).

the non-moving party.⁷ These rules bring order, fairness, and efficiency to the motion process whenever a party is able to predict the need to make such a motion. Any effort by a party to avoid or subvert the obligation to confer prior to making such a motion is highly disfavored by the court.

In this instance, the Court presumes the Secretary knew of the opportunity and obligation to disclose any need to amend her petition prior to the hearing. The Court ordered both parties to confer and submit a Joint Pre-Hearing Statement prior to the hearing. (Pre-Hr'g Order; Jt. Pre-Hr'g Stmt.) However, prior to hearing neither the Court nor JWR was apprised in writing or otherwise by the Secretary of her intent to seek amendment to the pleadings. (Tr. 56:3-5) Furthermore, it is apparent from the Secretary's argument and Inspector Willis' testimony that the Secretary planned in advance to present evidence at hearing to form the basis for an amendment to her pleadings. Despite the rules requiring disclosure and conference under these circumstances, the Secretary first announced her intent to seek amendment during the hearing. (Tr. 55:4-13)

JWR's Post-Hearing Brief raised points which, when considered in concert with both the Commission Procedural Rules and Federal Rule of Civil Procedure 15, convince the Court that JWR's interests would be prejudiced if the Secretary were allowed to amend. Throughout the nearly two-year period between the filing of this citation and the hearing date, the Secretary allowed the original pleadings to stand. The first time the issue of possibly charging the alleged violation under section 104(d), with all its more severe implications, was revealed to JWR or the Court was during the hearing. As a result, JWR had no meaningful opportunity to prepare for the new charge and its related consequences.

In *Cumberland Coal Resources, LP*, the Commission rejected a motion to amend pleadings to conform to evidence in the record when the first time the Secretary specifically referred to evidence to support her claim was during oral argument. *See, Cumberland Coal Res., LP*, 32 FMSHRC 442, 446-49 (May 2010) (noting that the Secretary had "ample opportunity" to reveal her plan to amend her pleadings in such a manner that would not have created prejudice to the operator). In this case, the Secretary offered up evidence for the first time at hearing to support her oral Motion to Amend the Pleadings to conform to the very evidence just introduced. Because the Secretary failed to give JWR or the Court any advance notice of her intent, the motion appears to have been part of a conscious strategy to bypass the pre-hearing rule mechanism. This strengthens JWR's argument that it was prejudiced by not having a realistic opportunity to respond to and prepare a defense against the significantly enhanced new charges. It also unnecessarily requires the Court to enforce reasonable compliance with its rules, requirements that should have been obvious.

⁷ Federal Rule of Civil Procedure 15(a) (2) also requires a party to confer with the opposing side before moving the court for leave to amend its pleadings: "In all other cases, a party may amend its pleading only with the opposing party's written consent or the court's leave. The court should freely give leave when justice so requires." Fed. R. Civ. P. 15(a) (2).

The Court has considered the various factors related to this issue including: counsel's prior intent to amend, her opportunity and obligation to avail herself of the orderly and prescribed means to amend provided in both the Federal Rules of Civil Procedure and the Commission's Procedural Rules, the lapse of two years during which a motion to amend could have been brought, and the magnitude of the consequences to JWR arising from approval of the proposed amendment. Based on those factors, it is the Court's conclusion that the Motion to Amend was made in bad faith, resulted from dilatory motive, and would result in undue prejudice to the operator if granted. Accordingly, the Secretary's Motion to Amend is Denied.

The Court could deny the Secretary's Motion to Amend on the basis of Federal Rule of Civil Procedure 15(b) (1) and prejudice alone, however, a separate basis for denial emerges when we consider Rule 15(b) (2). As discussed above, Rule 15(b) (2) allows a change in pleadings, even after a hearing, if the supporting facts have been tried with the express or implied consent of the parties. Fed. R. Civ. P. 15(b) (2). The purpose of this rule is to allow the parties to conform their pleadings to the issues that were actually tried. In keeping with this purpose, implied consent can be found where "the opposing party recognized that a new matter was at issue during the trial and that evidence was introduced to prove that [new] issue." *Cumberland*, 32 FMSHRC at 447-48 (emphasis added) (citing 3 James Wm. Moore et al., Moore's Federal Practice ¶ 15.18[1], at 15-73 (3d ed. 2002)). In determining whether there was implied consent, the Commission considers whether the trial record reflects that the opposing party understood that the moving party was litigating the unpleaded issue. *See Cumberland*, 32 FMSHRC at 448. However, in *Cumberland* the Commission also held that consent to try a new issue cannot be implied if it is based on the same evidence in the record that was relevant to an issue that was pleaded prior to the hearing. *See Cumberland*, 32 FMSHRC at 447-49. In other words, in circumstances of implied consent to amend pleadings under Rule 15(b) (2), there must be evidence in the record in addition to and distinct from the evidence supporting the issues originally plead.

As pointed out in JWR's Post-Hearing Brief, the "new" evidence provided by Inspector Willis affected no substantive change in the facts on which the original petition was based. This was confirmed by the Secretary when she stated that her proposed amendment was not based on any new facts or evidence. (Tr. 56-58) The only deviation from the facts supporting the Secretary's original theory of the case is Inspector Willis' statement that he failed to evaluate the observed conditions in the light of a possible emergency situation, and as a result failed to allege the higher level of violation that the proposed amendment seeks. (Tr. 27-30) The Court agrees with JWR's argument that such *ex post facto* corrections are based solely on speculation and hindsight. (JWR Br. 12) Inspector Willis' *mea culpa* does not tend to make the presence of water in the secondary escapeway any more probable to cause injury to miners, nor does it add anything substantive to the facts supporting the alleged violation. As a result, there is no new or distinct evidence from which to imply consent to amend, even if one ignores JWR's objection to Willis' new assessment of the situation he saw in the mine.

Accordingly, the Secretary's Motion to Amend is denied on the basis of Rule 15(b) (1) and (b) (2) for the reasons just given.

Violation of the Standard

The Commission held in *The American Coal Company* that the “applicable statute and legislative history emphasize the need for miners on a working section to exit a mine expeditiously in emergency situations.” *Am. Coal Co.*, 29 FMSHRC 941, 952 (Dec. 2007). The Commission went further to state that “[r]eady access to escapeways for all miners is a key component of an effective evacuation of a mine.” *Id.* Section 75.380(d) (1) of Title 30 of the Code of Federal Regulations requires that each escapeway be maintained in a safe condition to always assure passage of anyone. The Commission has determined that the language of this section imposes on operators a duty to maintain escapeways that satisfy a general functional test of “passability.” *Utah Power & Light Co.*, 11 FMSHRC 1926, 1930-31 (Oct. 1989). In determining whether the standard has been violated, each case must be examined on its own facts. *Harlan Cumberland Coal Co.*, 19 FMSHRC 911, 916 (May 1997). In evaluating an escapeway violation, the Commission has held that evacuation standards are different from other mine safety standards. *Cumberland Coal Res. LP*, 33 FMSHRC 2357, 2367 (Oct. 2011). They are intended to apply meaningfully only when an emergency actually occurs and are violated if escape is impeded in any way. *See id.* Therefore, evacuation standards are evaluated under an emergency scenario. *See id.* at 2366.

There is no question that the amount and extent of water described in this record would, even under the calmest and most benign of circumstances, impede, to some extent, the passability of the secondary escapeway. There is also no question that the existence of emergency conditions increases the likelihood that an obstacle, which under non-emergency circumstances might be no more than an annoyance, would become a real and dangerous impediment to free passage. In short, any condition that could degrade the passability of an escapeway in an emergency and can be mediated beforehand is a violation of the standard. This point was implicitly recognized by JWR’s witness, Hannig, when he testified that he would have pumped this area if a pump were handy. (Tr. 99:16-100:1) All other aspects and permutations of the evidence in the record are relevant to the calculus of gravity and negligence. Accordingly, the conditions described by Willis in Citation Number 7699497 violated 30 C.F.R. § 75.380(d) (1).

Negligence

Section 110(i) of the Mine Act requires that in assessing penalties the Commission must consider, among other criteria, “whether the operator was negligent.” 30 U.S.C. § 820(i). Each mandatory standard thus carries with it an accompanying duty of care to avoid violations of the standard. An operator’s failure to meet the appropriate duty can lead to a finding of negligence if a violation of the standard occurs.

Negligence “is conduct, either by commission or omission, which falls below a standard of care established under the Mine Act to protect miners against the risks of harm.” 30 C.F.R. § 100.3(d). “A mine operator is required . . . to take steps necessary to correct or prevent hazardous conditions or practices.” *Id.* The water accumulation impeded free passability in the secondary escapeway and was thus a hazard that JWR had an obligation to correct or prevent.

When determining the degree of negligence, “MSHA considers mitigating circumstances which may include, but are not limited to, actions taken by the operator to prevent or correct hazardous conditions or practices.” *Id.* Reckless disregard may be found when “[t]he operator displayed conduct which exhibits the absence of the slightest degree of care.” 30 C.F.R. § 100.3(d) tbl.X. High negligence is when “[t]he operator knew or should have known of the violative condition or practice, and there are no mitigating circumstances.” *Id.* Moderate negligence is when “[t]he operator knew or should have known of the violative condition or practice, but there are mitigating circumstances.” *Id.* Low negligence is when “[t]he operator knew or should have known of the violative condition or practice, but there are considerable mitigating circumstances.” *Id.* A finding of no negligence is appropriate when “[t]he operator exercised diligence and could not have known of the violative condition or practice.” *Id.*

This citation alleges moderate negligence. According to the guidance in Section 110(i), “low” or “moderate” negligence may be found when an operator knew or should have reason to know about a violative condition. *Id.* The evidence on this point is quite limited. The secondary escapeway had been examined on October 22nd, four days before the citation was issued. (Tr. 51:7-22, 72:8-20) JWR’s examiner did not make any notation about water or any other potential hazard in the record for the examination on October 22nd. (Tr. 72:11-13) And Inspector Willis found that examination to be compliant. (Tr. 72:8-20) Inspector Willis guessed that the water had been as he found it for three days, and testified that “the water could have been there at the time [of the examination] but possibly not at [the] depth [Inspector Willis observed].” (Tr. 52:7-25, 72:8-10; Sec’y Ex. 1) But given the lack of any hazard notation from the October 22 examination, it is equally logical, if not more so, to infer that the accumulation was not present in any form at the time of the examination and gradually developed over the next three days. Willis even admitted in his inspection notes (Sec’y Ex. 1) that he could not prove that JWR’s management should have known about the cited accumulation. Furthermore, Willis himself treated the possibility of non-discovery as evidence of mitigation which affected his assessment of negligence at the “moderate” level. (Tr. 51:7-53:4) JWR did what was required of it in examining its secondary escapeway on a weekly basis. There is nothing to support a finding that JWR failed to exercise reasonable diligence in conducting its weekly examination. In sum, the evidence does not support Willis’ “moderate” negligence assessment. In keeping with Section 110(i), the Court’s finding is “no negligence.”

Gravity (“Seriousness”)⁸

The gravity penalty criterion under section 110(i) of the Mine Act, 30 U.S.C. § 820(i), is viewed in terms of the potential or actual seriousness of the violation. *See Sellersburg Stone Co.*, 5 FMSHRC 287, 294-95 (Mar. 1983) *aff’d*, 736 F.2d 1147 (7th Cir. 1984); *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 673, 681 (Apr. 1987). The gravity analysis focuses on factors such as the likelihood of an injury, the severity of an injury, and the number of miners potentially injured. Gravity is “often viewed in terms of the seriousness of the violation.” *Consolidation*

⁸ The citation in this case, as originally written, does not allege that the violation was S&S or that it constituted an unwarrantable failure to comply with the standard in question.

Coal Co., 18 FMSHRC 1541, 1549 (Sept. 1996). The seriousness of a violation can be examined by looking at the importance of the standard which was violated and the operator's conduct with respect to that standard, in the context of the Mine Act's purpose of limiting violations and protecting the safety and health of miners. See *Harlan Cumberland Coal Co.*, 12 FMSHRC 134, 140 (Jan. 1990) (ALJ). The Commission has recognized that the likelihood of injury is to be made assuming continued normal mining operations without abatement of the violation. See *Consolidation Coal Co.*, 8 FMSHRC 890, 899 (June 1986).

Contrary to the argument in JWR's Post-Hearing Brief, the water accumulation in the secondary escapeway is a citable hazard under 30 C.F.R. § 75.380(d) (1). The court is persuaded by the Inspector's rationale that in an emergency situation—regardless of whether JWR's management knew of it—the water accumulation would pose a real impediment to escape. Willis considered many factors in assessing the gravity alleged in the citation: the extent of the water accumulation; the condition of the floor; the clearness of the water; the dimensions of the escapeway; the gassy condition of the mine; and the existence and condition of the life line. Although he paid greater attention to the complications an emergency situation would bring in the context of his attempt to ramp the violation up to a higher level⁹, he did have in mind that this hazard existed in an emergency escapeway when he made his original assessment. No other evidence was allowed into the record that bears on the issue of gravity as viewed by Willis at the time of the citation. He was aware that in the event of an emergency scenario with thick smoke or airborne dust, the air would be going out of the mine through the escapeway and would probably be smoky or dusty with poor visibility. (Tr. 27:22-29:5, 32:17-33:7) This mine was known to Willis to be "gassy" and has been elevated to spot checks for methane, thus increasing the likelihood of an explosion or fire. (Tr. 42:14-25; Ex. S-7 No. 9) Willis was aware that there would be a sense of urgency, if not panic, that could increase the likelihood that a condition deemed unremarkable under calmer circumstances would take on more dire dimensions in an emergency scenario. (Tr. 35:10-13) Willis duly considered that any normally-avoidable impediment could significantly impede evacuation in an emergency. From Willis' experience with mock mine emergency training, he was aware that the potential hazard was compounded by the real possibility that a stretcher evacuation might be necessary. (Tr. 33:8-14) In light of all this, Willis determined that the water accumulation could reasonably cause slip and trip injuries such as strains, sprains, and pulled muscles. (Tr. 46:21-25)

The citation categorizes the gravity of an event arising from this violation as potentially causing lost workdays or restricted duty for a single miner, but that such an event would be unlikely to occur. (Ex. S-1) The evidence discussed above supports that assessment, and JWR did not argue against it, other than to claim that there should have been no citation written at all. It is of some note that Willis did not treat the violation as significant enough to require evacuation of the mine or rerouting of the escapeway. (Tr. 74:8-75:2) Instead, he abated the citation when JWR pumped the water out. (Tr. 72:21-73:4) Willis' supervisor reviewed Willis' citation and notes and allowed them to stand without alteration. (Tr. 60:14-21) The Court sees no

⁹ The Court sustained objections to the admissibility of Willis' testimony about his reasons for wanting to charge the violation at the higher level. (Tr. 31:7-8, 46:7-8)

reason to view Inspector Willis' initial gravity assessment in any light different that he did at the time he wrote the citation. Accordingly, the violation's gravity assessment is sustained.

Penalty

The principles governing the authority of Commission administrative law judges to assess civil penalties *de novo* for violations of the Mine Act are well established. Section 110(i) of the Mine Act delegates to the Commission and its judges the authority to assess all civil penalties provided in [the Act]. 30 U.S.C. § 820(i). The Act delegates the duty of proposing penalties to the Secretary. 30 U.S.C. §§ 815(a), 820(a). When an operator notifies the Secretary that it intends to challenge a penalty, the Secretary petitions the Commission to assess the penalty. 29 C.F.R. § 2700.28. The Act requires that in assessing civil monetary penalties, the Commission and its Administrative Law Judges consider the six statutory penalty criteria:

[1] the operator's history of previous violations, [2] the appropriateness of such penalty to the size of the business of the operator charged, [3] whether the operator was negligent, [4] the effect on the operator's ability to continue in business, [5] the gravity of the violation, and [6] the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

30 U.S.C. § 820(i).

The allegations in the Secretary's petition regarding those six penalty factors were not factually contested by JWR at the hearing. (Ex. S-5) The Court accepts the Secretary's allegations regarding the operator's size and recognizes the stipulation that the violation was abated in good faith. The Court has considered the history of past violations at this mine as summarized in Exhibit S-5, including the citation for the standard discussed above. After considering all of the penalty criteria, I assess a penalty of \$100.00.

Order

Based on the criteria in section 110(i) of the Mine Act, 30 U.S.C. § 820(i), I assess a total penalty of \$100.00. JWR is hereby ORDERED to pay the Secretary of Labor the sum of \$100.00 within 30 days of the date of this decision.

/s/ L. Zane Gill

L. Zane Gill

Administrative Law Judge

Distribution: (*Certificate Return Receipt*)

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June 12, 2013

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 2011-1854
Petitioner	:	A.C. No. 46-01436-254778
	:	
	:	Docket No. WEVA 2011-1855
v.	:	A.C. No. 46-01436-254778
	:	
	:	
CONSOLIDATION COAL COMPANY,	:	
Respondent	:	Mine: Shoemaker Mine

AMENDED DECISION

Appearances: Rebecca J. Oblak, Esq., Bowles Rice, Morgantown, WV 26505

Andrea J. Appel, Esq. and Elaine M. Abdoveis, Esq., U.S. Department of Labor, Office of the Regional Solicitor, Philadelphia, PA 19106

Before: Judge Lewis

STATEMENT OF THE CASE

This case arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §801 *et seq.* (the “Act” or “Mine Act”). The Secretary of Labor has filed a Petition for Assessment of Civil Penalty pursuant to Sections 104(a) and 105(d) of the Act, 30 U.S.C. §815(d), in connection with Order Nos. 8030970 and 8033057 and Citation No. 8033058. A hearing was held in Pittsburgh, Pennsylvania on October 18, 2012. The parties subsequently submitted post-hearing briefs.

ISSUES

The general issues to be determined are whether Respondent violated 30 C.F.R. §75.400 as alleged in Order Nos. 8030970 and 8033057 and whether Respondent violation 30 C.F.R. §75.360(b)(3) as alleged in Citation No. 8033058. Specific issues include whether these violations were substantial and significant in nature (“S&S”) and/or constituted unwarrantable failure.

STIPULATIONS

The parties have entered into several stipulations, introduced as Parties Joint Exhibit 1. Those stipulations include the following:

1. Respondent, Consol Energy, Inc. – Shoemaker Mine is an “operator” as defined in Section 3(d) of the Federal Mine Safety and Health Act of 1977, as amended (hereinafter referred to as the “Mine Act”), 30 U.S.C. Section 802(d), at the Shoemaker Mine where the alleged Orders/Citation at issue in this proceeding were issued; and,
2. Shoemaker Mine is owned and operate by Respondent, Consol Energy, Inc.; and,
3. The operations of Respondent at the Shoemaker Mine are subject to the jurisdiction of the Mine Act; and
4. This proceeding is subject to the jurisdiction of the Federal Mine Safety and Health Commission (hereinafter “FMSHRC”) and its designated Administrative Law Judge pursuant to Sections 104, 105, 113 of the Mine Act; and.
5. The alleged Orders and Citation and terminations involved herein were properly served by a duly authorized representative of the Secretary of Labor upon an agent of the Respondent at the dates, times and places stated therein, and may be admitted into evidence for the purpose of establishing their issuance; and
6. True copies of the above-captioned alleged Order Numbers and alleged Citation Number were served on Respondent or its agents as required by the Mine Act; and
7. Each party shall stipulate to the authenticity and admissibility of the other party’s exhibits, but not to the relevancy or the truth of the matters asserted therein; and
8. Any formal MSHA computer printout reflecting Respondent’s history of violations is an authentic copy and may be admitted as a business record of the Mine Safety and Health Administration; and
9. The imposition of the proposed penalties will have no effect on Respondent’s ability to remain in business; and
10. Respondent demonstrated good faith in the abatement of the alleged Orders and Citations at issue in this proceeding.

Joint Exhibit 1 (*see also* Transcript Page 6).¹

¹ Hereinafter, the transcript of the proceeding shall be referred to as “Tr.”

LAWS AND REGULATIONS

The citation involved in this matter, Citation No. 7033058, was issued under Section 104(a) of the Federal Mine Safety & Health Act of 1977. That provision provides the following:

If, upon inspection or investigation, the Secretary or his authorized representative believes that an operator of a coal or other mine subject to this Act has violated this Act, or any mandatory health or safety standard, rule, order, or regulation promulgated pursuant to this Act, he shall, with reasonable promptness, issue a citation to the operator. Each citation shall be in writing and shall describe with particularity the nature of the violation, including a reference to the provision of the Act, standard, rule, regulation, or order alleged to have been violated. In addition, the citation shall fix a reasonable time for the abatement of the violation. The requirement for the issuance of a citation with reasonable promptness shall not be a jurisdictional prerequisite to the enforcement of any provision of this Act.

30 U.S.C. § 814(a)

Citation No. 8033058 deals with an alleged violation of 30 C.F.R. §75.360(b)(3) (titled “Preshift Examination”). That section provides the following:

(b) The person conducting the preshift examination shall examine for hazardous conditions, test for methane and oxygen deficiency, and determine if the air is moving in its proper direction at the following locations:

(3) Working sections and areas where mechanized mining equipment is being installed or removed, if anyone is scheduled to work on the section or in the area during the oncoming shift. The scope of the examination shall include the working places, approaches to worked-out areas and ventilation controls on these sections and in these areas, and the examination shall include tests of the roof, face and rib conditions on these sections and in these areas.

Both Orders involved in this matter, Order Nos. 8030970 and 8033057, were issued under Section 104(d) of the Federal Mine Safety & Health Act of 1977. That provision provides the following:

(1) If, upon any inspection of a coal or other mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard, and if he also finds that, while the conditions created by such violation do not cause imminent danger, such violation is of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard, and if he finds such violation to be caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standards, he shall include such finding in any citation given to the operator under this chapter. If, during the same inspection or any subsequent inspection of such mine within 90 days after the issuance of such citation, an authorized

representative of the Secretary finds another violation of any mandatory health or safety standard and finds such violation to be also caused by an unwarrantable failure of such operator to so comply, he shall forthwith issue an order requiring the operator to cause all persons in the area affected by such violation, except those persons referred to in subsection (c) of this section to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated.

(2) If a withdrawal order with respect to any area in a coal or other mine has been issued pursuant to paragraph (1), a withdrawal order shall promptly be issued by an authorized representative of the Secretary who finds upon any subsequent inspection the existence in such mine of violations similar to those that resulted in the issuance of the withdrawal order under paragraph (1) until such time as an inspection of such mine discloses no similar violations. Following an inspection of such mine which discloses no similar violations, the provisions of paragraph (1) shall again be applicable to that mine.

30 U.S.C. § 814(d)

Order Nos. 8030970 and 8033057 deal with alleged violations of 30 CFR §75.400 (titled “Accumulation of combustible material”). That section provides the following:

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 CFR §75.400.

The Secretary maintains that the citation and both orders were based upon violations that were S&S in nature. Well-settled Commission precedent sets forth the standard used to determine if a violation is S&S. A violation is S&S “if, based upon the particular facts surrounding the violation there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature.” *Cement Div., National Gypsum Co.*, 3 FMSHRC 822, 825 (April 1981). The Commission later clarified this standard, explaining:

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).

The S&S nature of a violation and the *gravity* of a violation are not synonymous. The Commission has pointed out that the “focus of the *seriousness* of the violation is not necessarily on the reasonable likelihood of serious injury, which is the focus of the S&S inquiry, but rather on the effect of the hazard if it occurs.” *Consolidation Coal Co.*, 18 FMSHRC 1541, 1550 (Sept. 1996) *emphasis added*.

The term “gravity” in the Mine Act is contained in Section 110(i), which states that in determining the appropriateness of a penalty, the Secretary must consider, among other things, “the gravity of the violation.” 30 U.S.C. §820. The Secretary promulgated three factors under 30 C.F.R. §100.3(e) to determine the gravity of a citation for purposes of determining the penalty. Those factors are:

[T]he likelihood of the occurrence of the event against which a standard is directed; the severity of the illness or injury if the event has occurred or was to occur; and the number of persons potentially affected if the event has occurred or were to occur.

30 C.F.R. §100.3(e).

Pertinent regulations and well-settled Commission precedent deal with the standard for negligence under the Act. Negligence “is conduct, either by commission or omission, which falls below a standard of care established under the Mine Act to protect miners against the risks of harm.” 30 C.F.R. § 100.3(d). “A mine operator is required to be on the alert for conditions and practices in the mine that affect the safety or health of miners and to take steps necessary to correct or prevent hazardous conditions or practices.” *Id.* Low negligence exists when “[t]he operator knew or should have known of the violative condition or practice, but there are considerable mitigating circumstances.” *Id.* Moderate negligence is when “[t]he operator knew or should have known of the violative condition or practice, but there are mitigating circumstances.” *Id.* High negligence exists when “[t]he operator knew or should have known of the violation condition or practice, and there are no mitigating circumstances.” *Id.* See also *Brody Mining, LLC*, 2011 WL 2745785 (2011)(ALJ). Finally, the operator is guilty of reckless disregard where it “displayed conduct which exhibits the absence of the slightest degree of care.” 30 C.F.R. § 100.3(d). MSHA considers mitigating circumstances which may include, but are not limited to, actions taken by the operator to prevent or correct hazardous conditions or practices. *Id.*

According to the Commission, an unwarrantable failure is defined as “aggravated conduct constituting more than ordinary negligence.” *Emery Mining Corp.*, 9 FMSHRC 1997, 2002 (Dec. 1987). The Commission explained the judge’s role in determining whether conduct is aggravated as follows:

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, the operator’s knowledge of the existence of the violation...

While an administrative law judge may determine, in his discretion, that some factors are not relevant, or may determine that some factors are much less important than other factors under the circumstance, all of the factors must be taken into consideration and at least noted by the judge.

IO Coal Co., Inc., 31 FMSHRC 1346, 1350-1351 (Dec. 2009).

VIOLATIONS

1. Order No. 8030970

On October 14, 2010 at 10:15 a.m. Inspector David M. Edwards (“Edwards”) issued to Respondent Order No. 8030970. Edwards found:

Accumulations of combustible material consisting of loose coal, loose fine and ground up coal, and coal dust including float coal dust deposited on rock dusted surface was [sic] being permitted to accumulate on the No. 8 Beltline from the belt regulator located at #8-50 crosscut to the belt drive and take-up area located at #8-1 crosscut. The accumulations coming in contact with the belt rollers measured anywhere from 2 to 3 feet in width and 24 inches in depth packed around the roller shaft and bearings were warm to touch. Float coal dust, black in color, was present on the bottom directly under the belt rollers approximately 6 feet in width and on the belt structure and water lines at the cited location. The conveyor belt of the No. 8 Beltline was not properly aligned from crosscut #8-46 to #8-47. The bottom belt was rubbing against the belt structure creating frictional heat which poses a fire hazard. Damaged rollers were present at crosscut #8-23 (Bottom Roller) and #8-3 crosscut (2 Bottom Rollers). Management was engaged in aggravated conduct constituting more than ordinary negligence in that the area was pre-shift and the conditions were not reported or worked on. This violation is an unwarrantable failure to comply with a mandatory standard. This mine has received 137 (75.400) citations over the past 2 years.

Government Exhibit 6.² Edwards noted that the risk of injury or illness for this violation was “Reasonably Likely,” “Lost Workdays or Restricted Duty,” “S&S” and would affect 1 person. He further found that Respondent exhibited “High” negligence with respect to this violation.

Respondent took action to terminate the condition on October 14, 2010 at 10:30 p.m. Under “Subsequent Action” Edwards noted:

The operator had miners shoveling on the beltline from approximately 1:00 p.m. to 10:00 p.m. to complete the cleaning and the belt line was rock dusted from the belt drive to the belt regulator at #8-50 crosscut.

² Government exhibits will hereinafter be referred to as “GX” followed by the number.

Id. On October 18, 2010, Edwards modified the body of the Order with respect to Condition or Practice, adding:

The heavy accumulations were present from #8-36 crosscut extending outby to #8-15 crosscut, a total distance of approximately 2,100 linear feet.

Id.

2. Order No. 8033057

On October 26, 2010 at 10:10 a.m. Inspector James Gropp (“Gropp”) issued Respondent Order No. 8033057. Gropp found:

Loose dry coal, coal dust, including float coal dust, black in color was permitted to accumulate on the active 8 South continuous miner sections on the left side, MMU 032, and the right side, MMU 016, at the following locations:

- 1) 15A #0 entry from the face at approximately 2+10 for a length of 80 feet outby. The accumulations were 4 to 15 ½ feet wide and were 4 to 15 inches in depth.
- 2) Intersection of 15A #0 and 8 South #1 at spad 6+94 where the miner had holed 8 South #2 to #1 crosscut allowing accumulations that were 15 ½ feet wide, 4 to 9 inches in depth and 10 feet in length outby the side of the intersection.
- 3) Intersection of 8 South #2 entry at 6+94 where the miner had holed 8 South #3 to #2 crosscut allowing accumulations 15 ½ feet wide, 4 to 19 inches in depth and 12 feet in length on the outby side of the intersection.
- 4) Crosscut of 8 South #4 to #3 between 6+94 to 5+75 a distance of approximately 140 feet in length, 15 ½ feet wide and 8 to 12 inches in depth.
- 5) 8 South #4 entry starting at approximate spad 5+20 for a length of 60 feet in length that was 14 feet in width and 12 inches in depth.
- 6) 8 South #6 entry starting at approximate spad location 4+15 for a distance of 30 feet inby where the miner head had scaled the right side rib maneuvering around the corner from #5 to #6 creating accumulations that were 12 to 24 inches in depth and ranged from 2 ½ feet to 6 feet in width.
- 7) 8 South #8 entry at 6+28 where the miner had holed the crosscut #5 to #6 that were 12 to 24 inches in depth and ranged from 6 to 15 ½ feet in width.

The standard 75.400 was cited 139 times at this mine in the last two years. The operator engaged in aggravated conduct constituting more than ordinary negligence in that the mine clean up program was not being followed and

permitted accumulations to exist in the active workings of 8 South. This violation is an unwarrantable failure to comply with a mandatory standard

GX-9. Gropp noted that the risk of injury or illness for this violation was “Reasonably Likely,” “Lost Workdays or Restricted Duty,” “S&S” and would affect 10 persons. He further marked that Respondent exhibited “High” negligence with respect to this violation. Respondent took action to terminate the condition on October 26, 2010 at 14:10, Calloway noted:

The accumulations were cleaned and removed from the mine.

Id. On October 27, 2010 at 12:51 p.m., Gropp modified the body of the Order with respect to Condition or Practice, replacing any mention of “032” with “083,” adding:

The wrong MMU number was entered for the 8 South Left side section.

Id.

3. Citation No. 8033058

On October 27, 2010 at 1:30 p.m. Gropp issued Respondent Citation No. 8033058. Gropp found:

An inadequate pre-shift examination was conducted on the midnight shift of 10-26-2010 preceding the oncoming day shift on the 8 South continuous miner sections, left side MMU 083 and right side MMU 016. The hazardous conditions of combustible coal accumulations that existed, including their locations, were not reported and entered into the pre-shift report and no actions were taken to immediately correct the obvious conditions that were noted in the Order No. 8033057.

GX-12. Gropp noted that the risk of injury or illness for this violation was “Reasonably Likely,” “Lost Workdays or Restricted Duty,” “S&S” and would affect 10 persons. He further found that Respondent exhibited “High” negligence with respect to this violation. Respondent took action to terminate the condition on October 27, 2010 at 1:31, Calloway noted:

The hazardous conditions cited were corrected on 10-26-2010 at 1410 hours, therefore the citation is terminated.

Id.

SUMMARY OF THE TESTIMONY

1. Testimony of Inspector David M. Edwards

A. Edwards' Qualifications and Work History

Edwards worked at MSHA's St. Clairsville, Ohio Office. (Tr. 15). He has a degree in electromechanical engineering at Belmont Technical College. (Tr. 97). Before joining MSHA, he worked for 18 years in the mining industry, all underground. (Tr. 19-20). From 2000 to 2006 he worked as a foreman at Shoemaker Mine, the mine at issue. (Tr. 21). Edwards' training as a foreman included fire boss training and his duties included pre-shift examinations. (Tr. 21). In April 2006, Edwards was laid off. (Tr. 22). Edwards joined MSHA on January 7, 2007. (Tr. 15, 22). He had 21 weeks of instruction at the Academy in Beckley, West Virginia. (Tr. 16). He also received on-the-job field training including specialized instruction on fire hazards and combustible accumulations. (Tr. 16). Edwards' other specialized certifications included foreman's papers in Ohio and West Virginia and an examiner certification for Consol. (Tr. 19, 21). He was authorized to train underground examiners and certify mine foremen. (Tr. 19).

B. Edwards' Testimony about Activities Conducted Before the Inspection

Edwards conducted an EO1 inspection on Shoemaker on October 14, 2010.³ (Tr. 22-23). Edwards arrived at the mine at 7:15 a.m. (Tr. 24-25). Shoemaker has three portals: Golden Ridge, Whittaker, and River. (Tr. 25). Edwards met Terry Wilson, a foreman trainee, at Whittaker. (Tr. 25). Edwards had never met Wilson before and Wilson said it was his first day. (Tr. 98-99). Edwards also notified the UMWA representative, Steve Lavenski, who was permitted to travel with the inspector. (Tr. 25).

Edwards testified that in order to prepare for an inspection, an inspector must review uniform mine files, the ventilation plan, the roof control plan, the emergency response plan, the mine-specific safeguards related to injuries in the past caused by transportation, the violation history, and the mines (d) series status. (Tr. 24). He also reviewed the pre-shift examination records for the areas he was going to travel. (Tr. 26, 99). He reviewed notes from the previous (midnight) pre-shift and perhaps even farther back. (Tr. 26). He will not conduct an inspection without reviewing the pre-shift examinations. (Tr. 101). Finally, Edwards filled out the inspection cover sheet (GX-7). (Tr. 32). The cover sheet shows the date of the inspection, the event number for the EO1, the arrival time and the list of records checked.⁴ (Tr. 32).

³ An EO1 inspection is a regular, quarterly inspection of the entire mine. (Tr. 23).

⁴ There was an error on this form; Edwards flipped the miner's representative and the company representative. (Tr. 32). He inserted the wrong names on the lines. (Tr. 33, 98).

C. Edwards' Testimony Regarding the Inspection

i. Conditions Observed

Edwards, Wilson, and Lavenski rode inby to do the pre-operational checks to make sure that it was safe to travel. (Tr. 26). En route, Edwards observed the roof condition, rib conditions, tie line, and ventilation. (Tr. 26). The rail jeep could not be parked at 9 Belt so Lavenski took it to 7 North. (Tr. 26-27, 98). Edwards inspected the No. 9 Belt and issued no citations. (Tr. 27- 28).

After inspecting 9 Belt, Edwards and Wilson began to move down 8 Belt. (Tr. 28). The 8 Belt was approximately 5-6,000 feet long. (Tr. 28-29). Edwards reviewed roof conditions, rib conditions, ventilation, accumulations, belt structure, belt rollers, and CO monitors. (Tr. 28). In doing so, he noticed fire hazards. (Tr. 28). After determining a "fire triangle" existed, Edwards issued a withdrawal order (Order No. 8030970, GX-6). (Tr. 31). To have a fire triangle, there must be an accumulation of combustible material, an ignition source, and 20.8% oxygen. (Tr. 96-97). He ordered the belt shut down to be cleaned and realigned. (Tr. 34).

At the hearing, Edwards described each element of the fire triangle present here. First, at intermittent locations from 8-50 to 8-1 along 2,100 feet of the 5,000 foot belt Edwards noticed float coal dust and other accumulations.⁵ (Tr. 29, 34, 36, 93, 138). Edwards noted the largest accumulation started at 8-36 crosscut and extended outby, towards the drive, to 8-15 crosscut.⁶ (Tr. 37). On cross examination, Edwards conceded that he was not sure of how many accumulations were present. (Tr. 138-140). He believed there were five or six, though he did not write the number down. (Tr. 138-140). Edwards testified to several kinds of accumulations including loose coal, loose fine and ground-up coal, coal dust, and float coal dust. (Tr. 45). He described black float coal dust as an accumulation of combustible material with the consistency of talcum powder. (Tr. 46). Edwards saw the black float coal dust on the belt line, the belt structure, the water line, and under the belt rollers. (Tr. 41-42). He found float coal dust was on the mine surfaces as well, including rock dusted areas. (Tr. 41). Edwards observed that the float coal dust covered most of the width of the entry, including the floor, ribs, and roof. (Tr. 42, 139). He stated that float coal dust as thin as a piece of paper can be an explosion hazard. (Tr. 41). Float coal dust must be mixed with rock dust so that the combination is 80% incombustible material. (Tr. 47). While mixed rock dust and coal dust will vary in color, depending on the components, Edwards noted that black color indicates that it is mostly coal dust. (Tr. 48, 49). However, gray coal dust is still an accumulation. (Tr. 49-50). The only way to know the content of dust was to take a sample. (Tr. 47). Edwards admitted that he did not take any samples. (Tr. 137). Neither Edwards nor Wilson had a sieve. (Tr. 49).

⁵ There was not a solid line of accumulations; some spots were worse than others. Tr. 93, 94.

⁶ He took some measurements with the 25-foot tape measure. (Tr. 137-138). He measured the width of the accumulations by using the width of the 72-inch belt and the depth of the accumulations with the tape measure. (Tr. 137).

With respect to air quality, Edwards testified that this area had 20.8% oxygen and 0% methane (despite the fact this was a gassy mine on a five-day spot).⁷ (Tr. 30).

Finally, Edwards testified to three ignition sources on the belt line: belt rubbing the structure, rollers running in accumulations, and damaged rollers. (Tr. 29-30, 34-35, 37, 39, 42-43, 130). The belt was rubbing structure at 8-46 to 8-47 crosscut. (Tr. 29-30, 34, 42, 130). Upon observing this condition, Edwards shut down the belt. (Tr. 30, 52, 130). The belt rubbing the structure was a violation of 75.1731(b) and, as a result, Edwards issued a citation. (Tr. 30). Edwards issued this as a 104(a) citation, marked as S&S.⁸ (Tr. 31). Edwards explained that this condition created frictional heat against the metal parts of the belt structure. (Tr. 42-43). The belt ran so fast that it could cut through metal. (Tr. 43). The belt was warm to the touch, smoking, and smelled of burning rubber. (Tr. 43). The belt structure was hot, not just warm. (Tr. 43). Edwards asserted Wilson also felt the belt was hot. (Tr. 43). To correct this condition, the operator had to train the belt, or move it so it was no longer rubbing. (Tr. 131, 132).

In addition, Edwards observed belt rollers spinning in coal accumulations between 8-36 and 8-15. (Tr. 29, 35, 37, 39). These were the accumulations that concerned him most. (Tr. 139). Edwards testified the accumulations were about as wide as the belt. (Tr. 38). He measured them at about two or three feet deep. (Tr. 38). However, Edward's notes indicated that the belt was three feet in width and 24 inches in depth. (Tr. 38). These accumulations included wet material. (Tr. 35, 39). However, Edwards noted wet dust can dry out and become combustible. (Tr. 35). Under normal mining operations, if this was allowed to continue, Edwards believed there was a potential for a fire. (Tr. 39). The area was rock-dusted. (Tr. 35-36). However, float coal dust on top of rock dusted was still an accumulation. (Tr. 35-36).

Finally, Edwards observed damaged rollers, a violation of §75.1731(a). (Tr. 30, 35, 43). There were two damaged bottom rollers at the 8-3 crosscut and one at the 8-23 crosscut. (Tr. 43-44). When the rollers break in two, inspectors call them "pizza cutters," and all of the broken rollers Edwards found here were pizza cutters. (Tr. 45). He explained that the metal from the roller cuts into the metal shafts and creates heat. (Tr. 30, 45). He considered this a fire hazard in light of the accumulations and the 20.8% oxygen atmosphere. (Tr. 45). He testified that to correct these problems the belt must be shut down and the rollers changed out. (Tr. 131).

⁷ Edwards knew this was a gassy mine because every quarter MSHA takes a return bottle sample and sends them to the labs for analysis. (Tr. 60). This showed how much methane was liberated from the coal mine at various strategic locations in the return air for 24 hours. (Tr. 60). These numbers together dictate how often a mine needs to be on a spot inspection for methane. (Tr. 60). Shoemaker was on a five-day spot. (Tr. 60-61). This means every fifth day the mine needs an EO2 inspection for liberation of methane. (Tr. 60-61).

⁸ Edwards called his supervisor, Joe Facello ("Facello"), at the mine before he returned to the field office. (Tr. 163). Edwards was not directed to issue the Order. (Tr. 163). He only called to ensure that writing 104(a) citations (for belt rubbing structure and other issues) in addition to the order was the appropriate process. (Tr. 163, 164).

Edwards contended this was “the worst belt line” he had ever seen. (Tr. 50, 126-127, 165). Edwards maintained this opinion on cross examination, though he admitted he had only taken five measurements. (Tr. 139). He claims that Wilson also said this was the worst belt he had seen at Consol. (Tr. 40).

ii. The Meaning of “Warm to the Touch” According to Edwards

According to Edwards, warm to the touch was not a term with a specific definition or temperature; it just means warmer than under normal conditions. (Tr. 117- 119). Edwards believed warm to the touch is serious; it indicates a potential ignition source. (Tr. 118, 122). Under normal mining conditions, something is wrong and will get worse. (Tr. 117, 121, 122). Similarly, Edwards did not know what temperature hot to the touch would be. (Tr. 125). The belt rubbing the structure was hot, meaning it would burn his hand. (Tr. 121). Edwards did not know how hot a roller must be or how long it must run to start a fire. (Tr. 118, 122). Edwards did not believe the exact temperature was significant; it was just important that a belt was not supposed to be warmer than room temperature. (Tr. 170-171).

Neither Edwards nor Wilson had a heat gun. (Tr. 40). He has never carried a heat gun as an AR nor has he asked an operator to test the heat of structure. (Tr. 125). Edwards took no objective tests of the frictional heat source; he just used his hand. (Tr. 132). He noted that there was smoky hot rubber. (Tr. 119). On cross examination, Edwards admitted that he was not aware of any belt fires at Shoemaker mine due to accumulations. (Tr. 142).

iii. After The Issuance of Order No. 8030970

Edwards notified Wilson that the belt or section would be down. (Tr. 51, 128-129, 160). Edwards believed Wilson informed management. (Tr. 52). Edwards believes he notified Tex Raider (“Raider”), a belt coordinator. (Tr. 52-53, 130). He did not know what time he provided notice. (Tr. 128-129). Edwards told Raider that the belt needed to be shut down and Raider promised to do so. (Tr. 53, 135). Respondent had to eliminate the ignition sources, change the rollers, and clean the accumulations. (Tr. 53, 135). The belt was shut down for an hour or an hour and a half for realignment. (Tr. 141).

Edwards went home. (Tr. 54). He testified that Afternoon Foreman Eric Turner (“Turner”) called him at 10:00 p.m. (Tr. 55, 57). Turner stated the belt was trained, the rollers were changed, and the ignition sources corrected. (Tr. 56). Edwards went back to the mine (Tr. 56). All of the conditions were corrected. (Tr. 57). The belt was not running while he was underground. (Tr. 57). Edwards did not believe it was running while the citations were being abated. (Tr. 57). Edwards testified that Order No. 8030970 at page 3 states that the operator shoveled and rock dusted the belt line for approximately 9 hours. (Tr. 57-58).

D. Edwards’ Testimony on the Negligence Finding in Order No. 8030970

Edwards testified that the operator exhibited high negligence. (Tr. 142). Edwards made this determination because the pre-shift exam was inadequate and the conditions were obvious and extensive. Edwards referred to the last pre-shift examination report of the No. 8 Belt before

his inspection. (GX-8, Tr. 66). The examiner was an agent of the operator and responsible for preventing accumulations of combustible material in active workings. (Tr. 64-65, 142). The examiner inspected this area and only noted that the area needed to be swept. (Tr. 143-144). Edwards also referred to Citation No. 8030971.⁹ (GX-9, Tr. 66, 67). The citation was issued for an inadequate examination of the No. 8 Belt. (Tr. 67, 68). Edwards noted that the violation was final and the penalty, \$9,100.00, had been paid without modification. (Tr. 68). Edwards believed the cited condition did not occur after this pre-shift examination. (Tr. 72, 143, 169). Based on his experience, Edwards knew that the accumulations could not have happened that quickly. (Tr. 72). Beyond high negligence, Edwards believed that the failure to take, or even mark the need for, corrective action was an unwarrantable failure. (Tr. 64, 70-71).

On cross-examination Edwards discussed the fact that there were some notations on the pre-shift record. Entry No. 4 for the pre-shift examination on October 14, 2010 noted 8-15 to 8-36 needed to be swept. (Tr. 151-152). Edwards marked that this condition was not reported in Order No. 8020970 because he believed that this notation was a report of a condition, just not the condition he observed. (Tr. 65, 152). He believed that the fact that the area where he found the heaviest accumulations only stated “needs swept” and listed no corrective action was important. (Tr. 65, 70-71). Edwards believed that if an area needs swept, it does not mean anything beyond float coal dust needs to be swept. (Tr. 144, 168). These accumulations were obvious, extensive and existed for some time. (Tr. 65). Edwards testified that the existence of these accumulations constituted an unwarrantable failure. (Tr. 65).

Edwards conceded that he did not look at any of the other pre-shift examinations beyond October 14, 2010. (Tr. 143-144). At hearing, Edwards reviewed several other pre-shift examinations, including those that stated there were areas that needed to be swept, areas where belt was rubbing the structure, areas with accumulations under the rollers, and broken rollers. (Tr. 147-149). Edwards admitted that he did not talk to the pre-shift examiner, Wilhem, who was not present. (Tr. 145).

In addition to the pre-shift examination evidence Edwards reviewed a MSHA record of the violation history for the Shoemaker during the previous two years. (GX-5, Tr. 67-68). Edwards testified that this history showed Shoemaker had 137 citations for §75.400 over the last two years.¹⁰ (GX-4, 5 p. 61-71; Tr. 69). Edwards had issued a §75.400 violation at Shoemaker in the past. (Tr. 70). When doing so, he spoke with management about corrective actions, the conditions found, and things to improve upon. (Tr. 70). Edwards was not sure as to what mine location the 137 part §75.400 citations were issued or if it was for the same or similar condition cited here. (Tr. 159-160). However, Edwards knew the mine had a significant history of violating §75.400. (Tr. 165-166).

⁹ The evidentiary support for this citation will be discussed below.

¹⁰ Thirty C.F.R. §75.400 is a “Rules to Live By” standard. (Tr. 151). The Rules to Live By identify and inform operators of the standards that result in the most fatalities when violated. (Tr. 69, 150, 151).

Edwards felt Respondent's conduct was aggravated because of Aracoma and the other history of death from fires on belt lines.¹¹ (Tr. 155). On cross examination, Edwards admitted that this situation was not like Aracoma, but stated that he was trying to prevent such a situation from occurring. (Tr. 156-157). Edwards also believed the conduct was aggravated because of the inadequate pre-shift reports, the inadequate examinations, and the condition was obvious and extensive. (Tr. 158). Edwards thought the pre-shift examiner downplayed the conditions. (Tr. 158). On cross examination, Edwards conceded that things can change in a matter of seconds in a coal mine and he was uncertain about how long the condition was obvious. (Tr. 159). He did not ask anyone how long the condition existed. (Tr. 159).

E. Edwards' Testimony on the Gravity of Order No. 8030970

Edwards testified that the minimal gravity of Order No. 8030970 was lost workdays or restricted duty. (Tr. 58-59). It could have been worse. (Tr. 58-59). He believed that miners could have been exposed to smoke inhalation or burns resulting in permanently disabling or fatal injuries. (Tr. 58). Edwards found that this was reasonably likely to occur because the fire triangle was present. (Tr. 59). Further, he believed the specific hazard created was fire on the belt line or an explosion. (Tr. 59-60).

According to Edwards, the likelihood of the cited danger was increased because there were three equally important ignition sources: belt rubbing the structures, damaged rollers, and accumulations of coal turning in the rollers. (Tr. 133, 164-165). Belt rubbing the structure was an ignition source because friction causes the structure to get hot and the roller to warm. (Tr. 62, 133-134). On cross examination, Edwards admitted that it was possible for a belt to go out of alignment in a matter of seconds. (Tr. 132). He admitted that even if the belt was misaligned, there was a CO system and water sprays on the belt. (Tr. 132). He also testified that there was no methane detected and that the belt was fire resistant. (Tr. 133).

Edwards stated rollers packed and spinning in accumulations were ignition sources because the coal acts as a restriction on the roller turning, causing frictional heat. (Tr. 61). Edwards further testified that broken rollers are an ignition source because uneven rolling can cause frictional heat. (Tr. 61-62). Also, damages rollers can break in two and cut into the metal causing arcing and sparking. (Tr. 61-62, 125-126). Here, Edwards touched the broken bearings and rollers and they were warm. (Tr. 62, 126). He did not see any pizza cutter rollers or sparks but he heard damaged rollers. (Tr. 126).

Edwards noted that one person, the examiner, would be affected by this condition. (Tr. 63-64). Belt lines might have a shoveler though Edwards did not see one here. (Tr. 64).

¹¹ The Aracoma Alma #1 Mine experienced a mine fire on January 19, 2006 caused by frictional heat generated by a misaligned longwall belt. See Report of Investigation Fatal Underground Coal Mine Fire January 19, 2006 Aracoma Alma Mine #1 Aracoma Coal Company, Inc. Stollings, Logan County, West Virginia I.D. No. 46-08801. The fire resulted in the deaths of two miners. *Id.*

Edwards discussed why he found this violation to be S&S. With respect to Order No. 8030970, Edwards testified that Respondent violated §75.400. (Tr. 152). He believed the hazard in this case was the risk of fire on the belt line. (Tr. 152). Although no methane was present, he testified that Shoemaker was a gassy mine on a five-day spot. (Tr. 153, 169). Methane can be liberated from the ribs, roof, the coal on the beltline or the coal in a stockpile at the surface. (Tr. 169). If there was a fire on the belt line, the examiner would be exposed. (Tr. 153-154). Edwards testified that the reasonably likely injury would be smoke inhalation, or burns, resulting in lost workdays, restricted duty, and possibly permanently disabling or fatal injury. (Tr. 153-154). Finally, Edwards believed Respondent exhibited negligence. (Tr. 154). According to Edwards, if all five criteria are met then a violation was S&S. (Tr. 154). This was true even though Edwards never heard of a belt fire at Shoemaker Mine. (Tr. 154-155).

F. Edwards' Testimony Rejecting Possible Mitigating Factors

Edwards conceded that some of the accumulations on the mine bottom were damp to wet. (GX-7, page 19, Tr. 63, 122-123, 134). However, he did not feel this was a mitigating factor because wet coal will dry out under normal mining conditions and become combustible. (Tr. 63, 122-124). The belt will run and the air will dry out the coal. (Tr. 123, 166). The fact that there was a working CO system and water sprays did not change his opinion that this was an S&S violation. (Tr. 166-167). He testified that the CO monitors will only note when there is already a fire, not the danger of a fire. (Tr. 167). He further noted the water sprays were designed to prevent coal dust suspension not to suppress fires. (Tr. 168). He also opined that a fire resistant belt does not mean flammable material was not a hazard. (Tr. 167).

G. Edwards' Testimony Regarding the Photographs

Neither Edwards nor Wilson took photographs; they had no cameras. (Tr. 72-73). Respondent provided pictures that were allegedly taken within sixty minutes of the writing of Order No. 8030790.¹² (Tr. 73). Respondent submitted 19 photographs numbered 12-30 and Edwards discussed each one. (Tr. 74-93). Edwards testified that the photographs showed accumulations of coal dust. (Tr. 75-93). He also observed that most of the photographs did not show the amount of accumulation that was present when he issued Order No. 8030970. (Tr. 75-92). In addition, Edwards noted that one photograph (#23) showed strands of the belt breaking off. (Tr. 86-87). He claimed that this was an indication of belt rubbing structure. (Tr. 86-87). He described how the structure becomes ragged and will slice the belt. (Tr. 87). However, Edwards also noted that the photographs were often dark in the background and overly bright where the flash or photographer's head lamp cast light. (Tr. 75-93).

In reviewing the photographs, Edwards often testified that there was no indication that the areas shown were at Shoemaker mine; however, he had no reason to believe it was a different mine. (Tr. 74-93, 161). Respondent's McElroy and Shoemaker mines look identical. (Tr. 161-

¹² The photographs are contained in Respondent's Exhibit 3, with each given a separate page number. Tr. 73. Respondent's exhibits will hereinafter be referred to as "RX" followed by the number.

162). Edwards was not present when the photos were taken, so he did not know when they were taken or who took them. (Tr. 162).

II. Testimony of James Gropp

A. Qualifications and Work History

Gropp had twenty years of experience before going to MSHA, fourteen years underground, all with Respondent. (Tr. 175-176, 178). He received a Bachelor's degree in Mining Engineering from the University of Pittsburgh in 1987. (Tr. 174). As an employee for Respondent, Gropp acted as an industrial engineer, a section foreman, a project engineer, a shift foreman, a mine engineer, and a track and construction foreman. (Tr. 177). In those capacities, Gropp performed pre-shift examinations of the active workings. (Tr. 178-189). He had been employed by MSHA since April 2007. (Tr. 173). MSHA provided him with specialized training, including on-the-job training with journeymen inspectors and 21 weeks of training at the Academy. (Tr. 174). The 21 weeks in Beckley included classes on law, regulation, policy; citation and order writing; and all the different aspects of Parts 75 and 48. (Tr. 174).

B. Gropp's Testimony about Activities Conducted before the Inspection

Gropp conducted an E01 inspection of Shoemaker on October 26, 2010. (Tr. 180). He was also at Shoemaker to run a noise survey on an MMU section. (Tr. 181). That day he calibrated his instruments, got his inspection gear, drove to the mine, and arrived after 7:00 a.m. (Tr. 181). Upon arrival, he reviewed the pre-shift book, on-shift books, and the weekly permissibility books. (Tr. 182).

C. Gropp's Testimony Regarding the Inspection

Upon entering the mine, Gropp did not immediately begin the survey; instead, he began an imminent danger run on all areas inby the tailpiece. (Tr. 182-183). This was done to ensure that nothing would result in an injury while he was there. (Tr. 183). He testified that this was standard procedure. (Tr. 183). He began around 9:00 a.m. (Tr. 183). The company escort was Gary Rose ("Rose") along with Craig Norton ("Norton"), a foreman trainee, and the union representative was John Miller. (Tr. 183). Upon arriving at the section he stopped at the right-side power center, dropped off his gear, and then went towards the face. (Tr. 184).

Gropp noticed an accumulation of coal just inby the power center. (Tr. 184). Then he traveled up the right side face of the No. 8 entry and saw a second accumulation of coal. (Tr. 184). He then informed Norton this was a violation. (Tr. 184). He ran the faces from 8 to 5 to 4. (Tr. 184). As he went from 4 to 3, he saw more accumulations and he told Norton it was bad. (Tr. 184). Then he examined 2, 1, and 0 entries of the 15D section. (Tr. 184). He found more accumulations and issued Order No. 8033057. (Tr. 184). Upon leaving the faces, Gropp entered the No. 4 entry and saw more accumulations where a piggyback loader was dumping. (Tr. 185). This coal was 60 feet from the intersection of the face outby. (Tr. 185). Gropp added this to the accumulation order. (Tr. 185).

Gropp testified regarding a mine map of Shoemaker. (GX-15, Tr. 187-189). The map included some of the areas Gropp inspected (it did not include the area where one accumulation was found). (Tr. 187-188). Gropp marked the map 1-7 to show the accumulations he found. (Tr. 188, 197). The accumulations here were in the active workings of 8 South. (Tr. 199-200). There were some pieces of equipment on top of the accumulations observed including a bolter by the face of the 15A 0 entry. (Tr. 200). The first accumulation (sixth in the Order) was inby the tailpiece in area 6. (Tr. 190). This accumulation was not on the map; it was outby. (Tr. 190). This was a heavily traveled area and the accumulation was on the right side of the entry. (Tr. 190). Gropp believed this accumulation occurred when a miner cut the rib while trying to maneuver in a tight area with the bits on. (Tr. 190). The accumulation was 30 feet in length, 12 to 24 inches in depth, and two and a half to six feet wide.¹³ (Tr. 190). The accumulation was made of coal. (Tr. 191). Gropp testified that he knew this because it was black and he could see where the rib was cut. (Tr. 191). He believed the operator should have scooped coal and put it on the belt. (Tr. 192).

The second accumulation (seventh in Order No. 8033057) was near the face of the No. 8 entry. (Tr. 192). The accumulation spanned 6 plus 28. (Tr. 193). This accumulation resulted from the miner holing through crosscut 7 to 8. (Tr. 193). When a miner goes from a crosscut to an entry, it is called holing through. (Tr. 192). This process causes coal to fall outside of the crosscut. (Tr. 192). Holing through is a normal part of the mining process and result in accumulations of coal and stone. (Tr. 193). There was a fan on top of these accumulations so Respondent could not have loaded them up. (Tr. 192-193). They were as wide as the entry or from to six to 15 and a half feet, 12 to 24 inches in depth. (Tr. 193). The operator should clean accumulations before mining 40 feet and did not do so here. (Tr. 193).

The next coal accumulation (listed fourth in Order No. 8033057) was in the crosscut 4 to 3 and completely covered the crosscut. (Tr. 193-194). The accumulation went from rib to rib and was 140 feet long. (Tr. 194). The coal was 8 to 12 inches in depth and fifteen and a half feet wide. (Tr. 194). Gropp had to walk over the accumulation as would anyone conducting a pre-shift. (Tr. 194). At this location Gropp told Respondent he would issue an order. (Tr. 247-248).

The next accumulation (listed third in Order No. 8033057) was also from holing into an entry from a crosscut at approximately 6 plus 94. (Tr. 194-195). The coal fell inby and outby the crosscut. (Tr. 194). The coal had not been cleaned. (Tr. 194). The accumulation was 15 and a half feet wide, 4 to 18 inches in depth, and 12 feet long on the outby side. (Tr. 195).

The next accumulation (listed second in Order No. 8033057) was in the No. 1 entry 8 south. (Tr. 195). This accumulation was also caused by holing in to an entry. (Tr. 195). It was 15 and a half feet wide, four to nine inches in depth, and 10 feet long. (Tr. 195).

¹³ The measurements listed in the Order No. 8030970 that were 15 and a half feet or less were made with the tape measure, the other measurements were walked off with each step being a yard. (Tr. 198). When Gropp took the measurements the Norton and Miller were with him; however, Rose may have left. (Tr. 241).

The next accumulation (listed first in Order No. 8033057) was at the 15 A 0 entry. (Tr. 195-196, 243). The operator had just taken the miner out and never pushed the coal back to the face or loaded it out. (Tr. 196, 243-244). Gropp believed the miner was pulled out on that shift, but it could have been earlier. (Tr. 244-245). Gropp did not know if the scoop was down. (Tr. 244-245). Gropp believed Respondent was cutting without a loader because it was being fixed. (Tr. 196, 245). There was 80 feet of coal from the face outby, the accumulation was four to 15 and a half feet wide and four to 15 inches deep. (Tr. 196, 244). Gropp believed a drag bar made this accumulation. (Tr. 196-197). Occasionally coal will fall onto the bottom when it is being loaded or moved. (Tr. 196-197). Shuttle cars have a drag bar to keep the roads smooth. (Tr. 196-197). On cross examination, Gropp conceded that some of this coal could have been added to after the pre-shift examination. (Tr. 265).

The next accumulation (listed fifth in Order No. 8033057) was outby the face of No. 4 where Respondent had the loader piggybacked. (Tr. 197). The accumulation stretched from 5 plus 20 for 50 feet. (Tr. 197). The accumulation was 14 feet wide and 12 inches deep. (Tr. 197). Gropp believes the drag bar was involved here and that coal was dragged off shuttle cars by cables on the top.¹⁴ (Tr. 197, 254-255). However, it was possible that coal fell when the shuttle car hit a rut. (Tr. 255-256). Gropp did not know what the bottom was made of here. (Tr. 254). If the bottom here were clay, whether it had ruts would depend on the moisture. (Tr. 254). He did not know if the bottom was wet was because he could not see through the coal. (Tr. 254).

At these areas, Gropp saw various kinds of coal accumulations. (Tr. 199). The difference between loose coal, loose fine and ground-up coal, coal dust, and float coal dust is size, and they are all combustible. (Tr. 199). Neither Gropp nor anyone else had a sieve. (Tr. 199-200). However, he knew float coal dust was present because miners produce it. (Tr. 199). Further, coal on the tram road would be pulverized by equipment. (Tr. 199). Black float coal dust means there was fresh coal that has never been rock-dusted. (Tr. 201-202). Rock dust is white and a mix of coal and rock dust is gray. (Tr. 202). Gropp did not take any photographs because he did not have a camera. (Tr. 203). He did not believe anyone else had one. (Tr. 203).

Gropp knew that these accumulations were not the result of sloughage because they spanned the entire entry from rib to rib. (Tr. 202). Sloughage is usually on the side by the rib. (Tr. 202). Accumulations 2, 3, and 7 resulted from holing into the crosscut. (Tr. 250). This was not sloughage. (Tr. 250-251). However, the miner often hits the ribs and causes sloughage. (Tr. 251). This was what happened at accumulation No. 6. (Tr. 251). This probably happens more than once in a given shift. (Tr. 251). With respect to accumulation Nos. 3 and 4, Gropp did not see a roof bolting machine correcting sloughage from the roof. (Tr. 251-252). He did not believe the material falling here was slate. (Tr. 252-253). Gropp was familiar with the slate at Shoemaker. (Tr. 252). The slate was usually white to gray in color though he has seen it look black. (Tr. 252). The accumulation was coal with perhaps a little stone. (Tr. 252-253). However, Gropp conceded that he took no samples at any of the areas of accumulation. (Tr. 258). He did not know if anyone took samples. (Tr. 259).

¹⁴ The miner cable was hanging up at the No. 3 entry across crosscut 3 to 4 and the shuttle cars were passing and likely scraping the coal from the cars. (Tr. 216). This would apply to accumulation Nos. 4 and 5, but mostly 4. (Tr. 216).

Gropp's impression of the working section was that there were about 400 feet of total, obvious, and extensive accumulations. (Tr. 204). The accumulations felt like walking on sand. (Tr. 204). A majority of the accumulations were on the left side, although Citation No. 8033058 was written for both sides. (Tr. 233). Two examiners walked the area without noting anything. (Tr. 233). Gropp never noticed anyone cleaning the accumulations and was not told why Respondent was not doing so. (Tr. 245, 280-281). Gropp did not write the citation for inadequate exam on October 26 because there were two people doing exams and he wrote the Order for both sides. (Tr. 275). During the investigation, Gropp did not observe anyone trying to clean. (Tr. 203). Gropp issued Order No. 8033057 (GX-10) at 10:10 a.m. for violation of §75.400. (Tr. 185, 187).

Respondent terminated the Order using three shuttle cars, two loaders, a scoop and people using shovels. (Tr. 205). Ten people cleaned the area in about four hours. (Tr. 205).

D. Gropp's Testimony on the Length of Time the Condition Existed, the Pre-shift Examinations and Clean-Up Plan

Accumulation No. 1 existed anywhere from one to three shifts. (Tr. 211). Gropp hypothesized the time based on the rate of mining (between 32 and 36 feet per day) and the distance between the accumulations and the face. (Tr. 256-267). The accumulation could not have occurred during the inspection because the left side had not started mining. (Tr. 212).

Accumulation No. 2 existed for one to two days. (Tr. 212-213). The accumulation could not have occurred during the inspection because the left side had not started mining. (Tr. 213).

Accumulation No. 3 occurred before No. 2 and so existed one to three days. (Tr. 213, 264). The accumulation could not have occurred during the inspection because the left side had not started mining. (Tr. 213).

Accumulation No. 4 could have existed one to two shifts. (Tr. 213-214, 264). The coal was there because it was getting drug off the top of the shuttle cars. (Tr. 213-214, 264). Gropp saw shuttles but did not see them in the accumulations because the left side was not producing. (Tr. 264). The spill could not have occurred during the inspection for that reason. (Tr. 214).

Accumulation No. 5 could have existed longer because of the way Respondent set up the miner with the piggyback loader. (Tr. 214). When Respondent ran the shuttle car from the face and dumped the coal on the ground, it covered up the miner cable. (Tr. 214). The accumulations were likely there the whole time Respondent mined the crosscut from 4 to 3 and across the 15A. (Tr. 214). The accumulations could have been there one to three shifts or one to three days. (Tr. 214). The time would depend on whether the accumulations had ever been cleaned. (Tr. 214, 215). The accumulation could not have occurred during the inspection because the left side had not started mining. (Tr. 215). The left side did not have shuttles running at the time. (Tr. 254).

Accumulation No. 6 existed a day. (Tr. 215). Gropp learned this from the dayshift foreman on the right side, Yorty. (Tr. 215).

No. 7 existed for one or two shifts, a day at most. (Tr. 215). Respondent holed crosscut 7 to 8 and turned up at that point. (Tr. 215-216).

Gropp admitted that some of the accumulations may have occurred after the last pre-shift examination and before the inspection, notably 1, 4, and 5. (Tr. 224-225). All of No. 1 could have occurred after the last pre-shift if Respondent had mined the entire area in 3 hours. (Tr. 225). However, Nos. 4 and 5 were too extensive to have been completely deposited in that time. (Tr. 225). Gropp did not believe Nos. 2, 3, 6, and 7 occurred since the last pre-shift. (Tr. 225).

Gropp believed that the examiner would have seen the seven accumulations. (Tr. 225). However, he did not ask anyone how the coal got there as he did not think it was important. (Tr. 256). The exception was accumulation No. 6, where he spoke to the foreman and learned that the bits on a miner had caused the accumulation a day before on dayshift. (Tr. 257-258).

Gropp referred to a pre-shift and on-shift examination report for 8 south left and right for 10-26 on the midnight shift.¹⁵ (GX-14, Tr. 227-228). Nothing in the report stated anything about accumulations on the left side. (Tr. 228-229). Gropp did not talk to the pre-shift examiner, although he had in the past. (Tr. 266). However, on cross examination, Gropp admitted that the on-shift report stated that No. 6 cross 7, cross 8, last open needed dusted. (Tr. 269-270). The report stated that this condition was corrected. (Tr. 269-270). However, Gropp felt this condition was not part of the violation. (Tr. 270). The report just stated the area needed to be dusted, not that there were accumulations. (Tr. 270). Another on-shift report notation dealt with four areas (1 was 4 entry, 2 was feeder, 3 was tail, and 4 was 0 entry). (Tr. 271). This was the section Gropp was on. (Tr. 272). Gropp did not look at this on-shift before the hearing. (Tr. 272-273). The report stated there were coal accumulations in all of these areas and that the problem was corrected. (Tr. 272). Gropp testified that if the problems were corrected, they must have occurred again. (Tr. 272). However, even if people had worked on the area, Gropp would not change his evaluation because of the amount of accumulations. (Tr. 278-279).

As a result of the observations above, Gropp also issued Citation No. 8033058 (GX-12), for inadequate pre-shift. (Tr. 226, 231). Gropp referred to the notes that substantiate the citation during his testimony. (GX-13, Tr. 226-227). Citation No. 8033058 was not issued until October 27, 2010, because the area cited was supposed to be examined by two different people. (Tr. 230). Gropp did not feel comfortable issuing a citation on the October 26 as a result of not knowing who did what at the time. (Tr. 230). He changed his mind after talking with his supervisor and realizing that something should have been on the books. (Tr. 227, 230). Two full mining crews and two other people worked on the section following the exam. (Tr. 233). The examiner reviewed these hazardous conditions and did not report them. (Tr. 233). The

¹⁵ A pre-shift report is prepared before anyone can go underground for the next shift to let people know about hazardous condition in the area. (Tr. 229). An on-shift exists so an examiner can record air readings, the error, observations, and corrections of violations or hazardous conditions during the shift. (Tr. 229). The on-shift in GX-14 did not occur on the same shift as Gropp's inspection. Tr. 230. Instead, it occurred on the previous midnight shift. Tr. 230.

conditions existed for a period of time, an exam occurred, and the condition was not corrected. (Tr. 275-276).

Gropp also testified that the mine had been cited 139 times for §75.400 in the last two years. (Tr. 223). Gropp learned this number from a computer program before issuance of Order No. 8033057. (Tr. 224). He also recalled from the file review that this violation was common. (Tr. 224). Gropp conceded that these citations were not issued in the same location. (Tr. 266-267). He also conceded that §75.400 is one of the top five violations in the country. (Tr. 277).

Gropp was familiar with the Shoemaker clean-up program. (RX-9; Tr. 216-217, 245). When Gropp worked at Shoemaker the cleanup sequence was as follows: the section was mined for 40 feet and the loader would clean up, then Respondent would apply rock dust, and then this would be repeated for the 300-foot entry. (Tr. 248). Once a face was finished, the miner operator would back the miner up the length of the cut, approximately 30 feet with the pan up in the air, then he would drop the pan and push the coal back up to the face. (Tr. 248-249). Then, it would be loaded out with a loader into shuttle cars. (Tr. 248-249). If the loader was down, he would use the miner because it also has a shovel. (Tr. 248-249). If the miner had already been taken out before the loader went down, the miner would be brought back in. (Tr. 249-250). The miner was a large piece of equipment though Gropp did not believe it was very slow. (Tr. 250).

Respondent did not conform to the clean-up plan with respect to the following sections: No. 1 stated that all coal spills will be cleaned up. (Tr. 217, 221). No. 2 stated, “after dusting, loader needs to be backed up 50 feet and both ribs pushed up to miner.” (Tr. 221). Instead of the loader, a miner could be used. (Tr. 221-222). No. 5 stated, “Coal spillage and accumulations near the fan will be cleaned up as mining progresses.” (Tr. 217-218, 222). No. 6 stated, “Return entries should be mined 30 feet passed center. The miner will be backed up 30 feet and push coal into the face past the last channel and loaded out.” (Tr. 218). No. 9 stated, “areas that cannot be cleaned with scoop or loader will be shoveled out and cleaned up.” (Tr. 217, 222). No. 10 stated, “No. 8 south and 8 north mains will be cleaned in the same manner as listed above.”¹⁶ (Tr. 217). No. 8 stated, “After holing to crosscut 1 to 2, No. 2 entry will be scooped starting two breaks from the face on both sides. Any cables in the entry need to be hung so they will not be damaged.” (Tr. 219). No. 14 stated, “At any time the loader is down and running into shuttle cars mine 40 feet back miner up and clean ribs and coal spilled from the shuttle car then dust before mining continues after the entry or crosscut is finished the entire area is to be scooped then dusted.” (Tr. 219). According to Gropp, these failures were a point in determining negligence because the conditions existed in the active workings of the mine and should have gotten attention. (Tr. 234).

Gropp found Order No. 8033057 to be an unwarrantable failure because the examiner would follow the same route as his inspection. (Tr. 210-211). Also, the accumulations were obvious and extensive. (Tr. 210-211, 266). Gropp believed the accumulations existed between one and three days total. (Tr. 211). Gropp believed that Respondent did nothing to correct the problem here. (Tr. 266). He further stated that the number of people in the area affects the

¹⁶ “Above” referred to No. 7 which stated, “After holing the middle crosscut, miner will be backed up 30 feet; clean both ribs as well as the coal in the intersection.” (Tr. 218-219).

unwarrantable failure finding. (Tr. 223). 8 South was well-traveled because it was the future of the mine. (Tr. 223). The section foreman, the CM coordinator, the mine foreman, and upper management would all be interested in this spot. (Tr. 223).

E. Gropp's Testimony on the Gravity of Order 8033057 and Citation No. 8033058

Gropp evaluated the gravity of Order No. 8033057 as reasonably likely, lost workdays or restricted duty, S&S and ten persons affected. (Tr. 205). Gropp evaluated Order No. 80332057 as reasonably likely to result in an injury because: combustible material was present; there was an ignition source of electrical cables in and on the coal; there was a bolter on top of the accumulations; and the mine liberated methane and was on a five day spot inspection. (Tr. 206). Gropp testified that the specific hazard created by the condition was an ignition of combustible material or a propagation of an explosion if there was a face ignition or explosion. (Tr. 205). He believed that if an ignition were to occur, at a minimum, there would be smoke inhalation and respiratory damage. (Tr. 205-206, 232). He also felt a miner could suffer crushing internal injuries from explosive forces. (Tr. 206, 232). He believed that these sorts of injuries would at least result in lost workdays or restricted duty. (Tr. 206).

With respect to likelihood Gropp found many ignition sources. Shoemaker has a history of cable violations. (Tr. 207). At the time of issuance, Respondent had five citations in the previous month for openings in cables. (Tr. 207). Gropp was not sure if the cables he saw that day were damaged; he did not check them or issue a citation for them. (Tr. 208, 259). It would not have mattered to him if the cables were not damaged; cables can be damaged and are damaged regularly. (Tr. 208, 259-261, 279). Cables can be damaged by wire mesh, by stones, or by equipment. (Tr. 262). Numerous hazards result from cables sitting in a coal pile, including heat. (Tr. 279). Also, there were other ignition sources. (Tr. 261). Methane was an ignition source when the face was actively being mined and Shoemaker was on a five-day spot. (Tr. 207-208, 279-280). Gropp testified that, given the accumulations here, if there was a methane ignition it could put fine coal dust into the air and propagate an explosion. (Tr. 280). However, he never heard of a face ignition propagating at Shoemaker. (Tr. 281). The shuttle car with a cable on top, the bolter cable on top of the accumulations in 15A, and the fan cable on right side of No. 7 were also ignition sources. (Tr. 261). However, Gropp did not examine or issue any citations with respect to this equipment. (Tr. 261).

Gropp believed ten people would be affected because there were ten people in by the violation where the air would travel. (Tr. 208, 273). Gropp wrote the citation as affecting ten people because there were violations on both air splits. (Tr. 277-278). The miner was operating on the right with an operator, two bolters, a utility man, and a loader operator. (Tr. 208, 273). On the left there were three people hanging curtains and two bolters. (Tr. 208-209, 273).

Gropp testified that Citation No. 8033058 (GX-12) was an S&S violation for the same reasons as Order No. 8033057. (Tr. 231-232). There were accumulations of combustible material; an ignition source from the cables and methane; and, people affected with no action taken to correct the problem. (Tr. 232). Also, an examination was made but the violations were still present, there were accumulations, there were cables, and the mine was on a five day spot. (Tr. 274-275).

III. Gary Rose

A. Rose's Qualifications and Work History

Rose graduated from high school and had no further education. (Tr. 283). He had assistant foreman certifications, MSHA training cards, an EMT certification, and a dust certification. (Tr. 283). He worked at Shoemaker as a Section Foreman. (Tr. 283-284). Before Shoemaker, he worked two years at another mine as a roof bolter, miner operator, and shuttle car operator. (Tr. 284). At the time of the citation, he was a CONSOL safety inspector. (Tr. 284).

B. Rose's Testimony Regarding Order No. 8030970

Rose was familiar with Order No. 8030970. (Tr. 389). He learned that the Order had been issued when he went to work on the afternoon shift. (Tr. 389). He did not know when the Order was issued. (Tr. 390). He was told by The Safety Department to go to No. 8 Belt and take pictures. (Tr. 389-390). He took the photos contained in RX-3. (Tr. 389). Rose did not have a copy of the Order or know where the violations were found, so he tried to take pictures of areas that may have been violations. (Tr. 391, 410). Rose took the photographs between 4:30 and 5:30 on the same day the violation was issued. (Tr. 391-392, 410). Rose testified that the photographs showed that the cited areas were muddy and well rock-dusted. (Tr. 392-409). He testified that the belt was 5,200 feet long and was wet for its whole distance. (Tr. 396-397). In addition, he believed the photographs indicated that there were no significant accumulations of coal dust. (Tr. 392-409). With respect to photograph #23, Rose testified that the two strings hanging down from the belt were normal and not a hazardous condition. (Tr. 403).

No one traveled with Rose when he took the photographs. (Tr. 409). Rose did not take any notes or sample with the photographs. (Tr. 409-410). While he was taking photos Rose never observed anyone working on the belt. (Tr. 402). Rose stated that the belt was running. (Tr. 402).

C. Rose's Testimony Regarding the Accumulations cited in Order No. 8033057

Rose was familiar with Order No. 8033057, as he was with Gropp when it was issued. (Tr. 284-285). The inspection began where the No. 7 was marked on the map. (Tr. 285). They then made their way across the faces and ended up at No. 1. (Tr. 286).

At No. 1, the last place the parties visited, the miner pulled out. (Tr. 286-287). Respondent was done mining and had re-hung the curtain. (Tr. 286-287). Rose did not know when the miner had moved out. (Tr. 287). He conceded that Respondent had not cleaned up 40 feet of accumulation. (Tr. 286-287). When a miner pulls out of an area the proper protocol was for the scoop to clean up. (Tr. 288). The operator should then push everything up to the face and rock dust. (Tr. 288). If the scoop was down, the loader was used, and if the loader was down, the miner must be used. (Tr. 288-289, 304-305). Rose testified that both pieces of equipment were down here. (Tr. 289). As a result, dusting would have been done by hand instead of with a loader. (Tr. 305-306, 315). No one was rock dusting by hand here, but Rose

testified that within 40 feet of the face, rock dusting was not required. (Tr. 315). Unlike Gropp, Rose saw no accumulation 80 feet outby, four to 15 feet wide, and four to 15 inches deep. (Tr. 287). Rose did not measure and did not recall Gropp doing so. (Tr. 287). Rose measured by counting roof straps, which were spaced four feet apart. (Tr. 288). Rose did not know how long it would take to fix the scoop. (Tr. 289). It can take 20-30 minutes to bring the miner back. (Tr. 289, 305). Rose did not recall Gropp asking why the area was not clean. Tr. 290.

No. 2 was at the intersection of 15A number 0 and 8 south 1 at spad 694. (Tr. 290). Rose did not see Gropp or Miller take any measurements here. (Tr. 290-291). The bottom was muddy clay with ruts formed in it. (Tr. 291). Also, there was some sloughage from equipment hitting the rib.¹⁷ (Tr. 291).

No. 3 and 4 dealt with areas being center bolted. (Tr. 292). Mesh was being placed because the top was bad and needed more support as a precaution. (Tr. 292-293, 307-308). At the time of the inspection the equipment was there though Respondent was not putting the mesh up. (Tr. 293, 309). Rose was not aware if the miners were bolting on the same shift as the inspection; it could have been on the last shift. (Tr. 309-310). The falling rocks were black or green and slimy. (Tr. 293). None of the rock was touching the ribs. (Tr. 294). Rose did not agree with Gropp that the accumulations were all the way across the entry. (Tr. 294-295). The accumulation was stone with a little coal mixed in. (Tr. 295, 311). Rose did not recall Gropp taking measurements in No. 3 or No. 4 and he did not take any. (Tr. 297, 311).

No. 5 was at 8 south 4 entry or spad 5 plus 20. (Tr. 297). Rose did not recall an accumulation there. (Tr. 297). Rose was not with Gropp at this location. (Tr. 304).

No. 6 was a muddy tram road with a buggy sitting in the entry. (Tr. 297). There was a very large puddle of water in the area. (Tr. 297). Shuttle cars go through the area to haul coal. (Tr. 296). If a shuttle car hits the ruts, it can hit a rib and knock rock or coal from the rib. (Tr. 296, 312-313). Rose did not see this happen. (Tr. 296, 312-313). Sometimes coal will fall out of the shuttle car if there was a bad operator or from hitting ruts. (Tr. 296-297, 313, 315).

No. 7 was located in 8 south No. 8 entry and was near where the fan was sitting, with mining occurring straight up from the fan. (Tr. 297). Rose stated this was an area that was holed through with a little accumulation next to the rib. (Tr. 297). To clean a hole through, Respondent must use a loader and shovel at the end of every shift. (Tr. 298). Rose testified that this area was going to be cleaned after the shift, when Respondent mined more than 40 feet. (Tr. 313).

Rose did not know why his assessment was so different from Gropp's. (Tr. 298). The only discussion Rose and Gropp was that Gropp said it looked pretty bad and then he issued Order No. 8033057. (Tr. 298). Rose did not take notes or photos on the day of the Order. (Tr.

¹⁷ Whether or not sloughage from the rib is combustible depends on whether it is coal, whether it is rock dusted, and whether there is methane in the air or another source of ignition. (Tr. 306). However, material is combustible whether or not there is an ignition source. (Tr. 306-307).

304). Rose did not accompany the pre-shift examiners (McCauley, Pribila, and Wilhelm) when they examined this area. (Tr. 312, 314). Rose did not have any first hand knowledge of how or when these accumulations occurred. (Tr. 312). Gropp took no measurements, no dust or air samples, no photographs, and did not check the ventilation to Rose's recollection. (Tr. 302-303). Rose was with Gropp most of the time, although he walked away occasionally because Norton and Miller were there as well. (Tr. 302). He was with him at all the cited areas, except for No. 5. (Tr. 302). Gropp did not discuss any ignition sources or cables. (Tr. 303). Rose did not know the average amount of mining per shift in this area. (Tr. 305).

D. Rose's Testimony Regarding the Clean-up Plan

Shoemaker mine had a clean-up and rock dusting plan. (Tr. 299). In a miner section, after the miner moves out, the coal must be scooped up and rock dusted. (Tr. 299). Dusting must occur every 40 feet, though after every 40 feet Respondent dusted the last 80 feet. (Tr. 299). This was to comply with the new regulations. (Tr. 300).

E. Rose's Testimony Regarding Gropp's Actions After the Investigation

When Gropp said he was going to issue an Order, Rose contacted his supervisor, Hough. (Tr. 301-302). Rose did not help clean the areas covered by Order No. 8033057 nor did he know how many people were involved or how long it took to clean. (Tr. 313).

IV. Testimony of Brian Hough

A. Qualifications and Work History

Hough received a Bachelor's degree and a Master's in Safety Management at West Virginia University. Tr. 317. Hough was trained in the Fundamentals of Supervision, Business Essentials, C.F.R. Training, and Managing Your Body by Consol. Tr. 317. He was a certified Mine Foreman in West Virginia, an MSHA instructor, a Con Ed instruction, a West Virginia EMT miner, and had a MSHA dust certification. Tr. 317. Hough had a total of twelve years of mining experience. Tr. 319. Hough received his assistant mine certification in 2003 and upgraded to a mine foreman a year ago. Tr. 347. He was an assistant mine foreman at the time of these violations. Tr. 348.

B. Hough's Testimony Regarding Gropp's Inspection

Hough was familiar with the Order No. 8033057 and he learned about it from Rose at the time of issuance. (Tr. 319-320). When he learned of Order No. 8033057, Hough examined the pre-shift and on-shift book, made copies, and headed into the mine. (Tr. 320). Hough went underground at approximately 10:40 a.m. (Tr. 351-352). When he got there, he talked to Gropp and then reviewed all of the locations in the Order. (Tr. 321). He did not take notes beyond mental notes and did not take any photos because he did not have a permissible camera. (Tr. 349-350). Hough did not accompany the pre-shift inspector. Tr. 351. He did not measure the

accumulations. (Tr. 351). He did not see the accumulations occur and he did not sample them to determine their composition. (Tr. 351).

After looking at the areas Hough told Gropp he did not think the accumulations justified an Order. (Tr. 321). He testified that he informed Gropp that the accumulations were minimal given the size of the area. (Tr. 321-322). The accumulations occurred in an area that was well over 1,000 feet from one side of the section to the other and had two separate MMUs with two separate crews. (Tr. 321-322). However, Hough conceded that it was possible to have a single accumulation so bad as to justify a withdrawal order, though that did not occur here. (Tr. 352).

C. Hough's Testimony regarding the Accumulations cited in Order No. 8033057

In Order No. 8033057, No. 1 was listed as four to 15 inches deep. (Tr. 322-323). Hough testified that this was not possible because the drag rails on the shuttle car prevent accumulations of that depth. (Tr. 322-323). Further, based on roof straps Hough saw only 40 feet of accumulation, not 80. (Tr. 323). Hough believed the last 40 feet do not need to be cleaned. (Tr. 355-356). On cross examination, Hough admitted that the 40-foot requirement was not part of the regulations and only comes from Respondent's clean-up plan. (Tr. 357-358). Hough did not know why the area was not cleaned. (Tr. 324). The delay may have been because the bolter was in the area. (Tr. 324). It would take a long time, up to an hour, to move the miner back in place because the ventilation would have to be moved. (Tr. 324, 359-360). It would be the section supervisor's decision whether to move the miner back in or wait for the loader and scoop to be fixed. (Tr. 325, 356-357). It was also his responsibility to ensure accumulations stay at no more than 40 feet. (Tr. 325, 356-357). Hough spoke with the section supervisor (he cannot recall who that was).¹⁸ (Tr. 325). He told the supervisor to move the miner back in to clean up. (Tr. 325).

No. 2 was located at the intersection of 15A 0 and 8 South No. 1. (Tr. 325). Hough saw material on the ground, some of which had been pushed by the shuttle cars. (Tr. 327). Some of the accumulation was rock material as there was a 12-18 inch stone binder at the lower part of Shoemaker. (Tr. 327). The area was also moist and slippery from seepage. (Tr. 327-328). This can cause stone to fall out of the binder in the rib and accumulate. (Tr. 327-328). This material was not combustible. (Tr. 327-328). He testified that it was mostly rock and mud including clay from the bottom. (Tr. 328, 360). However, Hough did not take any samples. (Tr. 328, 360). Hough did not believe these conditions warranted an order. (Tr. 328). On cross examination, Hough conceded that stone that falls from the rib falls onto the rib lines and if it falls from the roof it falls straight down. (Tr. 360). He also admitted that coal could come out of the shuttle cars because of ruts in the clay. (Tr. 352). Hough described the drag rails suspended from the shuttle cars to prevent ruts deeper than 4-inches. (Tr. 352-353). However, he noted that the rails only prevent the car from bottoming out; they do not eliminate all ruts. (Tr. 352-353). A rut could be a foot deep before the shuttle care bottomed out and the ruts could fill with coal. (Tr. 353-355).

¹⁸ Later, he remembered the supervisor on the left was Pribila and the right was Yorty. Tr. 357.

No. 3 was at the intersection of the 8 south and the 2 entry. (Tr. 328). There was material falling from the roof at this location. (Tr. 361). However, it was slate and was being bolted. (Tr. 361). This action was not a hazard because bolts were being added, though the situation may be dangerous if not corrected. (Tr. 361-362). The falling shale was not listed on the pre-shift or on-shift report, though examiners sometimes feel this was hazardous. (Tr. 362-364). However, the reports do not mean that mining occurred here, it only means that the power was on. (Tr. 364-365). Coal sloughage from the roof would be combustible. (Tr. 366).

No. 4 and 5 were a combined area for piggybacking. (Tr. 329-331). This was an area where coal from one shuttle car was dropped and then placed on another shuttle car. (Tr. 329-331). Piggybacking occurs when shuttle car cables are not long enough to reach from the loading point to the belt. (Tr. 330, 366). Coal must be placed on the bottom for piggybacking. (Tr. 330). At a certain level, that accumulation is not permissible, maybe 20 tons. (Tr. 366). However, Hough did not believe what he saw on the bottom warranted an order. (Tr. 331). Hough did not know how much energy went through a trailing cable. (Tr. 365).

Hough did not recall No. 6. (Tr. 331).

No. 7 was where the mine fan was sitting and the employees were setting up to mine. (Tr. 331). There were rib sloughage, some coal, some rock, in this area. (Tr. 331).

D. Hough's Testimony Regarding the Clean-Up Plan and Cleaning in General

Hough was familiar with the clean-up and rock dusting plan. (Tr. 334). The clean-up plan goes into effect at the end of each shift; employees clean the tailpiece and their areas at the shift change. (Tr. 334). The plan was not updated on a set schedule. (Tr. 335).

When a miner is holing in and there are accumulations as a result, the loader can turn into the crosscut and attempt to clean up the mess. (Tr. 332). It is very difficult because of the angle of the turn so usually Respondent has to shovel. (Tr. 332). Respondent has to wait until the area is holed through and then roof bolted before the accumulation can be cleaned. (Tr. 332).

E. Hough's Testimony Regarding Examinations cited in Citation No. 8033058

Hough was also familiar with Citation No. 8033058. (Tr. 336). It was true the pre-shift records do not include any information regarding this area. (Tr. 336-337). However, this was because any violations were corrected before the last three hours of the shift and so the on-shift took credit. (Tr. 342-343). Between pages 62 and 79 of the on-shift report, there were many entries that listed cited conditions and noted that the violations had been corrected during the shift. (Tr. 337-342). Hough showed these reports to Gropp so that he would see the attempts to correct violations. (Tr. 342). Gropp said he felt there was not enough effort. (Tr. 342).

Hough testified that the purpose of a pre-shift was to take care of hazardous conditions and to then report those conditions to the record book.¹⁹ (Tr. 344). He testified that pre-shift hazards must be corrected or dangered off before anyone can go into the section. (Tr. 344, 347). This was different than an on-shift hazard. (Tr. 344-345). In that case, the condition must still be corrected but the whole area does not need to be dangered off. (Tr. 344-345). However, hazardous violations must be dangered off, even when discovered on-shift. (Tr. 345). Hough felt that nothing listed in the on-shift report required dangering off because the conditions were not hazardous, just violations. (Tr. 345).

On cross-examination, Hough discussed why the on-shift did not list all of the accumulations in Order No. 8033057. (Tr. 369). He stated that the on-shift report might have included No. 6 from the Order and indicated the condition was corrected. (Tr. 369-370). He also noted accumulations in the No. 8 entry were cleaned and dusted. (Tr. 370-371). On-shifts for 0 Entry and Feeder tail also stated that conditions needed to be cleaned up. (Tr. 371). He also referred to the pre-shift report for the shift where Gropp issued the violations. (Tr. 371). That report stated 0 entry had loose coal accumulations and this was listed as a violation. (Tr. 371). Also, No. 4 entry from 4 to 3 had accumulation and the condition was listed as a violation. (Tr. 371-372).

Hough stated that there was no way to determine how long accumulations existed besides watching their creation. (Tr. 332, 366-367). Even knowing the rate of mining would not be accurate because mining distances can vary daily. (Tr. 333). On a good day, a miner can advance 200 feet. (Tr. 333). Hough did not know the rate of mining per shift at the time of Order No. 8033057. (Tr. 367). However, records existed that Hough could have checked if he wanted to dispute MSHA's estimate of mining rates per shift. (Tr. 367-368). Hough did not know why he and Gropp came to such different conclusions on how long the condition existed. (Tr. 334). According to Hough, at times in the past, even with Gropp, this amount of accumulation would warrant a citation, not an order. (Tr. 334).

V. Testimony of Tom Skrabak

A. Qualifications and Work History

Tom Skrabak ("Skrabak") graduated from high school. (Tr. 373, 374). He was certified as a mine Foreman. (Tr. 374). He had fire and shot papers in Ohio and West Virginia, as well as a training certificate with MSHA. (Tr. 374). He had 41 years of mining experience. (Tr. 376). He worked on miner sections, had done construction underground, and worked as section foreman, shift foreman, and mine foreman. (Tr. 376). Skrabak had been employed by Respondent at Shoemaker and has been for 23 years. (Tr. 374). His position at the time of the

¹⁹ Hough opined that all violations are not necessarily hazardous conditions. (Tr. 346). He stated that the accumulations here were not a hazardous condition and would not be unless they were extreme. (Tr. 346). However, Hough did not actually see the conditions. (Tr. 346-347). He reviewed the books and found that the examiner did not believe the conditions were extreme. (Tr. 346-347). Hough did not know if the miners stopped mining to clean them up. (Tr. 347).

hearing was General Mine Foreman; however, on October 14, 2010, he was an Assistant Mine Foreman in charge of the Whittaker Portal. (Tr. 374).

B. Skrabak's Testimony Regarding Order No. 8030970

Skrabak was familiar with Order No. 8030970. (Tr. 376-377). He became familiar when he was called about it on the afternoon of the October 14 by the assistant superintendent at Golden Ridge. (Tr. 376-377). He stated that he had no knowledge of the Order and that it had not been issued to him. (Tr. 377).

C. Skrabak's Testimony Regarding Edward's Inspection

On the day at issue, Skrabak saw Edwards in the morning and had a non-substantive conversation; however, he did not go underground. (Tr. 378). Instead, he went to a meeting at the Golden Ridge. (Tr. 378). Skrabak's meeting was at the engineering department. (Tr. 383-384). There was a screen showing belt production in that office. (Tr. 384-385). Skrabak even has one at his home because a down belt means no production. (Tr. 384-385). During the meeting only one alarm summary went off. (Tr. 385). Skrabak was not sure what time the alarm occurred. (Tr. 385). The summary stated "Disconnect, drive disconnect 1, disconnect 2," and was for 8 Belt. (Tr. 385). "Drive disconnect" indicated that the belt was down because the power was disengaged. (Tr. 385-386). A radio communication showed the belt was down because rollers were being changed. (Tr. 386). Skrabak learned the reason at his meeting and was told by one of the surveyors. (Tr. 386). He did not remember the belts going down at any other time. (Tr. 380). The meeting started at around 10:00 a.m. and ended around 1:00. (Tr. 383-384). He then went to the superintendent's office and discussed other matters before leaving at 2:00. (Tr. 383-384).

When Skrabak saw Edwards coming out of the mine, he asked how the inspection went and Edwards told him he "got you for a few." (Tr. 381). "Got you for a few" indicates to Skrabak that there were a few citations. (Tr. 382). Edwards gave no indication of an order. (Tr. 382). Skrabak did not learn about Order No. 8030970 until the phone call later. (Tr. 382). It was MSHA protocol to inform the mine foreman or assistant mine foreman when an Order was issued. (Tr. 383). Normally, when an order was issued, the section or belt was shut down until the situation was corrected. (Tr. 383, 386-387). As an assistant mine foreman, Skrabak would know if the belt shut off. (Tr. 381).

Skrabak learned about Order No. 8030970 around 4:00. (Tr. 387). After receiving the call, Skrabak went into the foreman's office and obtained a copy of the Order. (Tr. 378-380). Skrabak read the Order and called the assistant superintendent back. (Tr. 380). Skrabak never saw the condition, had no firsthand knowledge of the condition, and did not walk with the inspector. (Tr. 388).

CONTENTIONS OF THE PARTIES

The Secretary contends that Order No. 8030970 was validly issued. (*Secretary's Post-Hearing Brief* at p. 2). He also argues the violation of the standard was reasonably likely to result

in lost workday injuries, and would affect 1 person. GX-6. The Secretary claims that the violation was S&S (*Secretary's Post-Hearing Brief* at p. 7). Finally, he argues the violation was the result of high negligence and constituted an unwarrantable failure. (*Id.* at 14). Respondent argues that there were no significant accumulations of combustible material. (*Respondent's Post-Hearing Brief* at p. 30-33). It also contends that no injury was reasonably likely, that the condition was not S&S, and that no one would be affected. (*Id.* at pp. 37-39). Finally, it argues that it did not exhibit negligence and there was no unwarrantable failure. (*Id.* at pp. 39-40).

The Secretary contends that Order No. 8033057 was validly issued. (*Secretary's Post-Hearing Brief* at p. 18). He also argues the violation of the standard was reasonably likely to result in lost workday injuries, and would affected 10 persons. GX-10. The Secretary claims that the violation was S&S. (*Secretary's Post-Hearing Brief* at p. 26). Finally, he argues the violation was the result of high negligence and constituted an unwarrantable failure. (*Secretary's Post-Hearing Brief* at p. 29). Respondent argues that there were no significant accumulations of combustible material. (*Respondent's Post-Hearing Brief* at pp. 40-47). It also contends that no injury was reasonably likely, that the condition was not S&S, and that no one would be affected. (*Id.* at pp. 47-49). Finally, it argues that it did not exhibit negligence and there was no unwarrantable failure. (*Id.* at pp. 49-50).

The Secretary contends that Citation No. 8033058 was validly issued. (*Secretary's Post-Hearing Brief* at p. 31). He also argues the violation of the standard was reasonably likely to result in lost workday injuries, and would affect 10 persons. GX-12. The Secretary claims that the violation was S&S. (*Secretary's Post-Hearing Brief* at p. 33). Finally, he argued the violation was the result of high negligence. (*Id.* at p. 34). Respondent argues that the pre-shift examinations were conducted properly. (*Respondent's Post-Hearing Brief* at pp. 50-52). It also contends that that no injury was reasonably likely, that the condition was not S&S, and that no one would be affected. (*Id.* at pp. 53-54). Finally, it argues that it did not exhibit high negligence. (*Id.* at p. 54).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. Order No. 8030970

A. The Secretary has sustained his burden of proof by the preponderance of evidence that §75.400 was violated

With respect to Order No. 8030970, the Secretary presented sufficiently probative evidence of impermissible coal dust accumulations at the subject mine so as to establish a violation of §75.400.

Edwards gave credible testimony regarding coal dust accumulations along the No. 8 Beltline. Edwards observed areas with coal fines, some that had actually accumulated up to the rollers and the roller structure. The rollers were turning in the accumulations. (Tr. 29). Edwards found coal, loose coal, actual coal particles, and coal lumps on the belt line and also ignition sources from 8-46-8-47. (Tr. 29).

Edwards used a tape measure to measure the accumulations, some of which were up to three feet in height and six feet in width. (Tr. 36-38). As to the height of the accumulations, the belt structure was not consistently the same distance from the bottom. Some rollers were as little as one foot from the bottom. (Tr. 38). The accumulations were found to be sometimes coming into contact with rollers.²⁰ (Tr. 38). Edwards touched rollers that were packed in accumulations; the rollers were warm to the touch. (Tr. 39).

At hearing Edwards referred to his underground notes (GX-7) which were consistent with his in-court testimony. Respondent cross-examined Edwards regarding the pristine nature of his notes and regarding the actual time and place the Order was written. Although Edwards' testimony was somewhat problematic on these minor points, the ALJ found Edwards' testimony on the whole to be reliable, credible, consistent, and not impeached despite Respondent's vigorous cross-examination. (*see also Secretary's Post-Hearing Brief* at p. 3, Footnote 2).

The ALJ also notes Respondent's hearing cross-examination of Edwards and brief arguments that the Secretary's case was not supported by any photographic, heat measurement, or coal particle testing evidence.²¹ (*see inter alia* Tr. at 40, 49, 72, 119, 125 and Respondent's *Post-Hearing Brief* at p. 9 and 33).

The ALJ concurs that, in the best of all evidentiary worlds, MSHA inspectors would carry cameras to photograph all violation scenes, sieves to measure coal dust particles, coal dust meters,²² specimen bags to collect samples, and heat guns to measure friction temperatures. But, mines are not sterile environments where precise empirical testing can always be conducted. Moreover, placing aside questions of practicality, our current case and statutory law do not require such proof to establish the safety standard violations at issue.

An inspector's testimony, standing alone, if found credible and reliable, may constitute sufficient evidence to prove the existence of a safety violation and, indeed, its S&S nature. *See Harlan Cumberland Coal Co.*, 20 FMSHRC 1275, 1278-1279 (Dec. 1998) (holding that the opinion of an investigator that a violation is S&S is entitled to substantial weight); *Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 135-136 (7th Cir. 1995) (ALJ did not abuse discretion in

²⁰ *See also*, Edwards' descriptions of damaged rollers at 8-3 and 8-23 crosscuts that could become frictional heat sources. (Tr. 44-45).

²¹ The ALJ notes that Respondent also failed to present any scientific testing evidence. The problematic nature of its proffered photographs shall be discussed *infra*.

²² MSHA is encouraging underground mine operators themselves to collect and evaluate rock dust/coal samples. Last year, NIOSH verified the effectiveness of the coal dust explosibility meter (CDEM) to evaluate rock dust/coal dust samples to determine whether rock dusting was adequate to prevent explosions. *See* MSHA Program Information Bulletin No. P13-01, "Availability of a Report on the Use of the Coal Dust Explosibility Meter," dated Jan. 25, 2012.

crediting expert opinion of experienced inspector); and *Cement Division., National Gypsum Co.*, 3 FMSHRC 822, 825-826 (Apr. 1981) (regarding the probative value of inspector's judgment).

In the case *sub judice*, the ALJ recognizes that Edwards had not been working many years as an inspector for MSHA at the time of the instant inspection.²³ However, the ALJ rejects any argument advanced by the Respondent contending that Edwards' testimony should be accorded little weight due to his short time with MSHA. (*see inter alia Respondent's Post-Hearing Brief* at p. 34). As indicated *supra*, Edward, in fact, had 18 years of underground coal mining experience prior to joining MSHA, including more than 6 years as a certified mine examiner for Respondent in the Shoemaker Mine. (Tr. 19, 21-22).

After careful evaluation of the evidence, the ALJ finds that Edwards was an experienced miner who could readily identify the type of unreported impermissible accumulations cited in his order. The ALJ found Edwards' actual measurement of the accumulations and contemporaneous notes to further corroborate his testimony. As shall be discussed *infra*, Edwards' testimony was essentially un rebutted as to the fact of the violation. Thus, the ALJ accords Edwards' testimony substantial weight.

The ALJ notes Edwards' concession that there were areas of the beltline that were wet, damp, rock dusted, and/or not in violation of 75.400 and notes Respondent's arguments regarding such.²⁴ However, Edwards credibly testified that there were other significant areas of the beltline that had "major impermissible violations" starting at the 8-36 crosscut and extending to the 8-15 crosscut, a total distance of 2,100 linear feet. (Tr. 36-37). Despite Respondent's vigorous cross-examination, Edwards persuasively opined that given "the conditions of

²³ At page 2 of his brief, footnote 1, the Secretary ably summarized Edwards' experience:

MSHA Coal Mine Inspector David M. Edwards ("CMI Edwards") has been employed by MSHA since January 7, 2007 (Tr. 15). During his tenure with MSHA, CMI Edwards has attended the 21-week coal mine inspector training program and traveled (sic) with certified Coal Mine Inspectors for on-the-job training (Tr. 16). Both the training program and the on-the-job training specifically covered the areas of fire hazards and combustible accumulations (Tr. 16-19). CMI Edwards has earned his certified mine foreman's papers in Ohio and West Virginia and, since joining MSHA, has earned a certified electrician's card for both surface and underground and an MSHA training certificate to train underground examiners to qualify for certification as mine foremen (Tr. 19). CMI Edwards had 18 years of underground coal mine experience prior to joining MSHA, including more than six years as a certified mine examiner for Consol Energy in the Shoemaker Mine (Tr. 19, 21). At Shoemaker, CMI Edwards was a certified mine foreman, conducted pre-shift examinations and received fire-boss training (Tr. 21). CMI Edwards has an Associate's Degree in Electro-Mechanical Engineering (Tr. 20).

²⁴ The ALJ shall discuss *infra* why such possibly mitigating evidence as general wetness, rock dusting, and intermittent non-violative areas would not necessarily preclude findings of S&S and/or unwarrantable failure.

accumulations, the continuous presence of ignition sources and also knowing the oxygen content,” the cited area was the “worst beltline” he had ever seen. (Tr. 50, 127). Thus, even accepting there were various areas of the belt line at Shoemaker Mine that were in compliance with §75.400 on October 14, 2010, the ALJ is persuaded that significant lengths of Beltline No. 8 were in violation.

The Secretary’s position that §75.400 was violated is not only supported by the case record but also by applicable law. At hearing and in its brief, Respondent indicated that various areas along the belt line were wet, muddy, or rock-dusted. (*See Respondent’s Post-Hearing Brief* at p. 11-13). However, such factors do not necessarily mandate against a finding of a §75.400 violation. In *Utah Power & Light*, 12 FMSHRC 965, 969 (May 1990) (*citing Black Diamond Coal Company*, 7 FMSHRC 1117, 1120-21 (Aug. 1985), the Commission held that dampness in coal did not render it incombustible and that wet coal can eventually dry out in a mine fire and ignite. *See also Black Diamond*, 7 FMSHRC at 1121 (“a construction of (§75.400) that excludes loose coal dust that is wet or allows accumulations of loose coal dust mixed with non-combustible materials defeats Congress’ intent to remove fuel sources from the mine and permits potentially dangerous conditions to exist.”).

It is black letter law that the Secretary bears the burden of proof to establish the fact of violation by the preponderance of evidence. *Creek Pocahontas Co.*, 11 FMSHRC 2148, 2152 (Nov. 1989). However, this burden of proof standard only requires that the trier-of-fact conclude the “existence of a fact is more probable than its nonexistence.” *RAG Cumberland Resources Corp.*, 22 FMSHRC 1066, 1070 (Sept. 2000). As discussed *supra*, Edwards’ essentially un rebutted testimony establishes by the preponderance of the evidence that §75.400, as cited in Order No. 8030970, was violated. Moreover, there is also additional inferential evidence in the record supportive of a finding of violation.

Final Order No. 8030971 (GX-9) contains an unwarrantable failure finding that was uncontested by Respondent and reads as follows:

A record of hazardous conditions for the No. 8 beltline pre-shift was no recorded in the preshift report located on the surface. A hazardous condition which existed from #8-50 to #8-1 crosscut of the No. 8 Beltline was not recorded on the midnight shift of 10/14/2010. The area was preshifted at 5:36 a.m. by an examiner and the condition was obvious and extensive and was not worked on or corrected and not entered into the record book on the surface for that purpose. The condition is described in Order #8030970. This order is written in conjunction with that order. This violation is an unwarrantable failure to comply with a mandatory standard. The mine has received 6 citations of 75.360(f) over the past 2 years. Management engaged in aggravated conduct constituting more than ordinary negligence in that the area was preshifted and a hazardous condition was not reported or corrected.

(GX-9).

As averred under the condition or practice section, this Order finding a pre-shift examination violation was based upon “the condition...described in Order #8030970.” In his brief the Secretary properly points out pertinent Commission law indicating that for purposes of the Act, paid penalties that have become final orders pursuant to §105(a) reflect violations of the Act and the assertion of violation contained in the citation is regarded as true. *See inter alia Old Ben Coal Company*, 7 FMSHRC 205, 209 (Feb. 1985), (*Secretary’s Post-Hearing Brief* at p. 4), and (GX-5, page 53 - indicating Respondent had paid a \$9,100.00 penalty associated with Order No. 8030971).

The ALJ notes Respondent’s argument that the penalty was “inadvertently paid” and that, in any case, Edwards was unaware of the payment when he issued Order No. 8030970. (*Respondent’s Post-Hearing Brief* at p. 15 and Tr. 149-150). Respondent’s uncontested payment of the penalty at No. 8030971 may not invoke strict rules of *res judicata* or collateral estoppel, or constitute an admission as to violation of §75.400 as cited in Order No. 8030970. However, the ALJ finds that an adverse inference may reasonably be drawn from said uncontested payment, further supporting the Secretary’s position.

As noted *supra*, Respondent presented testimony from Gary Rose in an effort to undercut Edward’s testimony. Rose’s testimony, however, was not persuasive that no violation of §75.400 had taken place. The safety inspector at the Shoemaker Mine when Order No. 8030970 was issued, Rose had not been informed of such until nearly five hours after issuance.²⁵ (Tr. 389-390). Rose did not see any of the cited accumulations, did not see Order No. 8030970 before or during his photographs of the beltline, and had no actual knowledge of the specific areas that Edwards had cited. (Tr. 389-391, 410). Rose’s “random” photographs were taken more than 7 hours after this order was issued. Tr. 390-392.

Although Beltline No. 8 was approximately 5,000 to 6,000 feet long, Respondent only proffered 19 of Rose’s photographs for admission into evidence. Rose admitted that he had taken no notes, contemporaneous or otherwise, associated with the photographs and was solely testifying from memory. (Tr. 410). The ALJ gave credence to Rose’s testimony only to the extent that there may have been various areas along the belt line that had no impermissible accumulations.²⁶

In the final analysis, the ALJ finds Edwards’ testimony to be more credible regarding the violative accumulations located along approximately 2,000 feet of the No. 8 Beltline. None of Rose’s photographs were clearly established to have depicted the actual beltline areas that Edwards found to be in violation. (*see also Secretary’s Post-Hearing Brief* at p. 5-6 regarding such). The ALJ also finds that the testimony of Respondent’s witness, Tom Skrabak, was of

²⁵ Due to changing conditions associated with mining operations and environment, the ALJ had to consider the possibility that the scenes photographed by Rose may not have been an accurate reflection of the conditions witnessed by Edwards at the actual time of the inspection.

²⁶ *Inter alia* the ALJ has considered this to be a mitigating factor in denying the Secretary’s request for an increased penalty beyond \$4,000.00.

little probative value. Skrabak had no actual first hand knowledge of the cited accumulations. (see also *Secretary's Post-Hearing Brief* at p. 6 regarding such).

In view of the foregoing the ALJ finds that there was a clear violation of §75.400 as set forth in Order No. 8030970.

B. Respondent's violation of §75.400 was Significant and Substantial in nature

Taking into consideration the record *in toto* and applying pertinent case law, the ALJ finds that Respondent's violation of §75.400 was significant and substantial in nature. The first element of *Mathies* – the underlying violation of a mandatory safety standard – has clearly been established.

As to the second element of *Mathies* – a discrete safety hazard, that is a measure of danger to safety, contributed to by the violation – the record again clearly establishes satisfaction of such. Abundant case law has held that combustible accumulations create significant explosion and propagation hazards. see *Old Ben Coal Co.*, 1 FMSHRC 1954 (Dec. 1979); *Black Diamond Coal Company*, 7 FMSHRC *supra*; and *Amax Coal Co.*, 19 FMSHRC 846 (May 1997). Furthermore, Commission Judges have long recognized that coal accumulations along conveyor belts and/or longwall shields contribute to the safety hazard of a mine fire or explosion. *Consol Pennsylvania Coal Co.*, 32 FMSHRC 545, 560-561 (May 2010) (ALJ Bulluck); *San Juan Coal Co.*, 28 FMSHRC 35, 39 (Jan. 2006) (ALJ Hodgdon) (reversed and remanded on other grounds); *Mountain Coal Co. LLC*, 26 FMSHRC 853, 868 (Nov. 2004) (ALJ Manning); *Clinchfield Coal Co.*, 21 FMSHRC 231, 241 (Feb. 1999) (ALJ Barbour).

As discussed *supra*, Edwards credibly testified regarding extensive combustible accumulations under and along the No. 8 Beltline. The violative condition at issue, the impermissible accumulations, contributed to the discrete safety hazard of a mine fire or explosion. These accumulations were combustible and could provide the fuel source for a fire or explosion. (Tr. 46, 48-49, 59-60, 94-97). Thus, the Secretary has clearly established that the second prong of *Mathies* was met.

The third element of the *Mathies* test – a reasonable likelihood that the hazard contributed to will result in an injury – is usually the most litigated prong. The Commission has made it clear that the “test under the third element is whether there is a reasonable likelihood that the hazard contributed to by the violation...will cause injury.” *Musser Engineering Inc. and PBS Coals, Inc.*, 32 FMSHRC 1257, 1281 (Oct. 2010); see also *Cumberland Coal Resources LP*, 33 FMSHRC 2357, 2365-2369 (Oct. 2011). The Commission emphasized that the Secretary need not “prove a reasonable likelihood that the violation itself will cause injury...” *Id.* Further, the Commission reaffirmed the well-settled precedent that the absence of an injury producing event, where a cited practice occurs, does not preclude an S&S determination. *Id.* (citing *Elk Run Coal Co.*, 27 FMSHRC 899, 906 (Dec. 2005) and *Blue Bayou Sand and Gravel, Inc.*, 18 FMSHRC 853, 857 (June 1996)).

It is essentially uncontested that the hazard contributed to by the cited accumulation(s) was a fire or explosion, and such a hazard would have a reasonable likelihood of resulting in an

injury, including, at the very least, smoke inhalation and burns. (see Tr. 58-59; see also *Black Diamond Coal Company*, 7 FMSHRC at 1120 wherein the Commission noted “Congress’ recognition that ignitions and explosions are major causes of death and injury to miners...”). At hearing, Edwards described belt rollers turning in accumulations of coal, float coal dust on belt structures and water lines, the conveyor belt at No. 8 beltline not being properly aligned, and damaged rollers. (see GX-6 and Tr. 29, 34-37, 41-47, 50-51, 61-62, 133).

In *Amax Coal Co.*, *supra*, the Commission upheld the ALJ’s finding that belt running on packed coal was a potential source of ignition for accumulations of loose, dry coal and float coal dust along the belt line, and that the condition presented a reasonable likelihood of an injury causing event. In addition, in *Mid-Continent Resources, Inc.*, 16 FMSHRC 1218, 1222 (June 1994), the Commission held that accumulation violations may properly be designated as S&S where frictional contact between belt rollers and the accumulations, or between the belt and frame, results in a potential ignition source for the accumulations. The Commission in *Mid-Continent* found it was immaterial that there was no identifiable hot spot in the accumulation because continued normal mining operations must be taken into account when evaluating the circumstances. In the present case, if the violative condition had been allowed to persist, it would have reasonably led to smoke, fire and, potentially, an explosion. Further, an additional ignition source was present in the form of the misaligned belt rubbing the structure, which could generate frictional heat. Even if the coal near the damaged rollers and misaligned belt had been wet, the Commission has recognized that wet coal can dry out and ignite. See *Black Diamond Mining Co.*, *supra* at 1121. The preceding rulings, including those in *Musser* and *Cumberland Coal*, would all suggest a finding that *Mathies* third element was met in the case *sub judice*.

C. Respondent’s argument that there was not a confluence of factors present that would sustain a designation of S&S is specifically rejected.

Citing, *inter alia*, *U.S. Steel Mining Co.*, 6 FMSHRC 1834, 1836 (Mar. 1984), the Respondent argued that the record did not establish “a confluence of factors present that would sustain a designation of significant and substantial.” (See *Respondent’s Post-Hearing Brief* at p. 37-38). To the extent that Respondent maintains its cited case law and/or interpretations of such stands for the proposition that the hazard contributed to must be reasonably likely to result in an actual accident or untoward event, the ALJ rejects such as being inapposite to the above-cited Commission jurisprudence. However, even if Respondent’s proposed analysis of *Mathies*’ third element were utilized, the ALJ agrees with the Secretary’s arguments that a finding of S&S would still be warranted (See also *Secretary’s Post-Hearing Brief* at p. 9-14).

In determining whether a violation is reasonably likely to lead to injury, the likelihood of injury must be considered in the contest of “continued normal mining operations.” See *Mid-Continent*, 16 FMSHRC at 1221-1222). Additionally, when evaluating the reasonable likelihood of a fire, ignition, or explosion, the Commission has held that the examination of the confluence of factors must be based upon the particular facts surround the violation. *Enlow Fork Mining Co.*, 19 FMSHRC 5, 9 (Jan. 1997) (quoting *Texasgulf, Inc.*, 10 FMSHRC 498, 501 (Apr. 1988). “Some of the factors include the extent of accumulations, possible ignition sources, the presence of methane, and the type of equipment in the area.” *Id.* citing *Utah Power & Light Co.*, 12 FMSHRC at 970-971 (1990); *Texasgulf*, 10 FMSHRC at 500-503.

At hearing Edwards discussed the necessary confluence of factors at the subject mine by referring to the existence of a “fire triangle.” (Tr. 96). The necessary components of a fire triangle are: (1) an accumulations of combustible materials (fuel); (2) the presence of ignition sources; and (3) 20.8% oxygen content in the air. All were all found by Edwards during his inspection. (*See inter alia* Tr. 28-31, 34, 45, 50-51, 59, 96). The combustible “fuel” found by Edwards included loose coal, loose fine and ground up coal, and coal dust (including float coal) along the No. 8 Beltline.

As noted *supra*, both at hearing and in its *Post-Hearing Brief*, Respondent has attempted to diminish the combustible nature of the impermissible coal accumulations by emphasizing the dampness/wetness along the belt line and by arguing that the subject was rock dusted.²⁷ (*see Respondent’s Post-Hearing Brief* at p. 8, 11-13, 31-33, 38-39 and Tr. 35, 39, 123, 134, 392-407). However, both in *Utah Power & Light* and *Black Diamond*, the Commission observed that wet coal wet coal will eventually dry out during normal mining operations and that loose coal mixed with non-combustible materials may nonetheless pose a hazard. (*See also* Tr. 35, 63, 122, 123 for Edwards’ observation that wet dust will become combustible once dried out.).

Further, the photographic evidence presented by Respondent to prove the accumulations were wet and/or rock dusted was often of problematic probative value. As noted *supra*, Edwards was uncertain as to whether the scenes depicted in Rose’s photographs were of the actual sites Edwards had inspected or, indeed, were even taken at Shoemaker. (*see inter alia* Tr. 74-75, 77, 80, 82-84, 86, 88-89, 91-93, 161-162).

It was difficult to ascertain whether the photographed coal dust in some offered exhibits was lighter because of rock dusting or because of photo flashing. (*see also* Tr. 75-76, 78, 81, 83-84, 86, 88-93, 396, 404). Some of the photographed areas were so dark that one was left to speculate whether the area depicted was wet or had a coating of dry black coal dust. In weighing the probative value of the photographs, the ALJ carefully considered Edwards testimony that he had observed many areas where the coal dust was dry, black in color, and/or where the coal dust appeared to lay on top of the rock dust.²⁸ (Tr. 75-77, 79, 82-83, 85, 88, 91-93). Contrary to Respondent’s arguments, the ALJ finds that Edwards’ testimony established the existence of combustible materials which would be one of the necessary tri-part elements in the “fire triangle.”

Further, at hearing Edwards testified at length regarding the No. 8 Beltline being out of alignment and rubbing the metal belt structure at crosscuts 8-47 to 8-46. (GX-6, 7; Tr. 29-30, 34,

²⁷ *Respondent’s Post-Hearing Brief* at p. 38 cites Tr. 294-295 for the proposition that the cited area was damp to wet. However those pages contain Rose’s testimony on Order No. 8033057 and are not relevant to the immediate discussion on Order No. 8030970.

²⁸ The black color of the float coal dust would, on visual inspection, indicate little or no non-combustible rock dust component.

42-43). This rubbing of the belt on the metal structure with the associated friction heat²⁹ was a potential ignition source for the combustible accumulations – thus constituting the second necessary component of the fire triangle. The ALJ notes Respondent’s argument that “warm” rollers are common and do not constitute a hazard. However, according to above cited case law, the ALJ must consider that, with continuing normal mining operations, rollers subject to continued frictional heat may also rise in temperature, posing a hazard for fire and explosion. (*See also Secretary’s Post-Hearing Brief* at p. 11-12).

Other potential ignition sources found by Edwards were belt rollers in contact with, turning in, and impacted by the accumulations. (Tr. 29, 35, 37, 39, 50-51, 61, 133). These accumulations coming into contact with the belt rollers were extensive: they measured two to three feet in width and 24 inches in depth and were packing around roller shafts. (GX-6, 7; Tr. 35-38). The bearings of the impacted rollers were also found to be heating up – another potential ignition source for the accumulations. (Tr. 61-62, 133-134). Float coal dust, black in color, was observed directly under the belt rollers on the bottom, approximately 6 feet in width. The dust was also found on the belt structure and water lines. (GX-6, 7; Tr. 41-42). Again, under normal mining conditions pursuant to the above-cited Commission holdings, these conditions could worsen until a fire and/or explosion occurred. (*see also Highland Mining Company, LLC*, 31 FMSHRC___, slip op., KENT 2009-1241 (January 28, 2013) (ALJ Rae); Tr. 61-62, 117; and *Secretary’s Post-Hearing Brief* at p. 11 regarding the danger of the belt becoming an ignition source with continued friction).

The ALJ notes that another potential ignition source was methane. The subject mine is a gassy mine.³⁰ In fact, the Shoemaker mine was on a 5-day spot inspection for high methane levels on the day of the inspection. (Tr. 42, 60). Although not detecting any methane during his inspection, Edwards testified that methane can be liberated at any time to provide an ignition source. (Tr. 169). Further, the Commission has directly held that low levels of methane at a time of violation do not preclude methane from being a factor in the S&S designation. *See U.S. Steel Mining Co.*, 7 FMSHRC 1125, 1130 (Aug. 1985) (holding that whether a violation is S&S designated depends on the circumstances that would have existed if normal mining operations continued³¹ after the time the violation was cited, and, finding that methane levels can rise quickly during mining operations). Thus, in addition to the frictional heat associated with the

²⁹ *See inter alia* Tr. 43 wherein Edwards testified that when he and Terry Wilson touched the belt it was “actually hot.”

³⁰ Pursuant to 30 U.S.C. §813(i) a gassy mine liberates more than one million cubic feet of methane.

³¹ As noted *infra*, for S&S determinations the evaluations of the reasonable likelihood of an injury should be made assuming continued normal mining operations. *See U.S. Steel Mining Co.*, 6 FMSHRC at 1836. Further, the determination of S&S must not be based on the facts existing at the time of the citation issued but also in the context of continued mining operations without any assumptions as to abatement. *Secretary of Labor v. U.S. Steel Company, Inc.*, 6 FMSHRC 1573, 1574 (July 1984). Thus, it cannot be inferred that the violative condition will cease. *Secretary of Labor v. Gatliff Coal Company*, 15 FMSHRC 1982, 1986 (Dec. 1992).

misaligned belt, impacted and damaged rollers, the possibility of a methane release in the subject gassy mine were all part of the confluence of factors justifying an S&S designation.

Further, at hearing Edwards also gave un rebutted testimony that the subject area had a 20.8% oxygen content which was sufficient for creation of the third part of the “fire triangle.” In *Highland Mining Company, supra* and *Clinchfield Coal Co., supra*, ALJs Rae and Barbour respectively addressed similar fact patterns where accumulations created a reasonably likelihood of fire or explosion so as to satisfy *Mathies*’ third element. (*see Highland Mining* at 15-16 and *Clinchfield* at 241-242).

In *Highland Mining*, ALJ Rae found that rollers turning in a quantity of recently spilled coal posed a hazard of fire. Rae rejected the mine operator’s position that evidence suggesting that the spill was recent or that the coal was wet vitiated the third element of *Mathies*. (*See Highland Mining* at 14-16).

In *Clinchfield*, ALJ Barbour noted that there were locations where rollers were turning in the accumulations, places where stuck or misaligned rollers caused the belt to rub against the belt structure, portions of the accumulations that ranged from damp to wet, places where the belt was rubbing in the damp to wet accumulations and float coal dust laying on the belt structure. *Id.* ALJ Barbour specifically found that the belt rubbing against the belt structure produced friction, which generates heat, and was a reasonably likely ignition source. *Id.* ALJ Barbour explained:

Further, while many of the accumulations ranged from damp to wet, there were places where the belt was rubbing in the damp to wet accumulations, which meant that heat was being produced and therefore the accumulations were drying. This too meant that as mining continued, it was reasonably likely that even some of the damp to wet accumulations could have ignited.

Finally, there was the highly explosive float coal dust that lay on the belt structure from the portal to the Y... As mining continued, the places where the belt was malfunctioning could have generated heat sufficient to touch off an ignition. As [the MSHA Inspector] noted, “It only takes one frictional source to ignite coal dust” Once there was an ignition, the float coal dust could have propagated an explosion along the beltline.

Id. (*see also Secretary’s Post-Hearing Brief* at p. 12-14).

The ALJ has considered the nature and the extent of the accumulations, the oxygen levels, the fact that the subject mine was gassy, and the multiple ignition sources. A conclusion that a belt fire was reasonably likely to occur under continued normal mining operations is persuasively supported by the record. In light of such, the ALJ is further persuaded by the arguments advanced by the Secretary (*see inter alia Secretary’s Post-Hearing Brief* at p. 13) that even if he were required to prove that the violation itself was reasonably likely to lead to injury, *Mathies* third element has been established.

D. The record clearly established that the fourth element of *Mathies* is satisfied

Under *Mathies*, the fourth and final element that the Secretary must establish is that there is “a reasonable likelihood that the injury in question will be of a reasonably serious nature.” *Mathies Coal Co.*, 6 FMSHRC at 3-4; *U.S. Steel*, 6 FMSHRC at 1574. Smoke inhalation and burns sustained in a mine fire or explosion would inarguably be considered serious injuries. (See Tr. 58-59). The ALJ agrees that at least one person, as found in the order, would suffer such injuries. (See GX-6 and Tr. 64). Thus, the Secretary has carried his burden as to all of the elements of *Mathies* as to Order No. 8030970.

For reasons set forth within, the ALJ affirms the Order as written as to the gravity found by Edwards.

E. Respondent’s violation constituted an unwarrantable failure to comply with §75.400

In a decision issued on February 1, 2013, the Commission recently addressed the specific question of when combustible coal accumulations in violation of 30 C.F.R. §75.400 constituted an unwarrantable failure on the part of the operator to comply with mandatory health and safety standards. (See *Secretary of Labor v. Manalapan Mining Company, Inc.*, 35 FMSHRC ___, slip op., (February 2, 2013), 2013 WL 754106).

In *Manalapan*, the Commission reviewed the factors to be evaluated in determining unwarrantable failure:

In *Emery Mining Corp.*, 9 FMSHRC 1997 (Dec. 1987), the Commission determined that unwarrantable failure is aggravated conduct constituting more than ordinary negligence. *Id.* at 2001. Unwarrantable failure is characterized by such conduct as “reckless disregard,” “intentional misconduct,” “indifference,” or a “serious lack of reasonable care.” *Id.* at 2003-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194 (Feb. 1991); see also *Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 136 (7th Cir. 1995) (approving Commission’s unwarrantable failure test).

Whether conduct is “aggravated” in the context of unwarrantable failure is determined by looking at all the facts and circumstances of each case to see if any aggravating factors exist, including (1) the extent of the violative condition, (2) the length of time that the violative condition existed, (3) whether the violation posed a high degree of danger, (4) whether the violation was obvious, (5) the operator’s knowledge of the existence of the violation, (6) the operator’s efforts in abating the violative condition, and (7) whether the operator had been placed on notice that greater efforts were necessary for compliance. See *IO Coal Co.*, 31 FMSHRC 1346, 1351-57 (Dec. 2009); *Cyprus Emerald Res. Corp.*, 20 FMSHRC 790, 813 (Aug. 1998), *rev’d on other grounds*, 195 F.3d 42 (D.C. Cir. 1999). These seven factors need to be viewed in the context of the factual circumstances of a particular case, and some factors may be irrelevant to a particular factual scenario. *Consolidation Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2000).

Nevertheless, all of the relevant facts and circumstances of each case must be examined to determine if an operator's conduct is aggravated, or whether mitigating circumstances exist. *Id.*; *IO Coal*, 31 FMSHRC at 1351.

Id. at 5.

Considering each of these factors *seriatim*, the ALJ finds that Respondent's conduct constituted an unwarrantable failure to comply with §75.400.

As to the extent of violation factor, as discussed *supra*, Edwards' description of the cited coal accumulations was credible as to the extensive nature of such, being present over 2000 feet of No. 8 Beltline. Given the extent of the accumulations, it was quite apparent to Edwards that the violative condition had existed over a significant length of time. Respondent's own pre-shift examination report, performed hours before Edward's inspection, noted that the area where Edwards found the violations – crosscuts 8-15 to 8-36 – needed swept. (GX-8; Tr. 70-71, 142-144). Such extensive accumulations – taking many miners over 9 hours to shovel – would very likely have taken place over a long period. *See Windsor Coal Co.*, 21 FMSHRC 997, 1001-1004 (Sept. 1999) (extensive accumulations that existed for longer than one shift warranted an unwarrantable failure finding).

As to whether the violations posed a high degree of danger, the ALJ has carefully considered the evidence presented by Respondent that various areas along the No. 8 Beltline were damp, wet, muddy, had been rock dusted, that there was a working CO System present on the belt, that there were water sprays, that the belt was constructed from fire resistant material, and that the methane readings taken during the examination were 0%. (*See inter alia* Tr. 166-169; *see also Respondent Post-Hearing Brief* at p. 9). The ALJ grants that such factors might arguably be considered mitigating so as to diminish the degree of danger posed by the violative conditions. However, as discussed *supra*, just as such factors do not preclude an S&S designation, the ALJ finds that a diminished degree of danger does not vitiate a finding of unwarrantable failure.

As noted *supra*, the ALJ gave only partial credence to the testimony presented by Respondent. Edwards credibly disputed the extent of wetness and/or rock dusting in the areas of the beltline that he actually cited. Further, Edwards persuasively testified that a CO monitor will only alarm when there is already a fire, not where there is a danger of fire. (Tr. 167). In addition, water sprays were primarily designed for dust suspensions, not fire suppression. (Tr. 168). Furthermore, the fact that the belt was made of fire-resistant material did not vitiate the hazard of combustible accumulations. (Tr. 167). Given the above-cited case law holding that the ALJ must assume continuing mining operations and possible drying out of combustible materials, a diminished degree of danger at the time of actual inspection would not necessarily preclude an unwarrantable failure finding.

The ALJ is also mindful of the Commission's admonition in *Manalapan* that while the factor of dangerousness may be so severe that, by itself, it warrants of finding an unwarrantable failure, the absence of significant danger does not necessarily preclude a finding of unwarrantable failure. *Manalapan* at 6. Pursuant to the Commission's holding, the undersigned

has “considered the evidence relating to the danger factor, determined whether it was an aggravating or mitigating circumstance, and weighed it against the other relevant factors to determine whether the operator’s conduct under the circumstances amounted to an unwarrantable failure.” *Id.*

In weighing the other relevant aggravating factors, discussed herein, even if the degree of danger posed by the accumulations had been somewhat diminished, the ALJ finds that Respondent’s conduct was nonetheless impermissibly reckless.

As to whether the “violation was obvious,” the ALJ again notes Edwards’ description of the violative area as “the worst belt line” he had ever seen. (Tr. 50, 127). Even if Edwards had used exaggerated phraseology in describing the violative conditions existent, it is nonetheless clear from his testified to observations that the impermissible accumulations would have been obvious to a reasonably prudent person, familiar with the mining industry and the protective purpose of §75.400. Given the extent of the violative condition and the length of time it must have existed, the ALJ finds that the operator knew or should have known of its existence.

As to Respondent’s efforts in abating the violative condition and as to whether Respondent had been placed on notice that greater efforts were necessary for compliance, the ALJ essentially adopts the arguments advanced by the Secretary regarding such. (*See also Secretary’s Post-Hearing Brief* at p. 15-16).

Inter alia, Respondent had been issued 137 violations of 30 C.F.R. 75.400 for impermissible accumulation of combustible material at Shoemaker miner in the two years prior to the issuance of this Order. (GX-4, 5 p. 61-71; and Tr. 69). Although not knowing the specific number of §75.400 violations prior to his inspection, Edwards, based upon his review of the mine file, knew that Shoemaker had a significant violation history. (Tr. 165-166) (*see also* case law cited by Secretary holding that repeated similar violations may be relevant to determining unwarrantable failure. Such prior violations serve to put an operator on notice that greater efforts are necessary for compliance with the pertinent safety standard violated. *San Juan Coal Co.*, 29 FMSHRC 125, 131 (Mar. 2007).³² Further, during his previous quarterly inspection, Edwards specifically discussed with mine management their need to address the problem of impermissible accumulations. (Tr. 70).

In view of the foregoing the ALJ holds that a finding of unwarrantable failure is warranted.

³² *See also Consolidation Coal Co.*, 23 FMSHRC 588, 595 (June 2001) (finding unwarrantable failure indicated when the operator was cited 88 times during the prior two years period for §75.400 violations).

F. The civil penalty of \$4,000.00 is affirmed

Section 110(i) of the Mine Act establishes the six criteria to be considered in determining the appropriateness of a civil penalty.³³

Further, the Commission has outlined its authority for assessing civil penalties in *Douglas R. Rushford Trucking*, stating “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 system for points in Part 100 of 30 C.F.R. 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).

After reviewing all of the relevant facts and weighing the 110(i) factors applicable to such, the ALJ finds no reasons to depart upward or downward from the original \$4,000.00 amount proposed by the Secretary.

II. Order No. 8033057

A. The Secretary has also sustained his burden of establishing that §75.400 was violated as set forth in Order No. 8033057.

As described *supra*, on October 26, 2010 Inspector James Gropp issued Order No. 8033057 to Respondent for violation of §75.400. (GX-10).

During his EO1 quarterly inspection of Shoemaker (Tr. 180), Gropp³⁴ – like Edwards on October 14, 2010 – found extensive impermissible accumulations of combustible materials.³⁵ Gropp measured accumulations of coal created when the mining machine cut into the rib while being maneuvered. (Tr. 190-191). Gropp measured each accumulation up to 25 feet with a tape measure and stepped off larger accumulations, using each of his steps for one yard. (Tr. 191-192, 198). Like Edwards, Gropp documented his observations with contemporaneous notes.

³³ “[T]he Commission shall consider the operator’s history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator’s ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.” 30 U.S.C. §820(i).

³⁴ Gropp was accompanied by UMWA Safety Committee representative, John Miller, Respondent representative, Foreman trainee Craig Norton, and Safety Inspector, Gary Rose. (Tr. 183).

³⁵ See summary of Gropp’s testimony *supra* for full description of impermissible accumulations.

(Tr. 186). (Respondent clarified that Gropp recorded his observations underground and filled in his administrative details and summary questions/answers aboveground. Tr. 238-239).

At the time of the inspection, Respondent was actively mining on the right side face and the left side face. Gropp did not observe anyone preparing to clean or actually cleaning accumulations. (Tr. 280- 281).

The first impermissible accumulation that Gropp cited was located just inby the section tail piece. (*see* impermissible accumulation No. 6 on Order No. 8033057, GX-10). The accumulation had been created by the miner (machine) gouging into the right rib. (Tr. 190-191). The accumulation measured 30 feet long, 12 to 24 inches deep and 2.5 to 6 feet wide. (Tr. 190).

While such gouging accumulations are not unusual when the miner is being moved into a new entry, these accumulations had not been scooped or loaded into a shuttle car to be put on a belt and removed from the mine. (Tr. 191-192). Gropp testified that the impermissible accumulations had existed for at least one day prior to his investigation. He had been informed by the right side day shift foreman, Mr. Yorty, that the miner had been moved around the corner during the day shift the day before the investigation. (Tr. 215, 257-258).

The next accumulation found by Gropp was the No. 8 entry and cited as No. 7 on the Order and map. (GX-10, 15; Tr. 192-193). This accumulation was on the entire width of the entry – 6 to 15 ½ feet – and measured 12 to 24 inches deep. (Tr. 193). Gropp observed that Respondent had moved a fan on top of the accumulations along with the fan cables. (Tr. 193). A loader could not, given such, be brought in to clean up the accumulations (Tr. 192-193). In order to determine how long the cited accumulations had existed prior to his inspection, Gropp calculated Respondent's rate of mining, using *inter alia*, beeper machine shifts for the 30 shifts prior to his inspection. (Tr. 211-212). Averaging the numbers, Gropp concluded that Respondent mined an average of 36 feet per shift on the left side and 33 feet on the right side. (Tr. 212). Based upon his calculation, Gropp concluded that the impermissible accumulations, as cited at No. 7 on the Order and Map, had existed for at least one to two shifts.³⁶ (Tr. 215-216).

Gropp next described another §75.400 violation at the crosscut of 4 to 3, No. 4 in the Order: the “whole crosscut was completely accumulated in coal.” (Tr. 193-194). Gropp had to walk over the accumulations which measured 140 feet long, 8-12 inches deep, and the entire width of the entry (15 ½ feet wide). (GX-10, 15; Tr. 194). Gropp opined that a miner cable, loader cable, and water line hung from the mine roof, had likely shoved coal from the top of a shuttle car as it had driven underneath. (Tr. 202-203, 216). Gropp determined that this accumulation had also existed for at least one to two shifts prior to his inspection and would not have occurred since the last pre-shift examination. (Tr. 213).

Gropp further testified regarding the impermissible accumulation cited as No. 3 on the Order and map. (GX-10, 15, Tr. 194-195). This accumulation was also extensive, measuring 15

³⁶ *See also Secretary's Post-Hearing Brief* argument regarding Respondent's failure to challenge Gropp's calculations at p. 20-21; *see also* Tr. 215-216.

½ feet in width, four to 18 inches in depth, and 12 feet long. (Tr. 195). Gropp concluded that this accumulation had resulted from holing through, both inby the crosscut, at the face, and outby the crosscut. (Tr. 195).

Gropp indicated that Respondent had also failed to clean up this accumulation and had continued mining. (Tr. 195). Gropp concluded that this accumulation had existed for at least one to three days prior to his inspection. (Tr. 213). Gropp further opined that the accumulation could not have occurred since the last pre-shift accumulation. Respondent had not yet started mining on the left side during the inspection shift. Given Respondent's mining pattern, this accumulation had to occur prior to the No. 2 accumulation found by Gropp. (Tr. 213).

With respect to the violation cited No. 2 on the Order, Gropp measured the accumulations as 15 ½ feet wide, four to nine inches deep, and 10 feet long. This accumulation, which was located near the No. 1 entry of the 8 South Section, was the result of Respondent holing through from a crosscut. (GX-10, 15; Tr. 195). Gropp against determined that the accumulation had existed at least 1 to 2 days prior to his inspection, and , because Respondent had not yet started mining on the left side, could not have occurred since the last pre-shift examination. (Tr. 212-213).

In reference to the cited accumulation, identified as No. 1 on the Order, Gropp determined that Respondent recently finished mining this entry and pulled the miner out without ever having pushed the coal back into the face or loading it out. (GX-10, 15, Tr. 196). The loader that would have moved this accumulation had been switched out for maintenance. (Tr. 196). Gropp measured the accumulation as being four to 15 ½ feet wide, four to 15 inches deep, going from the face where Respondent finished mining outby 80 feet in length. (Tr. 196). Gropp further observed a bolter operating in the face of the 15 AO entry on top of the accumulation at the time of the inspection. (Tr. 200). Gropp determined that this accumulation had also existed for at least one to two shifts prior to his inspection. (Tr. 211).

The final impermissible accumulation cited in the Order, No. 5, was outby the face of No. 4 where Respondent had the loader "piggy-backed" (dumped coal onto the ground to move it from one shuttle car to another because each shuttle has a trailing cable that can only travel 1,000 feet) (GX-10, 15; Tr. 197). This accumulation measured 60 feet long, 14 feet wide and 12 inches deep (Tr. 197). This accumulation was also likely the result of cables shaving coal from the top of a shuttle car (Tr. 216), the coal then being spread out by the drag bar on the bottom of the shuttle car (Tr. 197). Gropp determined that this accumulation could have existed for up to three days (Tr. 214-215). In any event, this accumulation could not in any way have occurred since the last pre-shift examination, because Respondent had not yet started mining on the left side during the inspection shift. (Tr. 214).

At the time of his inspection, Gropp observed that all of the cited accumulations were dry. (Tr. 278). He further testified that each accumulation consisted of loose coal, loose fine and ground up coal, and coal dust including float coal dust (Tr. 199). Gropp conceded that no one present had sieves to measure particle sizes. (Tr. 200). However, regardless of particle sizes, all of the accumulations were combustible and had been left by Respondent. (Tr. 203-205). Gropp further noted that the coal in the cited accumulations was black in color in that the coal was just

freshly produced from the mining process and had never been rocked dusted. (Tr. 202). Gropp did not believe the accumulations were sloughage: sloughage is usually on the side of the rib; the cited accumulations were the entire entry width from rib to rib.³⁷ (Tr. 202).

Gropp testified that the accumulations in Order No. 8033057 were extensive and obvious: the accumulations were from rib to rib, measuring, in total, 400 feet in length; much of these accumulations were outby the face, an area where they should not have been. (Tr. 204). It would not have been possible for the impermissible accumulations not to have been noticed. (Tr. 204). Respondent had utilized three shuttle cars, 2 loaders, and ten miners using shovels, to abate the violations.

The undersigned found Respondent's attempts at hearing to rebut Gropp's testimony to be less than persuasive. Gary Rose, the safety inspector at Shoemaker mine when Order No. 8033057 was issued, conceded that he had taken no contemporaneous notes during the inspections nor had he taken any of his own measurements of the cited accumulations. He conceded that it was difficult to remember specifics due to the lapse of time. (Tr. 304, 311). Additionally, Rose admitted that he had no firsthand knowledge of how or when many accumulations had been made. (Tr. 312). Further, Rose's explanation for why Respondent had not timely dealt with the accumulations was less than compelling. (*See also Secretary's Post-Hearing Brief* at p. 24-25). For example, when asked why Respondent had not attempted hand dusting accumulations, Rose answered: "I do not have any idea why they were not doing it at that time." (Tr. 306).

Respondent's second witness, Brian Hough, also did not give persuasive evidence to contradict or rebut Gropp's testimony regarding the §75.400 violation. Hough also had taken no contemporaneous notes, measurements, or photographs of the cited violations but was instead relying on "mental notes."³⁸ (Tr. 349-350). Further, Hough testified that he had not seen any accumulations made nor did he sample any accumulations to determine what they were made of. (Tr. 351). It would be impossible for Hough to determine how long the accumulations had existed. (Tr. 366-367). Hough admitted that, after the Order was issued, he had the miner brought back in to clean up the cited accumulations. (Tr. 325).

The ALJ, hereby, incorporates his rationale *supra*, as to the applicable case law supporting a finding of §75.400 herein without a full recitation thereof.

Gropp, like Edwards, was an experienced miner.³⁹ While Gropp, like Edwards, had not worked for MSHA for a prolonged period, Gropp had 20 years of experience in mining as well

³⁷ In any case, Respondent admitted that rib sloughage constituted combustible material. (Tr. 306-307).

³⁸ The ALJ found the Secretary's argument in his *Brief* at pages 25-26 persuasive as to the limited probative value of Hough's testimony.

³⁹ *see* summary of Gropp's background *supra* and summary of such in *Secretary's Post-Hearing Brief* at 18, footnote 6.

as a B.S. in mining engineering. The ALJ found Gropp to be a credible and reliable historian as to his descriptions of the violative conditions at Shoemaker and accorded substantial weight to Gropp's testimony. The ALJ found Gropp's testimony to be more than sufficient to establish the fact of violation of §75.400.

B. Respondent's violation of §75.400 was Significant and Substantial in nature

The ALJ notes that much of the rationale and case law discussed *supra* as to Order No. 8030970 is equally applicable to the consideration of Order No. 8033057. The ALJ again incorporates said rationale and case law citations without full recitation thereof herein.

The ALJ again finds that all of the *Mathies* elements are met. There was a violation of a mandatory standard. A discrete safety hazard – a mine fire or explosion – was contributed to by the violation. (Tr. 205). Gropp's observation of extensive combustible accumulations at the active 8 South continuous miner section was credibly described. These accumulations, just as the accumulation described by Edwards, would provide a fuel source for fire or explosion. (Tr. 205-206).

Utilizing the *Musser/Cumberland* interpretation as to the third element of *Mathies* and applying the rationale used above as to Order No 8030970, there was clearly a reasonable likelihood that the discrete safety hazard contributed to would result in an injury. As testified to by Gropp, a mine fire or explosion would be reasonably likely to result in smoke inhalation, respiratory damage, and crushing internal injuries. Such injuries would result in lost workdays or restricted duty to at least the 10 miners Gropp actually observed near the cited accumulations: a miner operator, two bolters, a utility man, and a loader operator on the right side and 2 bolter operators and three miners hanging curtains on the left side. (Tr. 208-209, 273-274). Considering the specific fact pattern established and applicable Commission jurisprudence discussed *infra*, the ALJ finds that the Secretary has again carried his burden of proving *Mathies* third element as to Order No. 8033057.

The ALJ further accepts the argument advanced by the Secretary that, given the extensive combustible accumulations, oxygen level, and ignition sources testified to by Gropp, there was a reasonable likelihood of a fire and/or explosion at the subject mine. (*See Secretary's Post-Hearing Brief* at p. 27-29).

At the time Gropp issued Order No. 8033057, Shoemaker was a "gassy mine" on 5-day spot inspection because of the high concentration of methane liberated and recorded during the previous inspection quarter. (Tr. 206-207). Respondent did not dispute that Shoemaker liberates more than a million cubic feet of methane a day. (Tr. 207). The cited accumulations were located at the active working face; there could have been face ignitions. (Tr. 280). Equipment and electrical cables were in and on the combustible accumulations (Tr. 200, 206-207, 261-263, 274-275). Shoemaker had, within the last month, been issued five citations for electrical cable openings. (Tr. 207, 259-260, 279). Given that cables are regularly damaged during the mining

process, the Secretary established a reasonable likelihood of fire or explosion at Shoemaker Mine.⁴⁰ (Tr. 208, 262).

The Secretary persuasively cited several ALJ decisions containing similar fact patterns finding that an S&S violation of §75.400 was warranted. (see *Secretary's Post-Hearing Brief* at p. 28-29, including holdings in *United States Steel Mining Company, Inc.*, 5 FMSHRC 1873 (Oct. 1983) (ALJ Broderick) and *Youghiogheny and Ohio Coal Co.*, 8 FMSHRC 330 (Mar. 1986) (ALJ Maurer))

In *United States Steel*, given that the subject mine was gassy and on a 103(i) spot inspection for methane, that face ignitions had occurred in the past, and that mobile mining equipment operated in the cited areas, ALJ Broderick found S&S. 5 FMSHRC at 1875. In *Youghiogheny and Ohio Coal*, considering *inter alia*, evidence of insufficient rock dusting, the fact that the mine was gassy, and on the 103(i) spot inspection for methane, ALJ Maurer concluded that S&S was warranted. 8 FMSHRC at 334.

In light of Gropp's testimony regarding the extensiveness of accumulations, the significant length of time they were allowed to exist, and the multiple ignition sources existent, a conclusion that a fire or explosion was reasonably likely to occur under continued normal mining operations is supported by the record and above-cited case law. Thus, even if the Secretary had to prove the within §75.400 violation was reasonably likely to lead to injury, the third element of *Mathies* for this order has been established.

It is essentially undisputed that the injuries expected to result from the hazard of a fire or explosion would be of a reasonably serious nature. The fourth element of *Mathies* has also been clearly established.

C. Respondent's violation as set forth in Order No. 8033058 constituted an unwarrantable failure

The same rationale and case law utilized by this Court as to Order No. 8030970 is essentially applicable to this Order. The ALJ again incorporates such within without full recitation.

Applying the *Manalapan* factors *seriatim*, the ALJ finds that Gropp credibly described the extensive nature of the violative conditions. The impermissible coal accumulations had existed for a significant length of time. *Inter alia*, the amount of time expended and the number of individuals required to abate the condition is supportive of such.

The ALJ was not persuaded by the arguments advanced by Respondent in its brief that a lesser degree of danger was posed by the cited conditions. (see *Respondent's Post-Hearing Brief* at p. 43-49). However, as noted *supra*, even if the ALJ were to find that Respondent's cited factors diminished the degree of danger presented by the §75.400 violations, such a diminished

⁴⁰ Trailing cables, even if intact at the time of the inspection, have been found to be ignition sources for coal accumulations. Utah Power & Light, 12 FMSHRC 965, 971 (1990).

degree of danger would not, under *Manalapan*, necessarily vitiate a finding of unwarrantable failure.

There are other relevant aggravating circumstances to justify an unwarrantable failure designation, even if the degree of danger was somewhat diminished. Respondent has clearly been placed on notice that greater efforts were necessary to prevent §75.400 violations from occurring. Respondent had been issued 139 violations of §75.400 for impermissible accumulations of combustible materials at the Shoemaker mine in the 2 years prior to the issuances of this Order. (GX-4, 5, page 61-71, Tr. 267) (This number included unwarrantable failure Order No. 8030970 discussed *infra*).⁴¹

As to Respondent's efforts to abate the violative condition prior to issuance of the Order, Respondent admitted it was dilatory in such: Respondent essentially conceded that it chose not to clean up accumulations because the scoop and loader were broken and moving the miner or hand dusting would have taken too long. As noted by the Secretary, Respondent's inactions appeared to violate its own clean up plan. (*Secretary's Post-Hearing Brief* at p. 30; Tr. 218, 221-223).

Finally, as properly pointed out by the Secretary, Respondent's conduct in essentially ignoring the impermissible accumulations was especially egregious given the high traffic in the cited areas with numerous individuals walking on and around the combustible materials. (*See Secretary's Post-Hearing Brief* at p. 30; Tr. 223). Therefore, the ALJ is constrained to conclude that the instant violation was the result of Respondent's unwarrantable failure and high negligence.

D. The civil penalty of \$14,743.00 is affirmed

After carefully considering all of the criteria for assessing a civil penalty as set forth at 30 U.S.C. §820(i), including, *inter alia*, the fact that Respondent is a larger operator whose ability to stay in business will not be affected by payment of the civil penalty, the ALJ affirms the Secretary's original assessed penalty of \$14,743.00.

⁴¹ The ALJ notes Respondent's argument that the Secretary has failed to present a sufficient "breakdown" of the previous 139 citation that had been issued. (*Respondent's Post-Hearing Brief* at p. 33). Respondent cited no case or statutory law for the proposition that such a failure would preclude an S&S or unwarrantable failure finding. Indeed, our Commission case law indicates that previous violations cited, not just those involving the same facts, constitute an aggravating factor. (*see inter alia San Juan Coal Co.*, 29 FMSHRC at 131 (past violations in a different area of the mine may provide an operator with sufficient awareness of an accumulation problem to be considered for unwarrantable failure)).

III. Citation No. 8033058

A. Respondent violated §75.360(b)(3) as set forth in Citation No 8033058

It is black letter Commission case law that pre-shift examinations are of fundamental importance in assuring a safe working environment for miners. (*See Buck Creek Coal Co., Inc.*, 17 FMSHRC 8, 15 (Jan. 1995); *Enlow Fork Mining Co.*, 19 FMSHRC at 15).

On October 27, 2010 Gropp, after consulting his supervisor, issued Citation No. 8033058, determining that there were inadequate pre-shift examinations conducted on the midnight shift of October 26, 2010 preceding the oncoming day shift on the 8 South continuous miner section, left side MMU 083 and right side MMU 016 (GX-12). Gropp's citation was essentially based on Respondent's pre-shift examiners' failure to note and report the hazardous accumulations described supra and set forth in Order No. 8033057. (GX-12). Despite the obvious and extensive accumulations testified to by Gropp, the pre-shift examiners for the 8 South Right section and 8 South Left section recorded no observations of dangerous or hazardous conditions. (GX-14; Tr. 231).

Even accepting Respondent's argument that Accumulation Nos. 1, 4, and 5 may have occurred between the time the 8 South right pre-shift examinations had occurred and the time of the inspection – the ALJ finds that even lesser accumulations would have constituted a hazardous condition where the pre-shift examinations were conducted. In order to have given proper warning to miners, all 7 hazardous accumulations should have been observed, noted, and recorded on the pre-shift examinations. (Tr. 211-215, 225).

Inter alia, the ALJ notes the following: accumulation No. 6 had existed for at least one day, when Respondent moved the miner to a new entry. (Tr. 215, 257-258); given that no mining had taken place on the left side between the pre-shift examination and the inspection, accumulation Nos. 2, 3, 6, and 7 would have been present on the 8 South Left section at the time of the pre-shift examination. (Tr. 211-215, 225). Moreover, much of Respondent's hearing testimony was not presented to show that the accumulations had not existed but to explain why such had not been timely abated prior to inspection. (*See also Secretary's Post-Hearing Brief* at p. 33).

A review of the testimony and hearing record reveals clear and convincing evidence, unrebutted by Respondent, that there were extensive impermissible accumulation existent at the time of the pre-shift examinations and that such were not reported in violation of §75.360(b)(3).

B. Respondent's violation was Significant and Substantial

The ALJ incorporates his review of the applicable standards under *Mathies* to establish Respondent's violation was significant and substantial. The Secretary has persuasively carried its burden of proving the fact of a §75.360(b)(3) violation and that discrete safety hazard (mine fire or explosion) was contributed to by that violation. (Tr. 232, 274-275).

The third *Mathies* element is met pursuant to the *Musser/Cumberland* interpretations. It is readily apparent that the hazard of a mine fire or explosion at the cited areas in Shoemaker mine, where 10 miners were working, would be reasonably likely to result in an injury. For reasons already discussed *supra* the ALJ is persuaded that, even if the Secretary were required to show that the violation was reasonably likely to lead to injury, given the factual situation existent at Shoemaker Mine, the Secretary could carry this even more onerous burden. (*see also Secretary's Post-Hearing Brief* at p. 34).

The fourth prong of *Mathies* has also been established. As discussed *supra*, should there be a fire or explosion, the injuries that would be suffered by miners could be expected to be of a reasonably serious nature. Here, at least 10 miners working the cited area would be exposed to such serious injuries as smoke inhalation with associated respiratory damage and internal injuries from explosion. (Tr. 232, 274-275).

C. Respondent was highly negligent in failing to record and report the impermissible accumulations found by Gropp

§100.3(d) provides that, under the Mine Act, an operator is held to a high standard of care. *Inter alia*, a mine operator is required to be on the alert for conditions and practices that affect the safety of miners and to take steps necessary to prevent hazardous conditions. The pre-shift examiners' failure to report the hazardous conditions existent at Shoemaker Mine was found by Gropp to have constituted a grossly negligent departure from the standard of care imposed by the Mine Act.

Given that the required examinations were "of fundamental importance in assuring a safe work environment" (*See Buck Coal Co., supra*) – the ALJ finds that Respondent's pre-shift examiners were clearly derelict in their duty to report hazardous conditions and agrees with the high degree of negligence found by the inspector.

The Secretary has ably set forth a summary of the facts established at hearing that would support a high negligence assessment. (*see Secretary's Post-Hearing Brief* at p. 35-36). Notwithstanding Respondent's arguments otherwise, the pre-shift examinations were not conducted in a fashion consistent with what a reasonably prudent person, familiar with the mining industry and protective purposes of §75.400 and §75.360(b)(3), would have done. The pre-examination reports failed to fulfill the primary goal of giving fair and adequate notice of potential hazards to miners. The above-cited record compellingly establishes the high degree of negligence found by Gropp. Both of Respondent's examiners traveled the same route as Gropp. (Tr. 233, 275-276). Many of Respondent's managers and employees passed through the cited area. (Tr. 233-234). Respondent violated its own clean up program with regard to the accumulations. (Tr. 234).

Respondent was clearly put on notice that greater efforts were necessary to ensure adequate pre-shifts were being performed: Respondent had received 17 violations of §75.360 in the two years prior to the issuance of the within citation (GX-5 at 55-52). Respondent had been issued an unwarrantable failure order for failing to report hazardous coal accumulations on October 14, 2010 pre-shift examination (GX-9). Respondent had paid the penalty for this order

(GX-4). Respondent had been issued 139 violations of 30 C.F.R. §75.400 for impermissible accumulations of combustible material at Shoemaker Mine in the two years prior to the issuance of Order No. 8033057 (GX-5 at 61-71, Tr. 223). Respondent had been issued an unwarrantable failure order on October 14, 2010 (GX-6).

Like the Secretary, the ALJ was troubled by Respondent's seeming policy and practice not to record or correct pre-shift hazards so as to avoid down-time in production. The ALJ essentially adopts the Secretary's rationale regarding such as further grounds for a finding of high negligence. (*see Secretary's Post-Hearing Brief* at p. 36-37).

The ALJ affirms the assessed civil penalty of \$6,996.00.

ORDER

It is hereby **ORDERED** that Citation No. 8033058 and Order Nos. 8030970 and 8033057 are **AFFIRMED**.

Respondent is **ORDERED** to pay civil penalties in the total amount of \$25,739.00 within 30 days of the date of this decision.⁴²

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

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⁴² Payment should be sent to: MINE SAFETY AND HEALTH ADMINISTRATION, U.S. DEPARTMENT OF LABOR, PAYMENT OFFICE, P. O. BOX 790390, ST. LOUIS, MO 63179-0390

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
1331 Pennsylvania Ave., N.W., Suite 520N
Washington, DC 20004-1710

June 13, 2013

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA),	:	Docket No. LAKE 2011-183
Petitioner	:	A.C. No. 11-02752-236894-01
	:	
	:	Docket No. LAKE 2011-184
v.	:	A.C. No. 11-02752-236894-02
	:	
	:	Docket No. LAKE 2011-242
	:	A.C. No. 11-02752-239778-01
AMERICAN COAL COMPANY,	:	
Respondent	:	Mine: The American Coal Co. New Era

DECISION

Appearances: Bryan R. Kaufman, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, on behalf of the Secretary of Labor;
Jason W. Hardin, Esq., Fabian & Clendenin, Salt Lake City, Utah, for American Coal Company.

Before: Judge Zielinski

These cases are before me on Petitions for Assessment of Penalty filed by the Secretary of Labor pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C.

§ 815(d). The seven petitions originally set for hearing alleged that The American Coal Company (“AmCoal”) is liable for 141 violations of the Secretary’s Mandatory Safety Standards for Underground Coal Mines,¹ and proposed the imposition of civil penalties in the total amount of \$461,580.00. Prior to the hearing, the parties settled 130 of the violations for which a total of \$260,169.00 in penalties had been assessed. The settlement included 53 of the 56 violations in LAKE 2011-183, and all violations in LAKE 2010-835, LAKE 2011-243, LAKE 2011-590 and LAKE 2011-702. A Decision Approving Partial Settlement ordering AmCoal to pay penalties in the amount of \$177,414.00 was entered this date.

¹ 30 C.F.R. Part 75.

A hearing was held in Evansville, Indiana on the remaining 11 violations, and the parties filed briefs after receipt of the transcript.² In the course of the hearing, the Secretary vacated Citation No. 8423569 in Docket No. LAKE 2011-183. Tr. II 82. Remaining at issue are 10 violations for which the Secretary has proposed penalties in the amount of \$187,811.00. For the reasons that follow, I find that AmCoal committed nine of the violations, and impose civil penalties in the total amount of \$18,500.00.

Findings of Fact - Conclusions of Law

At all times relevant to these proceedings, AmCoal operated the Galatia Mine, an extremely large underground longwall coal mine, located in Saline County, Illinois.³ Underground coal mines must be inspected by the Secretary's Mine Safety and Health Administration ("MSHA") four times each year.⁴ The citations litigated by the parties were issued during inspections of the mine in July, August and September of 2010.

Citation No. 8424040 (LAKE 2011-184)

Citation No. 8424040 was issued by MSHA inspector Wendell Crick⁵ at 10:45 a.m. on August 30, 2010, pursuant to section 104(a) of the Act. It alleges a violation of 30 C.F.R.

² The hearing commenced on November 27 and ended on November 29, 2012. The transcripts for the three hearing days are referred to as "Tr. I", "Tr. II" and "Tr. III" respectively.

³ On September 24, 2010, the Galatia Mine was split into two separate mines. The mine identification number assigned by MSHA, 11-02752, was retained by the original mine and preparation plant, which was renamed "The American Coal Company New Era Mine." The mine that was split off, the "New Future Mine," was issued Mine ID No. 11-03232. All of the violations in these proceedings were issued under the original identification number.

⁴ 30 U.S.C. § 113(a).

⁵ Crick has been an MSHA surface mine inspector since August of 2007, has undergone initial and refresher training, and has received specialized training as an unlimited surface instructor, and in the areas of dust certification, maintenance and calibration of dust machines, and impoundment examination. He inspected the Galatia mine for 3 years while assigned to the Benton, Illinois field office. Prior to joining MSHA, he worked in the mining industry for 22 years, and held certifications from the State of Kentucky. He is a volunteer fireman, and has been an instructor in the use of CPR and first aid. Tr. I 13-16.

§ 75.1712-3(a),⁶ which requires that “bathing facilities, change rooms, and sanitary toilet facilities shall be provided with adequate light, heat, and ventilation so as to maintain a comfortable air temperature and to minimize the accumulation of moisture and odors, and such facilities shall be maintained in a clean and sanitary condition.” The violation was described in the “Condition and Practice” section of the citation as follows:

The bath house facility located at the plant area has not been maintained in a sanitary condition. Upon inspection, mold, dirt, and garbage was found on the floors and walls of the facility. The two shower rooms have mold on the floors and walls. One of these shower rooms is used by management personnel on a daily basis.

Ex. G-16.

Crick determined that the violation was reasonably likely to result in a lost workdays or restricted duty injury, that it was significant and substantial (“S&S”), that 10 persons were affected, and that the operator’s negligence was high. A regularly assessed civil penalty in the amount of \$15,570.00, was proposed for this violation.

The Violation

Crick was conducting a regular quarterly inspection of the surface areas of the Galatia mine, when he visited the building housing the bathhouse, locker room, and lunch room facilities for the preparation plant. He arrived at the bathhouse shortly after 10:00 a.m., and was accompanied by Michael Smith, an AmCoal safety representative. The building in question contained a lunchroom, a large shower room used by rank and file miners, a locker room, offices, and a smaller shower room across a hallway used by foremen and other supervisory personnel. The facilities were used by 20-30 miners, or more, depending on the number working a particular shift. Miners whose shift was ending would enter the facility, discard their soiled clothing, take showers, don clean clothing and leave. There was a boot wash station near the entrance that men were encouraged, but not compelled, to use. Presumably, miners also ate their lunches in the lunch room. Foremen moved through the area, providing work assignments to miners starting their shifts, and, occasionally, used the larger shower room.

Crick observed a number of conditions that led him to conclude that the facility was not being kept in a clean and sanitary condition. Dirt, clay, gravel and black coal residue, had been tracked into the facility, covering a large portion of the floor in the locker room and extending into the lunch room. Tr. I 27. Crick observed boot prints in the dirt on the floor leading into the locker room, but did not observe footprints in the shower area. Tr. I 28. The floor in and near

⁶ Crick originally cited 30 C.F.R. § 71.400, a regulation that applies to surface mines, as the standard violated. At the hearing, the Secretary moved to amend the citation to allege a violation of section 75.1712-3(a), which is the comparable provision applicable to surface areas of underground coal mines. The unopposed motion was granted. Tr. I 12-13.

the large shower room was washed clean. He conceded that some tracking of dirt could be expected, but not to the extent of covering the floor. Tr. I 59. Trash and garbage overflowed several containers in the lunch and locker rooms, and had been pushed to the side of walkways.

Crick also observed a black substance, that he believed was mold, on the walls and floor of the main shower room.⁷ The shower room was fairly large, approximately 15 x 20 feet, with multiple shower heads mounted on towers rising from the painted concrete floor. The walls were faced with white ceramic tile that extended down close to the floor. There was a course of concrete block between the tile and the floor. The black substance was on the walls, in the grout between the tile, and on the more porous concrete block and mortar around the base of the walls. Tr. I 28, 82. Although Crick did not test the substance, he believed that it was mold based upon training films he had seen; he stated “I know what mold is.” Tr. I 47. Crick saw no evidence that cleaning had been done in the recent past. Tr. I 35.

Smith, who had retired prior to the hearing, confirmed the presence of the black substance, but disputed that it was mold, noting that miners ending their shift had black coal dust on their clothing and faces, and there was black particulate matter on the floor of the shower room, partially washed down into the drains. Tr. I 73-75. Smith also believed that the dirt on the floor was nothing more than what would normally be expected after a large group of dirty miners cleaned up after a shift. He explained that there were three locker/shower facilities at the Galatia mine, and that each was cleaned after every shift change. The larger facility, at the New Era portal, was cleaned first, followed by smaller facilities, including the prep plant. Since it was just after 10:00 a.m., the prep plant facility had not yet been cleaned after the shift change that had occurred 2-3 hours earlier, which largely explained the condition of the facility.

Crick was very familiar with the Galatia mine, including the prep plant, having inspected it over a three-year period beginning in August 2007. Tr. I 16, 29. He had warned AmCoal officials about conditions in the bath facilities on prior occasions. Tr. I 30, 51. Because of the extent and nature of the conditions, he believed that they must have occurred over “a considerable amount of time;” mold “just doesn’t happen overnight.” Tr. I 31, 45. I find that the conditions represented a build-up of dirt and trash that occurred over more than one shift change. I also find, based on Crick’s experience and training, that the black substance on the walls in the shower room was mold, and that the bathing facilities and change room were not maintained in a clean and sanitary condition. The standard was violated.

⁷ Crick testified that the mold was in the main shower room, not in the smaller shower room used by the management personnel. However, the citation and his notes refer to both rooms, and he concluded that there must have been some mold in the smaller room. Tr. I 68-69.

Significant & Substantial

The Commission reviewed and reaffirmed the familiar *Mathies*⁸ framework for determining whether a violation is S&S in *Cumberland Coal Res.*, 33 FMSHRC 2357, 2363-65 (Oct. 2011):

The S&S terminology is taken from section 104(d) of the Mine Act, 30 U.S.C. § 814(d), and refers to more serious violations. A violation is S&S if, based on the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature. See *Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981). In *Mathies*, 6 FMSHRC 1, the Commission further explained:

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

Id. at 3-4 (footnote omitted); accord *Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 135 (7th Cir. 1999); *Austin Power, Inc. v. Sec'y of Labor*, 861 F.2d 99, 103 (5th Cir. 1988) (approving *Mathies* criteria). An evaluation of the reasonable likelihood of injury should be made assuming continued normal mining operations. See *U.S. Steel Mining Co.*, 7 FMSHRC 1125, 1130 (Aug. 1985). The Commission has emphasized that it is the contribution of a violation to the cause and effect of a hazard that must be significant and substantial. *U.S. Steel Mining Co.*, 6 FMSHRC 1834, 1836 (Aug. 1984).

....
....

The Commission recently discussed the third element of the *Mathies* test in *Musser Engineering, Inc. and PBS Coals, Inc.*, 32 FMSHRC 1257, 1280-81 (Oct. 2010) ("*PBS*") (affirming an S&S violation for using an inaccurate mine map). The Commission held that the "test under the third element is whether there is a reasonable likelihood that the hazard contributed to by the violation, i.e., [in that case] the danger of breakthrough and resulting inundation, will cause injury." *Id.* at 1281. Importantly, we clarified that the "Secretary need not prove a reasonable likelihood that the violation itself will cause injury." *Id.* The

⁸ *Mathies Coal Co.*, 6 FMSHRC 1 (Jan. 1984).

Commission concluded that the Secretary had presented sufficient evidence that miners who broke through into a flooded adjacent mine would face numerous dangers of injury. *Id.* The Commission also emphasized the well-established precedent that “the absence of an injury-producing event when a cited practice has occurred does not preclude a determination of S&S.” *Id.* (citing *Elk Run Coal Co.*, 27 FMSHRC 899, 906 (Dec. 2005); and *Blue Bayou Sand & Gravel, Inc.*, 18 FMSHRC 853, 857 (June 1996)).

I have found a violation of a safety and health standard. It contributed to hazards, a slip and fall hazard and exposure to mold that Crick believed could lead to infection. Whether the violation was S&S turns on whether an injury or illness was reasonably likely to result from the hazards contributed to and whether it would have been reasonably serious.

Crick believed that the primary hazard contributed to by the conditions was the health hazard presented by the dirt and mold.⁹ His concern was a “staph[ylococcus] infection . . . any type of infection” that could “lead to amputation of a finger or hand . . . if it’s not stopped in time.” Tr. I 32-33. He posited that men in the shower, who could have cuts on their hands or feet, could brush up against the walls, and “that mold and stuff gets in their hand and it could be infected . . . reasonably likely they are going to have to receive medical treatment.” Tr. I 34. Crick was somewhat circumspect in supporting his infection theory. He testified that he had seen training films that linked mold to staph infections, but could not state when or where he had seen them. Tr. I 55-57. He related that as a volunteer firefighter, a first responder, he was trained to assume that everyone was contagious, and to take precautions if he suffered a cut in moldy, dirty or rusty conditions. Tr. I 33-34. In the course of his training, he had “seen several times things that become these types of infections.” Tr. I 34.

Both parties rely on materials discussing potential health hazards presented by mold. The Secretary introduced an article titled, *Facts about Mold and Dampness*, published by the Center for Disease Control and Prevention. Ex. G-17. It notes that a 2004 study by the Institute of Medicine (“IOM”) “linked” indoor exposure to mold with “upper respiratory tract symptoms, cough[ing], and wheeze[ing] in otherwise healthy people; with asthma symptoms in people with asthma; and with hypersensitivity pneumonitis in individuals susceptible to that immune-mediated condition.” *Id.* at 1. The document also notes that the IOM found comparable linkage to such symptoms from “exposure to damp indoor environments in general.” *Id.* at 1. AmCoal relies on guidelines published by the World Health Organization in 2009, which are referenced in

⁹ At the hearing, Crick described a slip/fall hazard presented by the dirty floor. However, he noted on the citation that the violation presented a health, rather than a safety, hazard. Tr. I 60. He also did not mention a slip and fall hazard in his notes. Tr. I 60. I find that the hazard presented by the dirty floor did not present a reasonable likelihood of a reasonably serious slip and fall injury, either alone or in conjunction with the infection hazard.

the CDC document. Ex. R-66. It notes that the guidelines show that the IOM reviewed a number of mold-related studies and concluded that there was not “sufficient evidence of a causal association” between the presence of mold and any adverse health effects. *Id.* at 67-68. The WHO guidelines concluded that the “epidemiological evidence is not sufficient to conclude causal relationships between indoor dampness or mould and any specific human health effect.” *Id.* at 89. AmCoal contends that other materials support the WHO conclusions. Ex. R-64, R-65. A report from the American Industrial Hygiene Association, entitled “Facts About Mold,” notes that “most people have no reaction when exposed to molds,” and that “small amounts of mold growth in workplaces or homes (such as mildew on a shower curtain) are not a major health concern.” Ex. R-65 at 3. A publication by the Occupational Safety and Health Administration, “Preventing Mold-Related Problems in the Indoor Workplace, OSHA 3304-04N 2006, contains similar conclusions, i.e., most people experience no health effects from exposure to molds in indoor or outdoor air, and that the most common health effects associated with mold exposure include allergic reactions similar to common pollen or animal allergies. Ex. R-64 at 9.

None of the materials submitted suggest a relationship between mold and a bacterial staph infection. The available information with respect to the subject of health effects posed by the presence of mold, which is likely a complex subject, suggests that exposure to mold, or the damp environs of the shower room, would be unlikely to produce adverse health effects, at least in healthy individuals. Also to be considered is the relatively short-term exposure of miners, who would most likely be in the shower room for only a few minutes each day.

Based upon the foregoing, I find that the Secretary has failed to prove, by a preponderance of the evidence, that the hazards contributed to by the violation were reasonably likely to result in an injury or illness of a reasonably serious nature.¹⁰ The violation was not S&S. I find that an injury or illness resulting in no lost work days was unlikely to result to one person.¹¹

¹⁰ The Commission has held that the judgment of an MSHA inspector is an “important element” in determining whether a violation is S&S. *Harlan Cumberland Coal Co.*, 20 FMSHRC 1275,1278 (Dec. 1998). The weight to which an inspector’s S&S opinion is entitled must be evaluated on the particular facts of the case, including the relevance of the inspector’s experience.

¹¹ The number of persons affected by a violation is part of the gravity assessment. As stated in the Secretary’s penalty assessment regulations; “Gravity is determined by the likelihood of the occurrence of the event against which a standard is directed; the severity of the illness or injury if the event has occurred or was to occur; and the number of persons potentially affected if the event has occurred or were to occur.” 30 C.F.R. § 100.3(e). MSHA’s Citation and Order Writing Handbook for Coal Mines and Metal and Nonmetal Mines, provides a further

(continued...)

Negligence

Crick rated AmCoal's negligence as high because there was at least some mold in the foremen's shower room, and he concluded that the conditions in the facility had existed for a considerable period of time, such that they should have been observed by management personnel who frequently moved through the area. In addition, he had provided at least one warning to keep such facilities clean during a previous inspection, although he could not remember when that warning was given. Tr. I 30, 50-51. He had also issued a citation for unclean bathhouse facilities, as had other inspectors. Crick testified that at least one such citation was issued on June 7, 2009, but it does not appear on reports of previous violations introduced by the Secretary. Tr. I 37-39; Ex. G-28, G-30. The Secretary's "R-17" report of violations that became final from January 14, 2009 through April 13, 2010, lists four non-S&S violations of section 75.1712-3(a), which were issued on April 25, 2007, October 17, 2007, February 28, 2008 and November 9, 2009. Ex. G-28.

The violation history provided some notice to AmCoal that attention was needed to cleaning of bathhouse facilities, as did Crick's prior warning. However, the violations of record were not S&S and were spaced out over a considerable period of time, such that any notice to AmCoal of a need for greater compliance as of August 2010 was not as indicative of culpability as more recent violations or warnings would have been. While I have found, as Crick asserted, that the conditions had occurred over more than one shift, there can be little question that a considerable portion of the dirt and trash was the result of the third shift's use of the facility. The third shift's contribution would have been present at 10:45 a.m., because cleaning would not have occurred until later, after the New Era facilities had been cleaned. The mold, possibly mildew, would most likely have been present for a longer period of time, and could have been observed by supervisory personnel who frequented the area, but who most likely would have spent the majority, if not all of, their time in the lunch room and changing room.¹²

Considering these factors, I find that AmCoal's negligence with respect to this violation was moderate.

¹¹(...continued)

explanation of the term persons affected: "The number of persons affected is the number of persons who would be expected to be injured if an accident or overexposure occurred as a result of the violation." U.S. Department of Labor, Mine Safety and Health Administration, Coal Mine Safety and Health, Metal and Nonmetal Mine Safety and Health, Handbook Number PH08-I-1, March 2008, at 17.

¹² While Crick had noted the presence of mold in the foremen's shower area, his testimony evidences that the conditions in that area must not have been comparable to those in the main shower room.

Citation No. 8424958 (LAKE 2011-183)

Citation No. 8424958 was issued by MSHA inspector Bernard Reynolds¹³ on July 14, 2010. It was issued pursuant to section 104(a) of the Act and alleges a violation of 30 C.F.R. § 75.202(a), which requires that “[t]he roof, face and ribs of areas where persons work or travel shall be supported or otherwise controlled to protect persons from hazards related to falls of the roof, face or ribs and coal or rock bursts.” Ex. G-32. Reynolds determined that the violation was reasonably likely to result in a lost workdays or restricted duty injury, that it was S&S, that one person was affected, and that the operator’s negligence was moderate. A specially assessed civil penalty in the amount of \$7,700.00, was proposed for this violation.

AmCoal withdrew its contest to the violation and the special findings. Tr. II 41. It challenges only the amount of the penalty. The area in question was located at the shaft bottom, where the elevator discharged and picked up all men and material entering and leaving the mine through the New Future portal. It was adjacent to a brow that had most likely been created by a fall of about 4 feet of material. Reynolds noticed that the roof bolts in an area that measured 6 x 6.5 feet, from competent bolt to competent bolt, were not supporting the roof. The bearing plates on the bolt heads were no longer in contact with the roof. The bolts were “torque - tension, double lock” bolts, generally six feet long, but may have been up to 8 or 9 feet long. Such bolts are anchored with a locking device on the upper end, that is reinforced with resin. The torquing of the bolt, compresses the bearing plate against the roof, squeezing the roof layers together. If the plate is not in contact with the roof, no roof support is provided, and the bolt is little more than steel rod sticking down through a hole.

The unsupported area was relatively small, encompassing only 39 square feet. Reynolds confirmed that just one competent bolt, properly positioned in that area, could have satisfied the requirements of AmCoal’s roof control plan. Tr. I 112-13. However, there were 10-12 damaged bolts in the area, many more than were required under the plan.¹⁴ Some additional bolts may have been installed to provide support for the brow created by the previous roof fall. They could also have been replacements for bolts that

¹³ Reynolds had been an MSHA inspector for 4.5 years at the time of the hearing, and has undergone initial and refresher training. After working one year in the mining industry in 1979, he obtained a mining engineering degree, and then began working for Freeman United Coal Company. After 3 years, he began working at the Galatia mine for Kerr-McGee Coal Corporation, AmCoal’s predecessor as mine operator. He worked at the Galatia mine for 11 years, in a variety of capacities, including familiarization with the mine’s roof support systems.

¹⁴ Reynolds recorded in his notes that “several” or “many” bolts in the area were damaged, suggesting that some were not. However, he testified that all bolts in the subject area were damaged, such that none were supporting the roof. Tr. II 25.

had been damaged. An incident of damage by mobile equipment typically does not involve more than one bolt. Tr. I 107. Since damaged bolts are not removed, it is likely that the bolts were damaged in a series of incidents, over a considerable period of time, e.g., a bolt might be damaged, a new bolt would be installed to provide required support, the new bolt might then be damaged, and another bolt would be added, and so on. Tr. I 110, 114-15.

While AmCoal has withdrawn its contest to the fact of violation and the special findings, it is unfortunate that the status of the damaged bolts remains unknown, i.e., whether they all had been required to support the brow, or had been added periodically to substitute for damaged bolts. Considering the number of damaged bolts, it is highly likely that they were damaged in a series of incidents. If they were substitute bolts, inadequate support would have existed only from the time that the last-installed substitute bolt was damaged. If they were all required to support the brow, the roof would have been inadequately supported from the time the first bolt was damaged, and the inadequacy of the support would have grown as successive bolts were damaged. Reynolds' assessment of gravity does not appear to have been based on the more serious scenario.

Reynolds testified that the area was between two busy areas of the mine, the main maintenance shop and the rock dust bore hole, such that miners had "plenty of reason" to go through the area. While he was inspecting the area and issuing the citation, miners on two golf carts attempted to drive through it. However, he indicated in his notes that "most day-to-day traffic bypasses the area," and stated that he had not seen equipment staged in it. Tr. I 117; Ex. G-32.

Reynolds rated AmCoal's negligence as moderate because the condition was obvious, had occurred over several shifts, and should have been seen by a preshift examiner. He did not feel that the violation was one that "glares at you," to justify a determination of high negligence, and tends to rate negligence as "moderate" if the question is close. Tr. I 108. He also agreed that the condition most likely was created by a series of events that occurred over a period of time, and that he could not determine when any of the bolts had been damaged. Tr. I 114-15. If, as Reynolds noted, the majority of incidents of equipment damage to bolts involve one bolt, and the overall condition was created by a series of such events, then to portray the violative condition as 10-12 damaged bolts could be misleading. In fact, there could have been a substantial number of damaged bolts in that area for some time, and the roof would have been adequately supported as long as one properly positioned bolt remained competent. Damage to that one competent bolt would have created a violative condition, and AmCoal's culpability would be measured not by its failure to observe a large number of damaged bolts, no doubt a well-known condition, but that there was no longer a bolt providing support, i.e., the last-installed replacement bolt had been damaged, and there is no evidence as to when that may have occurred. Considering that the damage may well have occurred prior to the last preshift examination, approximately 2 to 5 hours earlier,

and that an examiner should have paid close attention to what was obviously a problematic area, Reynolds' assessment of moderate negligence appears conservative.

Citation No. 8427602 (LAKE 2011-184)

Citation No. 8427602 was issued by Reynolds at 1:00 p.m., on August 30, 2010, pursuant to section 104(a) of the Act. It alleges a violation of 30 C.F.R. § 75.1720(a), which requires that miners wear “[p]rotective clothing or equipment and face-shields or goggles when welding, cutting, or working with molten metal or when other hazards to the eyes exist from flying particles.” The violation was described in the “Condition and Practice” section of the citation as follows:

A miner was observed cutting steel anchoring rods with an oxygen/acetylene powered cutting torch, without wearing protective cutting goggles designed for this job. This condition existed at the belt drive pad for the 1WHG unit on 6 seam at the New Future portal.

Ex. G-22.

Reynolds determined that it was reasonably likely that the violation would result in a permanently disabling injury, that the violation was S&S, that one person was affected, and that the operator's negligence was high. A regularly assessed civil penalty, in the amount of \$5,961.00, was proposed for this violation.

AmCoal does not challenge the fact of the violation. It disputes the gravity and negligence allegations and the amount of the penalty.

S&S

The fact of the violation has been established. The miner was wearing ordinary safety glasses, rather than goggles designed for use when cutting metal with a torch. The violation contributed to a discrete safety hazard, an increased risk that a piece of molten metal, or a spark, would contact his eyes and cause injury.¹⁵ Any such injury would be serious. Consequently, whether the violation was S&S turns on whether it was reasonably likely that the hazard would result in an injury.

¹⁵ Reynolds so-described the potential injury in his notes. Ex. G-22. At the hearing, he also posited that a burn to the eye might be inflicted by the brightness of the torch. Tr. II 45-46, 58-59. As noted above, the standard, by its terms, addresses conditions where “other hazards to the eyes exist from flying particles.” The Secretary's argument is directed to Reynolds' “primary concern,” i.e., that “a piece of molten hot material, or dust or debris could contact the miner's eye.” Sec'y. Br. at 15. I find that the violation did not contribute to a hazard associated with the brightness of the torch.

Reynolds was accompanied by Mike Harris, at the time AmCoal's safety director at the New Future portal. They proceeded to the area of the first west headgate on the 6 seam, which was being prepared for mining. A large concrete pad had been poured to serve as a foundation for the belt head drive. In order to keep the pad from moving, 3/4 - inch steel rods were inserted into the mine floor and were grouted in, similar to roof bolts. They extended from 1 to 2 feet above the pad.

As Reynolds and Harris approached the area, a miner, Harley Partridge, had his back to them, and was using an oxygen/acetylene torch to cut the rods off, flush with the pad. He noticed the light from their cap lamps as they approached, and turned to greet them. It was apparent that he was wearing regular safety glasses, not appropriate cutting goggles, and Harris reminded him that he needed his goggles. Tr. II 69. Partridge went to his supply bag to get his goggles, but they weren't there. He indicated that they had been there that morning. The hoses to the torch were disconnected, until proper cutting goggles could be obtained, and Reynolds issued the subject citation.

The Secretary contends that the safety glasses worn by Partridge were not sealed around the eyes, and that flying debris could blow around them. Cutting goggles, designed for such use, would have had a rubber enclosure that would keep material from coming in from the sides. Consequently, it was reasonably likely that the miner would suffer a serious eye injury. AmCoal argues that the miner's position, and the combination of his safety glasses and hard hat, furnished protection nearly as effective as cutting goggles, and that an eye injury was not reasonably likely.

Reynolds described the function of the torch. Acetylene gas is discharged around the periphery of a circular head, heating the metal to be cut. Once the metal is heated to near molten state, oxygen at high pressure is released through a small hole in the center of the torch, blowing the molten metal away in small hot particles, or sparks. Having operated such a torch, he described a process whereby even experienced operators would experience a "pop," or minor explosion, at the tip of the torch, which "very possibly" could throw molten material back toward the operator.¹⁶ Reynolds had also suffered an eye injury while working on the surface in the 1980s, when a particle of coal was blown by wind into his eye, despite his wearing of "old horned-rimmed" safety glasses that had side shields. Tr. II 47, 60.

At the hearing, Harris produced a pair of safety glasses, like those worn by Partridge, and a hard hat. He demonstrated that the glasses were "wrap around" style, that left "very little space" on the top, bottom and sides, for any particle or object to pass by. Tr. II 71. The hard hat added to the protection, because its 2 to 2.5 inch bill projected out over the glasses, further obstructing objects that might approach from the

¹⁶ Reynolds testimony as to molten material being thrown back toward the torch operator was not convincing. He did not mention such an effect when he first described the cutting process, and did so only in response to a suggestion by counsel. Tr. II 51, 55.

front or top. He described cutting goggles as being made of clear plastic, with ventilation holes, similar to “glasses that fit over glasses.”

Partridge was kneeling and was operating the torch at arms length, pointing it down and away from his face. Tr. II 60-61, 68. It took very little time to cut a rod; Harris estimated about ten seconds. There is no evidence as to how many rods needed to be cut, or how much of the job Partridge had completed before Reynolds and Harris arrived.
Tr. II 76-77.

There is no question that the safety glasses worn by Partridge provided some protection from bits of molten metal or sparks that were produced by the cutting action of the torch. The Secretary maintains that they did not form a complete seal, such that debris could blow around them. While that statement may be technically accurate, it does not address the size of any gaps, or the likelihood of such an event occurring. Reynolds does not appear to have made an assessment of the effectiveness of Partridge’s safety glasses. He did not record, in the citation or his notes, that safety glasses were being worn, and did not recall at the hearing whether or not Partridge was wearing safety glasses, stating “[w]hatever he had on was clear and not sealed completely around your eyes. There would be ways for flying debris to blow around them.” Tr. 47, 59; Ex. G-22.

This statement, like the Secretary’s argument, convincingly establishes the violation, but does little to explain why an injury causing event would be reasonably likely to occur. It appears that Reynolds’ evaluation of gravity was based, almost exclusively, on the fact that Partridge was not wearing cutting goggles. It does not appear that he attempted to assess the degree of protection provided by the safety glasses and hard hat. Harris’ demonstration, donning the safety glasses and hard hat, showed that there was no direct path for a particle to strike an eye, and very little space on the bottom or sides for anything to blow by. The torch was directed down and away from Partridge’s face, and actual cutting action was very brief. There is no evidence of significant air movement, like the wind that played a role in Reynolds old injury. While there is no evidence of the number of rods that Partridge had, or would have cut, it was most likely not a large number, and there is nothing to indicate that Partridge would have engaged in other cutting or welding tasks without wearing appropriate goggles. Consequently, the duration of the violation was, and would have been less than five minutes of actual cutting.

Considering all of the above factors, I find that the hazard contributed to was unlikely to result in a permanent injury, and that the violation was not S&S.

Negligence

Reynolds evaluated AmCoal's negligence as high, and recorded the following in his notes:

High Negligence

No operator can be excused from requirement of wearing proper eye protection while cutting or welding. Safety talk given in recent days prior - 4 days earlier - following another citation for same infraction.

Ex. G-22.

Reynolds consulted MSHA records prior to the hearing and confirmed that another citation alleging a violation of the same standard had been issued a few days earlier. Tr. II 52-54, 62-63. That citation apparently prompted AmCoal to give training, in Reynolds' words, "demanding from everybody that they be sure and wear their cutting goggles when they are using a torch or welder." Tr. II 53. This was the thrust of the evidence introduced by the Secretary to establish that AmCoal's negligence was high.

No evidence was introduced during the Secretary's case, that an AmCoal agent was aware, or should have been aware, that Partridge was not wearing cutting goggles while cutting the rods. However, the Secretary elicited, on cross-examination of Harris, that Partridge's supervisor, the belt foreman, should have checked on his miners once per shift, and, at least when present, should have assured that they were using any required personal protection equipment ("PPE"). Tr. II 78-79. The Secretary concedes that Partridge's negligence cannot be imputed to AmCoal, but argues that the belt foreman should have checked on him as he began his job to make sure he was wearing cutting goggles, and that his failure to do so justifies a finding of high negligence against AmCoal. This is especially so because the issuance of another citation that same day for failure to wear protective equipment should have put AmCoal on notice that training alone was not sufficient to ensure that miners would wear PPE. Sec'y. Br. at 16-17.

The Secretary's argument reaches too far. The belt foreman was responsible for the conveyor belts, which no doubt encompassed a considerable area. Tr. II 76. He was not in the area when the citation was issued, and there is no evidence that he was aware of, or in any way condoned, the violation. Tr. II 73, 76. It would almost certainly have been physically impossible for the belt foreman to have checked on every miner under his supervision as he began an assigned task. That a foreman is required to check on his workforce once per shift, does not suggest anything close to a duty of constant supervision, especially for a foreman with responsibility over a large area.

The Secretary introduced no evidence to establish that the foreman should have anticipated that Partridge would not wear PPE, for example that he had done so in the past. AmCoal provided required periodic training on use of cutting goggles and other

personal protective equipment. Moreover, 4 days prior to the issuance of the subject citation, it provided specialized training on use of PPE, including cutting goggles. This was done in response to a citation that had been issued for a violation of the standard. The recent increased emphasis on the use of PPE, weighs heavily against any argument that the foreman should have anticipated Partridge's actions.

Nor was there any evidence that AmCoal had failed to discipline miners who violated the PPE standard. The only evidence as to discipline is that Partridge was suspended for the violation. Tr. II 73-74. AmCoal provided all required safety equipment to miners, and maintained a "cabinet" where such items were available at the start of each shift. Harris had manned the cabinet at the start of the shift on which the citation was issued. Tr. II 74.

The citation relied on by the Secretary to put AmCoal on notice that its training was insufficient was issued that same morning, at 9:15 a.m., for miners not wearing respiratory protection at the New Era portal, some distance removed from the New Future portal. MSHA inspectors typically type and deliver citations at the end of the inspection day, after coming to the surface. The actual citation was most likely not delivered to AmCoal safety personnel until well after it had been issued. Whether the issuance of that citation should have put AmCoal on notice that miners would disregard the emphasis on use of PPE and risk incurring discipline is debatable. However, having been issued only a few hours earlier than the instant citation, whatever notice it provided could have had no impact on the instant violation.

I find AmCoal's negligence with respect to the violation was low to moderate.

Citation No. 7575299 (LAKE 2011-183)

Citation No. 7575299 was issued by then MSHA inspector James Rusher¹⁷ on July 14, 2010, pursuant to section 104(a) of the Act. It alleges a violation of 30 C.F.R. § 75.517, which provides that "[p]ower wires and cables . . . shall be insulated adequately and fully protected." The violation was described in the "Condition and Practice" section of the citation as follows:

The energized power cable serving the No. 39 battery charger was no longer adequately insulated and fully protected. There were four

¹⁷ Rusher retired prior to the hearing. He had worked in the mining industry for 12 years before joining MSHA in 1978. He participated in the first inspection of the Galatia mine when it opened in 1983 under the ownership of Kerr-McGee, and inspected the mine regularly through his retirement in 2011. He obtained a bachelor's degree in workforce education, completed numerous training courses, and has maintained certifications, such as his electrical card.

Tr. II 83-85.

rips/holes in the outer jacket which exposed the inner insulated conductors. In one of the tears of the outer jacket, the inner white in color insulated conductor was torn open which exposed the inner energized bare wires. This condition was found in the No. 6 seam bottom shop at the No. 39 battery charger.

Ex. G-1.

Rusher determined that it was reasonably likely that the violation would result in a fatal injury, that it was S&S, that one person was affected, and that the operator's negligence was high. A specially assessed civil penalty, in the amount of \$47,000.00, was proposed for this violation.

AmCoal withdrew its contest of the violation and the special findings on gravity. It challenges the negligence determination and the amount of the penalty. Tr. II 82.

Negligence

Rusher was passing through the No. 6 seam bottom shop, a maintenance shop, when he noticed a knot in the cable supplying 480-volt power to the No. 39 battery charger. He examined the knot, and immediately saw that the outer jacket of the cable had been torn open, exposing the inner conductors. The insulation on the white conductor had been damaged, and he could see the copper conductor itself. The damage was to the top side of the knot, such that a person who might have stepped on it could have been electrocuted. The shop floor was damp, and there were footprints in the area. Miners might have accessed the area for a number of reasons, including to use or inspect the charger, distribute rock dust, or set a roof prop. Consequently, he determined that the violation was reasonably likely to result in a fatality and that it was S&S.

Rusher evaluated AmCoal's negligence as high. He explained his rationale as follows: there were "several shop people working there, somebody, including the supervisor, should be checking equipment." Tr. II 98. The shop repairmen each held electrical cards and were trained to identify hazardous electrical conditions. "[I]t was so easy for me to find . . . the guys that work [there] . . . should have seen that, especially when you think about the time I wrote it . . . 11:45 . . . Half the shift is over, and they still hadn't done anything." Tr. II 98.

The problem with that analysis is that, with the exception of the passing reference to the "supervisor," the repairmen were rank-and-file miners, whose negligence cannot be imputed to AmCoal. Tr. II 124-25, *See, e.g., U.S. Coal, Inc.*, 17 FMSHRC 1684, 1686 (Oct. 1995). The operators of the shield movers using the charger and those applying rock dust or setting props would also have been hourly employees. Tr. II 124. As to the shop supervisor, Rusher indicated that he typically would give men instructions near the work bay or the "grease pit," and the knot in the cable could not be seen from those areas,

unless one was specifically looking for it. Tr. II 169-71; Ex. G-, R-77. The supervisor would typically leave to visit production units and then return. Tr. II 125, 169. He was not required to conduct a preshift or onshift examination of the area.

Electrical equipment, such as the charger, must be examined weekly by a qualified person acting as an agent of the operator.¹⁸ Tr. II 94; 30 C.F.R. § 75.512-2; *U.S. Coal*, 17 FMSHRC at 1688. The last weekly examination of the charger and its cable occurred on July 11, 3 days prior to the issuance of the citation. Tr. II 141-42; Ex. R-62. The notations in the weekly examination records showed that on the date of the examination, the examiner “put ground cable and clamp on,” indicating that a problem was found and corrected. Ex. R-62. A Battery Charger Permissibility Check List, which guides the examiners, provides that the cable should be checked for damage and/or bad splices, which should have resulted in the discovery of any defects, especially one as obvious as the cited condition. Tr. II 143-44; Ex. R-51. No cable defects were noted on the report of the examination. Ex. R-62.

The charger is not a stationary piece of equipment; it could be picked up with a scoop and moved to other areas of the mine. Tr. II 87, 155. Rusher opined, on rebuttal, that the charger was routinely located in the maintenance shop, and that it appeared to have been there for “quite a long time.” Tr. II 172-73. While he did not know when the charger had been placed there, from the amount of dust on it, considering that there was not a lot of dust in that area, he was led “to believe that it had been there for quite a while.” Tr. II 173. He agreed that it was “possible . . . but not probable,” that the dust could have accumulated while the charger was in a different location. Tr. 173-74.

Keith Violet, an AmCoal safety specialist who accompanied Rusher, confirmed that the inner conductors were exposed and that the insulation on the white conductor was damaged such that copper was visible. Tr. II 153. He testified that the white conductor appeared “fairly white” leading him to conclude that “it hadn’t been exposed very long.” Tr. II 130.

The Secretary argues that the charger was in its location at least since the July 11 electrical examination, that the knot must have been in the cable at that time, that the tears in the cable occurred as the knot was being dragged, i.e., that they existed before July 11, and that the examiner must have failed to examine the cable thoroughly to discover the defect which may have been hidden by the knot. Sec’y. Br. at 19-20.

¹⁸ Rusher noted that AmCoal had a policy of requiring pre-operational checks of equipment, but he was uncertain whether it applied to equipment that was not located in a working section. Such checks would have been conducted by the person operating the equipment, an hourly employee. Tr. II 94, 102.

While the Secretary's theory is plausible, it is not persuasive. First, it is not reflected, or even hinted at, in Rusher's contemporaneous notes, in which his assessment of negligence is based virtually exclusively on the failure of the hourly shop workers to have noticed the obvious hazard and corrected it. Violet and Rusher disagreed on the location of the knot, and the layout of the cable. Violet testified that the knot was near a travelway to the left of the power center and charger, where it may have been damaged by passing equipment. Tr. II 136-38, 146-48; Ex. R-77. Rusher was certain that the knot and exposed wires were in close proximity to the charger, and that the nature of the tear evidenced that it had been caused by the knot snagging on something sharp as the cable was dragged.¹⁹ Tr. II 103-04, 164-67; Ex. R-77. Accepting Rusher's description of the scene, the Secretary's theory requires a finding that the person conducting the weekly electrical examination failed to observe the hazard. The damaged and exposed conductors were clearly visible; not partially hidden as posited by the Secretary.²⁰ Rusher repeatedly noted that they were easy to see. AmCoal's records of weekly examinations of electrical equipment establish that the charger was examined on July 11, while it was in the shop, and that a ground cable and clamp were installed.

I find it highly unlikely that a competent electrical examiner would have failed to notice the obvious tears in the cable jacket, even if he did not carefully examine the cable as he was required to do. The obvious damage to the cable was very close to the charger, and the examiner identified and repaired an apparent defect on the charger. Other explanations for the damage, e.g., that the knot was actually located near a travelway and was struck by a piece of mobile equipment, or that the charger may have been moved after the July 11 exam and returned to the shop prior to the inspection, appear equally, if not more probable.²¹

¹⁹ Rusher testified that when a cable is dragged and it snags on something, "there's a tear pretty big that tapers off. That's how this was, indicating to me that it snagged on something." Tr. II 103-04. That explanation is somewhat inconsistent with the citation and his notes, wherein he states that there were "four" tears, rips, or holes in the cable's outer jacket. Ex. G-1.

²⁰ There is no evidence to suggest that anyone would have had reason to re-position the cable, except the possibility noted by AmCoal that the charger itself may have been moved after the July 11 examination.

²¹ Rusher's conclusion that the charger had been in the shop for more than 3 days rested largely upon his recollection of events that occurred over 2 years prior to his testimony. While he appeared to be an honest and forthright witness, who had a reasonably accurate recollection of events, I find it difficult to place a high level of confidence in an estimate of the length of time the charger had been in that position, based upon recollections of the quantity of dust that may have been on the charger, compared to estimates of the quantity of dust that may have existed in the air in that area of the shop over several previous days.

I find that the Secretary has failed to prove that AmCoal's negligence was high, i.e., that it "suggests an aggravated lack of care that is more than ordinary negligence." *Eastern Ass. Coal Corp.*, 13 FMSHRC 178, 187 (Feb. 1991). I find that AmCoal's negligence with respect to this violation was moderate.

Citation Nos. 7575300 and 7575301 (LAKE 2011-183)

There are very few standards addressing hazards associated with the transportation of men and materials in mines. However, pursuant to section 314(b) of the Act, and the Secretary's regulations, authorized representatives of the Secretary may issue orders, called "safeguards" to address hazards related to the transportation of men and materials at a particular mine. 30 U.S.C. § 874(b); 30 C.F.R. § 75.1403. The mine operator is obligated to comply with a safeguard, violations of which may subject it to citations or orders issued pursuant to section 104 of the Act. *Cyprus Cumberland Res. Corp.*, 19 FMSHRC 1781 (Nov. 1997).

Safeguards are issued by individual MSHA inspectors, who do not follow a notice and comment rulemaking procedure. Recognizing the "unusually broad grant of regulatory power" granted to MSHA, the Commission, in *Southern Ohio Coal Co.*, 7 FMSHRC 509, 512 (Apr. 1985) ("*SOCCO I*"), held that "safeguards must be drafted with specificity, so that operators receive adequate notice of the conduct required and the conditions covered by the safeguard." *The American Coal Co.*, 34 FMSHRC 1963, 1967 (Aug. 2012). While the Secretary's authority to issue a safeguard is interpreted broadly, the language of a safeguard, which may be issued without consulting with representatives of the operator, must be narrowly construed. *Cyprus Cumberland*, 19 FMSHRC at 1785; *SOCCO I*, 7 FMSHRC at 512.

Safeguard No. 7568565 was issued at the Galatia mine on August 3, 1998, and provides:

Bottom irregularities, debris in the form of rock that had fallen from the roof, and wet and muddy conditions were present on the mine travelways at the following locations: on the Main East travelway from no. 69 to no. 85 crosscut, on the 6th North travelway from the mouth to no. 28 crosscut, and for the entire 6 North 5A unit travelway, a distance of approximately 20 crosscuts. This Notice to Provide Safeguards requires that all mine travelways be kept as free as practicable of bottom irregularities, debris and wet and muddy conditions that could affect the control of mobile equipment traveling these areas.

Ex. G-3, R-11.

The validity of Safeguard No. 7568565 was recently upheld by the Commission in a separate challenge by AmCoal, the Commission noting that it has “consistently treated safeguards that *specify hazardous conditions and specify a remedy* as valid safeguards.” *American Coal*, 34 FMSHRC at 1969, 1974 (emphasis in original). It concluded that the safeguard specifies the nature of the hazard, “i.e., bottom irregularities, debris, and muddy conditions in a travelway that could affect the control of mobile equipment[,]” and specifies a remedy, “i.e., all mine travelways are to be kept as free as practicable of bottom irregularities, debris, and muddy conditions that could affect the control of mobile equipment.” *Id.* at 1974.

Citation Nos. 7575300 and 7575301 allege violations of Safeguard No. 7568565. AmCoal challenges both citations, arguing that a narrow interpretation of the safeguard, under *Cyprus Cumberland* and *SOCCO I*, requires that all of the conditions identified in the safeguard be present before a violation can be established, i.e., that there must be bottom irregularities *and* debris *and* muddy conditions. Since there is no evidence that debris was present,²² AmCoal argues that the citations must be vacated. The Secretary counters that AmCoal’s reading of the safeguard is overly strict.

Any of the conditions addressed by the safeguard could threaten the loss of control of mobile equipment. Under AmCoal’s reading, compliance with the safeguard could be achieved by simply removing as little as one piece of debris from a travelway that was so wet and muddy, with bottom irregularities, that the loss of control of mobile equipment was threatened. The safeguard specified three hazardous conditions, bottom irregularities, debris and wet and muddy conditions, and it specified a remedy for those conditions. Under the safeguard, AmCoal was obligated to keep its travelways as free as practicable from any and all of the three hazardous conditions. The safeguard was issued in 1998 and, until the recent challenge to its facial validity, AmCoal and MSHA apparently did not have widely divergent views on the breadth and scope of the safeguard. AmCoal’s strict interpretation argument, which is directed to Citation Nos. 7575300 and 7575301, is rejected.

²² While not reflected in the citation or his notes, Rusher testified that he recalled brushing against a splintered piece of board in the area that was the subject of Citation No. 7575300. Tr. II 306-12; Ex. R-12. AmCoal disputes Rusher’s testimony. The rejection of AmCoal’s narrow interpretation argument obviates the need to resolve that issue, at least for present purposes.

Citation No. 7575300

Citation No. 7575300 was issued by Rusher at 12:38 p.m. on July 15, 2010, pursuant to section 104(a) of the Act. It alleges a violation of 30 C.F.R. § 75.1403, and charges AmCoal with violating Safeguard No. 7568565. The violation was described in the “Condition and Practice” section of the citation as follows:

The following condition existed that could adversely affect the control of mobile equipment traveling through the area of the 6th West longwall travel road from crosscut No. 38 to 44 which had wet and muddy conditions. Additionally, several more areas of this road are quickly deteriorating from wet and muddy conditions, resulting in several ruts in the road. Finally, a four wheel drive AL Lee diesel mantrip was found stuck in the mud at the overcast at this travel road for the past ten minutes. A second mantrip was parked just outby this overcast for any emergencies in case this AL Lee mantrip could not get out of the mud. A safeguard has previously been issued requiring that all mine travelways be kept free as practicable of bottom irregularities, debris, and wet and muddy conditions that could affect control of mobile equipment. This standard was cited 71 times in two years at this mine.

Ex. G-2.

Rusher determined that the violation was reasonably likely to result in lost workdays or restricted duty injuries, that it was S&S, that three persons were affected, and that the operator’s negligence was high. A specially assessed civil penalty in the amount of \$25,800.00 was proposed for this violation.

The Violation

Rusher inspected the Galatia mine on July 15, 2010. After reviewing examination books, conducting a safety talk, and terminating some previously issued citations, he proceeded underground, escorted by AmCoal safety representative, Keith Violet. They proceeded up the Main North travelway to several worked-out and sealed areas, and after inspecting the seals proceeded inby. They traveled approximately 125 breaks, up the Main North travelway to the entrance to the 6th West (“6W”) longwall panel headgate entries. There was an overcast at the intersection of the 6W travel road - and the Main North travel road.²³ To provide clearance for traffic on the 6W travel road, the road bed was excavated several feet. Water infiltrating the mine collected in the low spot, softening the fire clay floor, and creating very wet and muddy conditions. AmCoal had installed an air-driven pump in a sump at that location, but conditions had deteriorated

²³ An overcast is an enclosed airway constructed so as to allow an air current to pass over another air current. Tr. II 180-81.

such that the travelway under the overcast was, at least temporarily, impassable. A four-wheel-drive diesel mantrip was mired in the mud at that location. Another mantrip was parked on the Main North travelway for use in an emergency.

Rusher proceeded past the overcast and walked inby on the 6W travel road. It was the middle of three entries, the entry on the left was the belt entry and the one on the right was the return and the secondary escapeway. Crosscuts on the entries were numbered consecutively, with No. 1 being the first crosscut off the Main North travelway. Crosscuts were made approximately every 150 feet.²⁴ When Rusher reached the area of crosscuts 38-44, he encountered knee-deep wet, muddy and rutted conditions, which extended for 900 feet, and rendered the travelway, in his opinion, impassable. Tr. II 182-85, 219.

Although Rusher stated that debris, such as roof bolts or pieces of bridge boards, could be buried in muddy conditions, he did not state that he observed any such objects in the cited area on the 6W travel road and did not record any such observations in the citation or his notes. Tr. II 189-90; Ex. G-2. However, he later indicated that there was one broken piece of bridge board, a “spear,” that brushed against his leg, and which he threw away. Tr. II 306, 311-12. He did not state that he regarded the piece of wood as an impediment to mobile equipment travel, and did not cite it as a violation of the bridge board safeguard.

Rusher opined that the wet, muddy, rutted condition of the 6W travel road between crosscuts 38 and 44, and other areas, could affect the control of mobile equipment, particularly small vehicles, such as mantrips and golf carts.²⁵ Tr. II 199. He posited that the operator of a mantrip carrying 8-10 men could lose control while attempting to traverse the rutted mud, and strike the coal rib at an angle. Miners riding in the vehicle could be thrown out and, possibly, run over by the vehicle as it continued through the mud.

AmCoal did not present any evidence challenging Rusher’s description of the conditions in the cited area. His conclusion that they could affect the control of mobile equipment appears reasonable, and I so find. The standard was violated.

²⁴ Rusher thought that coal pillars were 90 feet wide. Tr. II 185; Ex.G-33. However, AmCoal points out that mine maps introduced into evidence, with survey spads noted thereon, show that crosscuts were on 150-foot centers. Tr. II 29-30; Ex. R-56.

²⁵ Large vehicles travel slower than smaller ones, and the operators would not tend to lose control in such conditions, although they might become mired, or have to maneuver through.

S&S

The conditions on the 6W longwall travelway violated the safeguard standard. A measure of danger to safety, a discrete safety hazard, was contributed to by the wet, muddy conditions, an operator's ability to control a piece of mobile equipment in the area was impaired which could result in injuries to a miner or miners.²⁶ The remaining issues in the S&S analysis are whether the hazard contributed to by the violation was likely to result in an injury, and whether such an injury would be reasonably serious. AmCoal concedes that a reasonably serious injury could possibly occur. It argues that the conditions were unlikely to result in an injury.

Rusher posited that the operator of a mantrip carrying 8-10 miners could lose steering control while trying to navigate the rutted, muddy travelway causing the mantrip to strike a rib at an angle, and that "at least two to three" miners would suffer injuries from being thrown out, or from being run over by the mantrip after being thrown out. Tr. II 186-88. AmCoal argues that the cited condition did not exist for a significant period of time, and that it had taken measures to keep the travelway as free as practicable from wet and muddy conditions.

It is not clear how long the condition had existed. Water infiltration was a prevalent condition in the mine, and, as evidenced by Citation No. 7575301, which Rusher issued a little over 2 hours later, conditions of travelways can deteriorate rapidly. Rusher traveled the Main North travel road on his way to the 6W longwall travel road, and did not observe any violative conditions. When he rode back down that road, after issuing Citation No. 7575300 at 12:38 p.m., he found that conditions on the Main North travel road had deteriorated "in a matter of hours," and issued Citation No. 7575301 at 2:50 p.m. Tr. II 229. The Secretary conceded that it was "likely" that the conditions cited in 7575301 "deteriorated rapidly." Sec'y. Br. at 22.

²⁶ The Secretary argues that the violation also contributed to another hazard, delayed evacuation in case of an emergency, and exposure to injuries from sharp objects in the mud. No such hazards were noted, or alluded to, in the citation or Rusher's notes. As discussed above, there was no debris in the area, with the limited exception of a possible splintered piece of bridge board. AmCoal argues that no such hazard can be associated with the cited violation, noting that it does not include an allegation of failure to maintain an escapeway or any other standard associated with responses to emergency conditions; that the primary escapeway remained passable because the mantrip did not completely block the travelway; and that Rusher confirmed that the alternate escapeway through the return entry of the 6W headgate entries was in good condition and the "entire route [was] passable." Tr. II 222; Ex. G-2. Rusher also agreed that no escapeway violation was involved and that the hazard associated with Citation Nos. 7575300 and 7575301 was the loss of control of mobile equipment. Tr. II 230. I find that the additional hazards advanced by the Secretary are neither factually nor legally supported.

When asked whether the conditions in the 6W travel road could have deteriorated rapidly, Rusher pointed out that the “unit’s” mantrip was stuck under the overcast at the mouth of the road, and that the crew apparently walked in, because there was no mantrip up at the unit. Tr. II 313-14. However, he had previously testified that there was a mantrip at the unit “that they obviously had got in there some way.” Tr. II 186. In addition he had stated: “there were men in here at the active unit mining coal. Whether these men knew that their travel road out of here was blocked or not, I don’t know.” Tr. II 181. AmCoal points out that its Production and Delay reports for July 15 show that the midnight crew and the oncoming day shift did not experience delays in traveling to and from the unit. Ex. R-58 at 19, 20. Those reports show overall travel times between the unit and the portal of 40-45 minutes, consistent with what Rusher had thought they would be, which indicates that the 6W travel road was passable and that the miners could not have walked nearly a mile to the unit.²⁷ I find that the 6th West travel road was open and passable at 9:30 a.m., three hours before Rusher issued the citation. Conditions at the overcast and crosscuts 48-54 deteriorated thereafter. The mantrip mired in the mud under the overcast was there long enough that a back-up mantrip was brought to the area and parked next to it. The cited conditions existed for approximately 2 hours before the citation was issued.

It is unclear how long the conditions would have existed under continued normal mining conditions. AmCoal had installed an air-driven pump in the vicinity of crosscuts 48-54 to remove water, and Rusher observed that the pump was running. Tr. II 197. There was also a pump working on the Main North road before the intersection with the 6W road. Tr. II 198, 231. Rusher testified that, to the best of his recollection after 2.5 years, there was a miner in the crosscut 48-54 area using a jackhammer to create a sump for a pump in the hard pan bottom. Tr. II 306-08. Since there was a pump running in that area, it appears that if there was a miner digging a new sump, AmCoal may have been in the process of installing another pump at the location. Rusher had indicated, “they were trying to work on it.” Tr. II 308.

There is limited evidence as to when the conditions were actually abated. The P&D report shows a delay of 15 minutes, from 12:34 to 12:39, due to “Belts/AFC shutdown (travelway blocked).” Ex. R-58 at 20. The citation was terminated 4 days later, on April 19; the termination sheet reflecting that the water and mud had been removed and the road had been graded. Ex. G-2. It is doubtful that abatement occurred in 15 minutes, because Rusher would still have been in the area, and most likely would have terminated the citation at that time. April 19 was the date specified on the citation for termination. It is doubtful that the travel road to the 6W longwall would have been allowed to remain in what Rusher believed to be an impassable condition for a significant

²⁷ AmCoal points out in its brief, referencing testimony, mine maps in evidence, and spad numbers reflected thereon, that crosscuts 38 to 44 ranged from 5,285 feet to 6,185 feet from the Main North travel road, approximately twice as far as Rusher had estimated. Resp. Br. n.16 at 63.

length of time. As noted in the discussion of negligence, AmCoal had a road grader for use in maintaining travel roads. However, it was out of service on July 15. Rusher opined that grading could have been done by other means, e.g., by dragging a steel beam through the area, which he had seen done in other mines. Tr. II 303.

I find that the condition would have existed for approximately one shift under continued normal mining conditions. A limited number of mantrips transporting mining crews would have attempted to pass through the 6W longwall travel road in that time frame. The diesel mantrip mired in mud under the overcast would have had to have been removed before vehicles from outby could have traveled up the road.

The S&S designation, and the Secretary's arguments on the nature and seriousness of the hazards presented by the condition of the road, are somewhat at odds with Rusher's determination to allow almost 4 days, up to April 19 at 8:00 a.m., for the citation to be terminated. Ex. G-2. While he felt that AmCoal could have made more of an effort to address the conditions, he was "not suggesting that you shut down the unit." Tr. II 303. Rusher was familiar with the Galatia mine, and knew that water infiltration impacting roadways affected main entries and travel roads everywhere in the mine. Tr. II 197. Yet he was not aware of any incidents resulting in injuries from a mantrip going out of control in muddy road conditions. Tr. II 300. Nor was he aware of any such injuries occurring in any other mine, although he did not profess to know all the data for the nation's mines. Tr. II 300-01.

Considering the length of time that the condition had existed and would have existed under continued normal mining conditions, the limited number of times that a mantrip carrying passengers would likely have encountered the conditions, and the fact that there is no evidence of any injuries resulting from the loss of control of mobile equipment in wet, muddy, rutted conditions, I find that the hazard contributed to was unlikely to result in an injury and that the violation was not S&S.²⁸

Negligence

Rusher's determination that AmCoal's negligence was high rested upon a number of factors. He believed that the mantrip mired in mud at the overcast belonged to the incoming day shift crew, such that supervisors of the incoming day shift and the subsequently departing midnight shift would have had to walk through the conditions on

²⁸ As noted in the discussion of bridge board safeguard citations, *infra*, relevant accident history should be considered in evaluating whether a violation was S&S. While the Secretary, through Rusher's hypothetical examples of how injuries might result from the hazard, established that an injury causing event *could* happen, he failed to prove that it was reasonably likely that such an event *will* occur. *Musser Engineering*, 32 FMSHRC at 1281; *Amax Coal Co.*, 18 FMSHRC 1355, 1358-59 (Aug. 1996).

the 6W travel road. Tr. II 200-01, 313. He knew that a citation for similar conditions had been issued a week earlier on the same road, that he issued two such citations that day, and that the safeguard standard had been cited 71 times in two years at the mine. Tr. II 194-95, 200; Ex. G-2, G-4. In light of what he believed was AmCoal's knowledge of the conditions, he felt there should have been more of an effort to address them, such as pulling a drag through, or installing more pumps, especially since the road grader was inoperable.²⁹ Tr. II 309.

If the day shift and midnight shift supervisors had been forced to walk in and out of the unit on the 6W travel road, through the cited conditions, AmCoal could be charged with direct knowledge of the conditions several hours before they were cited. However, as found above, the conditions did not exist when the shift change occurred, and the respective crews, one traveling in by at 8:30 a.m. and one departing at 9:30 a.m., were able to navigate the road without delay. The cited conditions developed after the shift change, and there is no evidence that AmCoal managers were aware of them prior to their being cited.

The fact that similar conditions had been cited on the same roadway one week earlier evidences that AmCoal was on notice that such a condition had developed. However, such wet and muddy conditions were prevalent in the mine, and the fact that a citation had recently been issued for a different area of the road does little to elevate AmCoal's negligence with respect to this violation; nor does the fact that Rusher issued the subject citation, and one later that afternoon for conditions that all agree developed rapidly. Rusher acknowledged that there are over 20 safeguards in effect at the mine, and that citations for 71 safeguard violations could have been for any one of those. Tr. II 300.

The lack of evidence to establish that AmCoal had direct knowledge of the conditions several hours prior to the issuance of the citation largely undercuts the significance of Rusher's perceived lack of effort to address the conditions, although AmCoal may have been in the process of installing an additional pump at the location.

As Rusher readily acknowledged, water infiltration in the mine was a wide-spread and persistent problem. Several measures had been employed to address it, but it was not always contained. The road grader was inoperable on the day in question. The Secretary questions whether equipment from a nearby mine should have been pressed into service. However, there is no evidence as to how long it would have taken to obtain and employ such equipment, what effect it would have had on the other mine, which was also "wet," or how long the grader was expected to be out of service.

²⁹ Rusher testified that he wondered why the road grader was not in the area. Tr. II 302. However, when he wrote the citations he apparently was aware that the road grader was inoperable that day, because it was reflected in his notes. Tr. II 302; Ex. G-2.

Based upon the foregoing, I find that AmCoal's negligence was no more than moderate.

Citation No. 7575301

Citation No. 7575301 was issued by Rusher at 2:50 p.m. on July 15, 2010, about two and one-half hours after he had issued Citation No. 7575300. It also alleged a violation of Safeguard No. 7568565. The violation was described in the "Condition and Practice" section of the citation as follows:

There are wet and muddy conditions along with deep ruts and rough areas in the road that affect the control of mobile equipment operating on the Main North travel road. This condition exists at approximately crosscuts No. 82 to 86 and crosscuts No. 48 to 50 on the Main North travel road. A safeguard was previously issued on this condition that states that all mine travelways be kept free as practicable of bottom irregularities, debris, and wet and muddy conditions that could affect control of mobile equipment. This standard was cited 72 times in two years at this mine.

Ex. G-5.

Rusher determined that the violation was reasonably likely to result in lost workdays or restricted duty injuries, that it was S&S, that two persons were affected, and that the operator's negligence was high. A specially assessed civil penalty in the amount of \$21,900.00 was proposed for this violation.

The Violation

Rusher was on his way out of the mine, having issued the previously discussed safeguard citation for conditions on the 6W travelway. As he proceeded south on the Main North travel road, he encountered portions of the roadway that were wet and muddy, with deep ruts, at crosscuts 82-86 and 48-50. At 2:50 p.m., just over 2 hours after having issued the citation on 6W travelway, he issued Citation No. 7575301, for a violation of the same safeguard. The conditions were "basically" the same as those cited on the 6W travelway, and posed "virtually the same hazard." Tr. II 202-03. For the reasons stated above with respect to Citation No. 7575300, I find that the conditions violated the safeguard.

S&S

I also find, as with Citation No. 7575300, that the violation was not S&S. Rusher explained that the violation and hazard presented were virtually the same as those he determined for Citation No. 7575300, and the S&S analysis presents the same issues as with that citation. The Main North road was not blocked, and mantrips traveling the road

at that time of day tended to be occupied by only a driver and one passenger. Tr. II 205. Consequently, he determined that two persons would be affected if the hazard resulted in an injury causing event. Rusher had traveled the Main North road on his way up to the 6W longwall panel, and had did not observe conditions that violated the safeguard. Tr. II 228-29. He agreed that the conditions had changed in a matter of hours, and the Secretary confirmed that “it is likely that [the conditions] developed rapidly.” Sec’y. Br. at 22. As with those on the 6W road, they most likely would have been addressed before they had existed a full shift, possibly sooner because of their location.

Considering the length of time that the condition had existed and would have continued to exist under continued normal mining conditions, the limited number of times that a mantrip carrying passengers would likely have encountered the conditions, and the fact that there is no evidence of any injuries resulting from the loss of control of mobile equipment in wet, muddy, rutted conditions, I find that the hazard contributed to was unlikely to result in an injury and that the violation was not S&S.

Negligence

The evidence relevant to AmCoal’s negligence with respect to this violation is similar to that for Citation No. 7575300, except that the fact that the violative condition existed only for a short period of time is uncontested. Since it did not exist during the shift change, there is no argument that supervisors traveling with mining crews observed the hazardous condition. However, Rusher noted that the Main North road was an “active travelway” used by “supervisors of all kinds.” Tr. II 207. He added that “hardly a day ever went by I didn’t see a management person on any shift I go on.” *Id.* He believed that a manager should have seen the conditions.

While it is possible that an AmCoal agent observed the violative condition before the citation was issued, it is equally, if not more plausible, that none did. The condition existed at 2:50 p.m. It did not exist when Rusher traveled the area on his way to the 6th West longwall panel. Rusher’s notes reflect that he arrived at the mine at 7:15 a.m., participated in a safety talk at 8:00 a.m., terminated citations, inspected mobile equipment, and inspected a number of seals of mined-out areas. Ex. G-2. He then proceeded to the 6W travel road, and issued Citation No. 7575300 at 12:38 p.m. He most likely passed through the area later cited at approximately 11:00 a.m. The violative condition, which did not exist at that time, developed rapidly, and was cited at 2:50 p.m. It most likely would have existed for no more than two hours before Rusher issued the citation. Accepting Rusher’s observation that the Main North road was traveled by a variety of supervisors in addition to those traveling with mining crews, and that he observed a “management person” traveling the road at least once per shift on the vast majority of days he was in the mine, it is, at best, possible that a member of AmCoal’s management observed the violative condition, and, if so, would have had very little time to address it. A pump had been installed in the area, and Rusher posited that another pump may have been needed to handle the water.

Considering the above, and the bulk of the analysis of the negligence issue discussed with respect the Citation No. 7575300, I find that AmCoal's negligence with respect to this citation was no more than moderate.

Citation Nos. 8423567 and 8423568 (LAKE 2011-183)

Citation No. 8423567 was issued by MSHA inspector Keith Roberts³⁰ at 10:00 a.m. on July 14, 2010, pursuant to section 104(a) of the Act, and alleges a violation of 30 C.F.R. § 75.202(a), which requires that "[t]he roof, face and ribs of areas where persons work or travel shall be supported or otherwise controlled to protect persons from hazards related to falls of the roof, face or ribs and coal or rock bursts." The violation was described in the "Condition and Practice" section of the citation as follows:

An area of unsupported rib coal is present along the 7th West Headgate (003-0) travel road (Entry #2) between XC-34 & XC-35. Three sections of broken, loose and overhanging rib are present on the south side rib. The sections are approximately 4' - 5' L x 4' H x 8" T and are separated from the pillar approximately 1.5" - 2". The entry has been mined into the soft, unconsolidated floor clay to an approximate depth of 18". The floor clay and the bottom sections of rib coal have sloughed away to create the cited condition.

This travel road is frequented by miners operating open-type personnel vehicles and by miners traveling on foot. This standard was cited 111 times in two years at this mine.

Ex. G-13.

Roberts determined that the violation was reasonably likely to result in a lost workdays or restricted duty injury, that it was S&S, that one person was affected, and that the operator's negligence was high. A specially assessed civil penalty in the amount of \$25,800.00 was proposed for this violation.

The Violation

AmCoal was in the process of developing a new longwall panel, and was using continuous miners to create a three-entry access to the panel. The left entry facing inby,

³⁰ Roberts, currently a regulatory compliance officer for White Oak Resources, worked for MSHA from 1999 to 2011, during which time he conducted numerous inspections of the Galatia Mine. Prior to joining MSHA, he worked for 15 years as a staff safety engineer at the Galatia Mine while it was operated by AmCoal's predecessor Kerr-McGee. He also had worked for 11 years as a miner, section foreman and training and labor specialist for Old Ben Coal Company.

the #1 entry, was the belt entry, the middle entry was the travelway - the 7 West Headgate ("7WHG") travelway, and the right entry was the return. A minimum mining height of 7 feet was required in the travelway to accommodate longwall shields that would have to be transported to the set-up entries for the panel. The coal seam in that area was only 5.5 to 6 feet thick. To obtain the required clearance, AmCoal determined to mine approximately 18 inches of the soft fire clay from the mine floor, rather than the harder limestone and sandstone layer above the coal seam.

That practice can lead to problems with stability of the ribs. The softer clay tends to deteriorate, and slough away, removing support from the edge of the coal rib. The load pan on a continuous miner, or the bucket of a scoop, can cut into the clay, exacerbating the process. If significant undercutting of the coal rib occurs, the face of the rib may slough or spall, falling to the mine floor, and/or toppling into the travelway. AmCoal was encountering significant water in the 7WHG entries. The solid limestone roof had given way to water-bearing sandstone, and water was flowing into the entries from the roof. Watersheds and barrel sumps were being installed to remove the water, but the area was very wet, particularly near the faces.

On July 14, Roberts traveled the 7WHG travelway, accompanied by Matt Mortis, AmCoal's safety director. As they arrived at the section, they parked their ride, and their attention was drawn to a piece of yellow "caution" flagging tape that had been hung from a roof bolt near the south rib of the entry, between crosscuts 34 and 35, about one crosscut outby the section transformer and one crosscut inby the mantrip parking area. Ex. G-13. Upon closer examination, it was apparent that three sections of rib coal had broken away from the pillar. As Roberts recorded in the citation and his notes, the pieces were approximately 4 to 5 feet long, 4 feet high and 8 inches thick. They were separated from the pillar by approximately 1.5 to 2 inches. At that location, approximately 18 inches of floor clay had been mined and the clay had "spalled from beneath the rib coal." Ex. G-13. Mortis confirmed the accuracy of Roberts' description of the violative condition. Tr. III 72.

Roberts issued Citation No. 8423567 for the unsupported rib, and, also issued Citation No. 8423568 for inadequate preshift and onshift examinations because the condition was "easily visible" and had not been recorded in the examination books that he had reviewed prior to going underground. AmCoal does not challenge the fact of the section 75.202(a) violation. However, it does challenge the inadequate preshift examination citation, as well as the special findings, negligence determinations and the amounts of the penalties for both violations.

S&S

The unsupported rib violation has been established. There were large sections of coal rib that had broken away from the coal pillar. The violation contributed to a discrete safety hazard, a risk that the unsupported rib sections would fall and strike a miner. The

sections of rib were large, and any such injury would be serious. Consequently, whether the violation was S&S turns on whether it was reasonably likely that the hazard contributed to would result in an injury.

The loose rib sections were sizeable, 4 to 5 feet long, 4 feet high and 8 inches thick. While they might have fallen straight down, i.e., remained upright, 90% of the time they would topple over into the travelway. Tr. II 280. Absent something that would have caused the coal to break up and roll, the sections would have fallen approximately 4 feet into the travelway. Tr. II 277. Miners typically walk near the center of the 18-20 foot wide entry. *Id.* However, Roberts testified that they might have occasion to hang cable on the rib, or could get close to the rib in a golf cart, if passing another vehicle. *Id.*

As previously noted, there was a piece of yellow caution tape adjacent to the area in question. It was hung from a roof bolt, 4 feet away from the rib at the outby end of the loose pieces. Tr. II 293, Tr. III 81. Yellow flagging generally indicates that caution should be used; red flagging indicates “stop,” i.e., do not proceed. Tr. II 253, Tr. III 21, 30-32, 57. Flagging material, 3/4 inch wide tape, in both yellow and red, was readily available to all miners working in the area.³¹

Terry Hill, an experienced AmCoal mine examiner, conducted the preshift examination of the area in question between 5:00 a.m. and 7:00 a.m. the morning of July 14. He explained that red flagging is used to prevent access to hazardous areas, e.g., areas of unbolted roof. Tr. III 56. Yellow flagging, indicating caution, is used to warn of equipment or material parked out of a line of sight, or bad rollers on a belt line. Tr. III 57. He has never hung a yellow flag near a rib as a sign to “keep and eye on it.” Tr. III 67-68. If he thought there was an issue with a rib, he would examine it and would red flag it if it was hazardous, e.g., “spalling off, you know the rib falling off.” Tr. III 62. If it was not hazardous, he would not flag it.

Stacy Hill, the face boss for the midnight shift, 12:00 a.m. to 8:00 a.m. on July 14, offered similar explanations for use of flagging. He tries to reserve red flagging for hazardous roof conditions. Tr. III 30. He has used yellow flagging to mark a rib that he did not believe was hazardous, but that needed to be watched, and believed that the yellow flag indicated that the condition was “not that bad” when the flag was hung, or it “would have been addressed,” i.e., “it wouldn’t have been there.” Tr. III 33-35.

Roberts downplayed the significance of the fact that there was a yellow flag hung at the location of the violation. It is not mentioned in the citation, and appears only on the last page of his notes, in his discussion of the duration of the violation. Ex. G-13. Roberts testified that, as he walked up, he observed “the condition,” the undercut evidenced by the contrast of the gray clay and the black coal rib, which was “easily

³¹ Examiners carry red and yellow flagging. It is available on the units, in the dinner hole and on equipment. Tr. III 30, 65.

visible.” Tr. III 240, 244. He denied that his attention was drawn to the area by the yellow tape, adding that “at some point” he would “probably note the flagging.” Tr. III 262. In contrast, Mortis testified that when he and Roberts arrived at the section and started walking toward the face, their attention was drawn to the area by the yellow tape. Tr. III 71.

Mortis’ rendition of events strikes me as considerably more likely. The yellow tape was designed to call attention to an area or condition. It most likely would have been far more visible than the undercut, especially in typical underground low light conditions. Roberts described the undercut as a contrast between gray fire clay and the black coal rib. Mortis testified that the rib coal would probably have been lightened by rock and road dust. Tr.III 78.

The sections of loose rib coal were 4 feet high. If they fell, they most likely would have toppled over, landing approximately four feet into the travelway.³² Miners using the travelway, whether walking or riding, would tend to stay near the middle of the entry, and would typically have been at least 5 feet away from the rib.³³ Consequently, falling sections of rib would have been unlikely to cause injury to miners using the roadway, even if they fell while a miner happened to be passing that particular location.

The presence of the yellow flagging almost certainly rendered the possibility of injury even more unlikely. The yellow caution flag, hanging 4 feet off the rib, would have been clearly visible to anyone approaching the area. The normal reaction to the flag would have been to avoid the area near the rib. Roberts opined that miners might be on foot hanging cable along the rib, and that a golf cart passing another cart might come close to the rib. However, there is no indication of whether, or how often, that was likely to occur. It is doubtful that any miner would have worked at the rib line, given the presence of the warning tape, and the obvious loose coal, and drivers of golf carts would also have been unlikely to travel in the area marked by the yellow tape, even if they had to pull over to let another cart pass.

I find that the hazard contributed to was unlikely to result in an injury producing event and that the violation was not S&S.

³² There is no indication of any conditions that would have caused the coal to roll, which appears unlikely considering that the floor consisted of soft clay.

³³ Many of the vehicles that passed the area would not have had canopies. However, the presence of a canopy would have had little bearing on the likelihood of a rider being injured by a falling rib, which would most likely have struck the vehicle from the side.

Negligence

There is no question that the unsupported rib presented a hazardous condition. It is also apparent that someone at AmCoal had observed something that caused concern about the rib, although the condition may not have been as severe when the flag was hung. The critical question as to the negligence determination, as well as whether there was an inadequate preshift examination, is when the condition occurred, specifically, whether it existed for a sufficient length of time that an agent of AmCoal should have observed it.

Roberts' testimony on the duration of the violation was quite limited. When asked about the entry of "duration" in his field notes, he explained:

Well, on duration, I reasoned that the condition had to be present at least one shift, probably longer. There was a piece of yellow flagging along the side of the rib, which to me would indicate that the area was beginning to deteriorate.

Tr. III 253.

He went on to state:

Seeing that flag there indicated to me that somebody at least saw the rib at some point in time and reasoned that it's not looking real good and that was the reason for the flagging. There was no equipment parked in the area. There was no other reason for a yellow flag to be posted at that location.

But the rib I believe existed at least during the time that the section foreman was on the unit, and based on the flagging probably at least one shift prior to that and probably longer.

Tr. III 253-54.

Opinions of experienced inspectors as to the duration of a condition or violation are frequently offered in a variety of contexts, typically, as here, to establish that a condition existed when an earlier examination was or should have been conducted. Often there is some obvious, or at least arguable, basis for crediting the estimate. For example, an estimate as to the length of time that accumulations of coal, or a certain thickness of float coal dust, had been present might be supported by evidence as to the rate that such substances would be expected to be deposited in the given area.

There is no such evidence to support Roberts' opinion on duration.³⁴ The loose sections separated from the pillar at some point. However, there is no obvious relationship between the fact of the separation and when it occurred. It appears that Roberts placed a great deal of significance on the presence of the yellow flagging. Yet, there is no explanation as to why the presence of flagging should indicate that the condition existed for any particular length of time. Certainly, one could hardly dispute Roberts' conclusion that someone had seen rib conditions that raised a concern prior to his discovery of the condition. But there is no evidence as to when the flagging was hung. The identity of the person that hung the flagging, and the time that the flagging was hung are unknown.³⁵ Tr. II 283, Tr. III 74. Given the ready availability of flagging tape, Stacy Hill opined that the flag could have been hung by a scoop operator, or other hourly employee. Tr. III 48-49.

Terry Hill, who conducted the preshift examination on the morning of July 14, did not observe any hazards in the 7WHG travelway, and so noted on the Preshift Mine Examiners Report. Tr. III 58-60; Ex-R-60 at 6. He testified that he did not observe a condition like that observed by Roberts, and that it could not be determined how long the condition had existed, because "conditions change by the minute." Tr. III 66. He explained that if he had seen a yellow flag, he would have checked the conditions in the area. If they presented a hazard, he would have hung red flagging and contacted a supervisor to remedy the problem. He would have taken the yellow flag down if the area was not hazardous. Tr. III 60, 62-63. Hill was cognizant of potential rib problems when he conducted the preshift examination between 5:00 a.m. and 7:00 a.m. that morning. He had identified hazardous rib conditions, "rib rash" and "loose rib," and noted them in his preshift report. It is highly unlikely that he would have failed to notice yellow caution tape hanging near a rib. I find that the caution tape was not present during the preshift examination.

³⁴ Roberts raised some question as to exactly what the violation was. At one point he indicated that the undercutting of the rib "in and of itself" was a violation. Tr. II 240. However, the citation was issued for "bottom sections of the coal rib" that had sloughed away from the pillar. Ex. G-13. In addition, abatement of the violation was accomplished by taking down the loose rib sections. There is no indication that it included supplemental support of the rib where it had not sloughed, or other measures to address undercut areas. Tr. II 254-55, Tr. III 72-73; Ex. G-13. The Secretary described the violative condition as consisting of "three pieces of loose rib." Sec'y. Br. at 29. I find that the violation consisted of loose, unsupported sections of the coal rib that had sloughed away from the pillar.

³⁵ The midnight shift personnel, including the person that conducted the preshift examination for the oncoming day shift, had departed the mine by the time Roberts issued the citation. Tr. II 283.

As Roberts' notes indicate, citations had been issued for unsupported ribs in the same unit and another unit within the previous 3 weeks, and citations for roof/rib control violations had been issued 111 times in the past 2 years. He had also discussed with AmCoal safety department personnel problems with rib support in areas where significant floor clay was being mined, and had emphasized the need to monitor rib stability.

Tr. II 250-51; Ex. G-13. AmCoal "concedes that it had been placed on notice that increased efforts to comply with roof control standards, insofar as they related to rib control issues, were needed at that time in that section." Resp. Br. at 82. It maintains that it had increased its efforts to identify and address such conditions.

As evidence of its efforts, AmCoal points to the fact that hazardous rib conditions were identified in both examinations conducted on July 14 prior to issuance of the citation. Stacy Hill, who conducted the onshift examination during the 12:00 a.m. to 8:00 a.m. shift, testified that undercut ribs could lose strength and that he actively monitored rib conditions. Tr. III 15-16. In the course of his onshift examination, he identified hazardous rib conditions in the #3 entry and began re-supporting the rib with roof bolts, actions that he recorded in his production and delay, and onshift reports. Tr. III 15-16; Ex. R-58, R-60 at 5. Roberts acknowledged that the records reflected that hazardous rib conditions had been reported and addressed. Tr. II 270. Terry Hill, identified hazardous rib conditions during his preshift examination, took steps to address them, and duly reported them on his preshift report. Tr. III 56-58; Ex. R-60 at 6. Roberts also acknowledged that hazardous rib conditions were noted and addressed as a result of the preshift examination. Tr. II 274.

I find that the violative condition, the loose and unsupported sections of rib that had separated from the coal pillar, occurred after Terry Hill performed his preshift examination, and that the yellow flag was hung thereafter. While it is possible that the condition existed when section foremen arrived with the day shift and departed with the midnight shift, that has not been established by the evidence. Hazardous rib conditions were identified and addressed as a result of both examinations that occurred immediately prior to issuance of the citation, indicating that AmCoal was monitoring rib conditions as it had been advised to do.³⁶ I find that AmCoal's negligence with respect to Citation No. 8423567 was low to moderate. Citation No. 8423568, the examination violation, will be vacated.

³⁶ The Secretary argues that AmCoal exhibited high negligence because it took a "wait-and-see" approach to sloughing ribs. Sec'y. Rp. Br. at 32. However, that statement is based on a misinterpretation of Terry Hill's testimony. He did not view "sloughing ribs" as not being hazardous. Rather he was addressing "sloughing floor clay." Tr. III 67. Roberts sanctioned that approach. He had told AmCoal that it "either had to install rib supports or be diligent in taking down the loose ribs," i.e., monitor the rib conditions and promptly take down any sections that became loose. Tr. II 250.

Citation Nos. 8424517 and 8426154

Citation Nos. 8424517 and 8426154 allege violations of a safeguard requiring that “bridging lumber” be secured and that loose or dislodged lumber be removed from travelways.

The Galatia mine has experienced significant water infiltration since its opening. In low, or especially wet spots, water softens the fire clay mine floor making it difficult to maintain roadways. Various steps have been taken to keep the roadways passable, including pumping water, depositing gravel and rock dust, and installing wooden “bridges,” assemblies of lumber intended to provide a more firm travelway surface. Prior to 2005, bridges were nailed together, and were much more fragile. Since that time, they have been made of three layers of approximately 2" by 10" rough-sawn lumber, bolted together. As fabricated, they are approximately 10 feet wide, 16 feet long and 6 inches thick. A photograph of new bridges, ready for installation in the mine, was introduced into evidence. Ex. R-70. Bridges were placed in particularly soft locations, and were typically covered with gravel. Over-traveling mobile equipment pressed them into the mine floor. A piece of heavy mobile equipment, e.g., a ram car hauling supplies, can place considerable stress on a wooden bridge. Not infrequently, boards are broken and dislodged from bridges.³⁷

In 1990, when Kerr-McGee Coal Corporation operated Galatia, a fatal accident involving a dislodged bridge board occurred. A ram car rode over a 12-foot-long bridge board that was lying in a soft, muddy travelway parallel to the direction of travel. As the car’s forward wheel finished traversing the board, it pressed the end of the board down into the mine floor, which cantilevered the opposite end up into the air. As depicted in a photograph, the operator’s compartment of that particular type of ram car was directly behind the wheel, and about 12 feet away from it. Ex. R-71. The elevated end of the board entered the compartment and impaled the operator as the car continued to move forward. MSHA investigated the accident, and issued a report. Ex. R-68.

As a result of the accident, Notice to Provide Safeguard No. 3538483 was issued on August 17, 1990. It states, in pertinent part:

The established rubber-tired (off track) haulage roadway located in the No. 1 entry of the 1st East Longwall tailgate entries was not maintained to allow safe passage of miners and material. Numerous pieces of bridging lumber (2-1/2" x 10-1/2" x 12'-14'), which were used to stabilize the mine floor, were dislodged or protruding from the mine floor along the travel entry. This is a notice to provide safeguards requiring all bridging lumber

³⁷ Wooden bridges are no longer installed in the Galatia mine. AmCoal has found that a product called “bottom ash” resulting from the generation of electricity provides more effective control of soft, muddy travelway conditions. Tr. III 145-46.

used on the mine floors be secured or that loose and dislodged pieces of lumber be re-secured or removed from the travelway.

Ex. G-19.

The persistent and widespread wet conditions in the Galatia mine resulted in hundreds of bridges being installed in numerous locations. JX-1 at 277-79. High volumes of mobile equipment traffic, especially heavy pieces of equipment such as shield movers and ram cars carrying supplies, frequently resulted in damage to bridges. Pieces of bridge boards broken from a bridge and dislodged boards could regularly be found in muddy travelway areas. When found by MSHA inspectors, violations of the safeguard standard would be cited. Several bridge board safeguard violations were at issue in a previously heard and decided case. *American Coal Co.*, 33 FMSHRC 2511 (Oct. 2011) (ALJ). The history of the use of bridge boards, including the 1990 accident, the issuance of the safeguard, and the effect of active mining on bridge boards, was thoroughly examined in the prior hearing. In order to avoid duplicating that effort, the parties stipulated that a substantial portion of the record from that hearing could be incorporated into the record in these cases. Accordingly, the record was left open to allow the submission of designated portions of the prior hearing transcript, and a cross-reference of exhibits introduced in that proceeding, to exhibits introduced in the present record.³⁸

The record from the previous hearing, as supplemented by the current record, establishes that heavy equipment, e.g., a ram car hauling supplies, could do considerable damage to a bridge in a single pass. 33 FMSHRC at 2522; JX-1 at 67, 240, 277-78, 306, 343. Broken or dislodged bridge boards could remain covered with mud and be brought to the surface by a passing vehicle. 33 FMSHRC at 2534; JX-1 at 256, 359. Many different types of mobile equipment use the travelways, including shield movers, ram cars, scoops, tractors, end loaders, mantrips and golf carts. The varying configurations of the vehicles, particularly the locations of operators and/or passengers, present different potentials for injuries to miners caused by loose lumber. 33 FMSHRC at 2518; JX-1 at 45, 88, 97, 230-32. Following the 1990 accident, steel bar “lips” were welded along the top edge of ram car operator compartments in an effort to prevent boards from riding up the side and entering the compartment. JX-1 at 274; Ex. R-71. While the bars might catch some boards, boards 4 feet long or longer continued to present a risk of injury. JX-1 at 229-30, 236. Following the 1990 accident, Kerr-McGee, and later AmCoal, have conducted periodic training on the dangers posed by loose and dislodged bridge boards and emphasized the requirement of the safeguard that they be secured or removed from travelways. 33 FMSHRC at 2522-23; JX-1 at 224-25, 279, 349. Since the 1990 fatal accident, there have been no fatal, permanently disabling or lost time injuries suffered as a result of loose or dislodged bridge boards at the Galatia mine. Tr. III 117-19; JX-1 at 98, 278, 367.

³⁸ Joint Exhibit 1 (JX-1) consists of portions of the transcript of the previous hearing, and Joint Exhibit 2 (JX-2) consists of a cross reference of previous and current exhibits.

Citation No. 8424517 (LAKE 2011-242)

Citation No. 8424517 was issued by MSHA inspector Danny Ramsey³⁹ on August 23, 2010, pursuant to section 104(a) of the Act. It alleges a violation of 30 C.F.R. § 75.1403, and charges AmCoal with violating Safeguard No. 3538483. The violation was described in the Condition and Practice section of the order, as amended, as follows:

Bridging lumber was observed in the Main North travelway from #144 cross cut to the 8th West Headgate unit. The bridging lumber measured approximately 2 feet in length to 16 feet in length. Safeguard #3538483 requires all bridging lumber used on the mine floor to be secured or that the loose and dislodged pieces of lumber be re-secured or removed from the travelway.

Standard 75.1403 was cited 67 times in two years at mine 1102752 (67 to the operator, 0 to a contractor).

Ex. G-18.

Ramsey determined that the violation was reasonably likely to result in a fatal injury, that it was S&S, that one person was affected, and that the operator's negligence was moderate. A specially assessed civil penalty in the amount of \$18,700.00 was proposed for this violation.

The Violation

Ramsey was traveling the Main North travelway when he encountered a wet, muddy area near the #145 crosscut. The roadway was relatively flat and passable, but there were ruts approximately 1 foot deep, and heavy equipment would likely have to "squirm" to get through. Tr. III 90. He observed bridge boards, crib ties and cap boards in the travelway and along the ribs, and measured two bridge boards, one was approximately 2 feet long, and the other was approximately 16 feet long.⁴⁰ One end of the longer board was elevated approximately 12-18 inches in the air. The other end was

³⁹ Ramsey joined MSHA in 2003, and has been trained as a ventilation and roof control specialist, as well as a special investigator. He has extensive experience in the mining industry, beginning in 1972. He worked at the Galatia mine from 1996 through 2002, holding positions, including longwall coordinator and superintendent.

⁴⁰ The safeguard specifies that bridging lumber is to be secured or removed. It does not address crib ties, cap blocks, or any other type of debris. Under the narrow interpretation rule of *Cyprus Cumberland* and *SOCCO I* the presence of crib ties and cap boards cannot be considered part of the violative condition, although they may have been citeable under a different safeguard, e.g., Safeguard No. 7568565.

under the mud, most likely attached to the bridge because the board could not be removed by hand. Tr. III 91.

AmCoal does not challenge the fact of violation. It argues that the gravity and negligence designations are inappropriate and that the assessed penalty is excessive.

S&S - Gravity

It is undisputed that the bridge boards were in the travelway in violation of the safeguard standard. A measure of danger to safety, a discrete safety hazard, was contributed to by the failure to re-secure or remove the partially dislodged 16-foot piece of bridging lumber from the travelway, i.e., that a person using the travelway would be injured by the board.⁴¹ While some injuries resulting from the violation, e.g., a contusion resulting from incidental contact, might not have been reasonably serious, the majority of the injuries posed by the presence of the lengthy board, which could impale an equipment operator or passenger, would be reasonably serious. As is often the case, the primary issue in the S&S analysis is whether the hazard contributed to by the violation was reasonably likely to result in an injury.

⁴¹ Although the citation indicates that there were more than two bridge boards present, Ramsey identified only two. His notes indicate that material was present in the roadway and along the ribs, where mud had been pushed up. Boards along the ribs would not present a significant hazard, even if they were of appreciable length. There is no evidence as to other bridge boards, i.e., their size, number, or location, and they will not be considered other than to establish the violation. The 2-foot board did not contribute to a discrete safety hazard. At the prior hearing, Keith Roberts, an MSHA inspector who had worked for 15 years as a safety engineer at the Galatia Mine for AmCoal's predecessor as operator, testified that he would not issue a citation for pieces of bridge lumber that were not of sufficient size to create a hazard. JX-1 at 454. There, the S&S analysis focused on boards that were long enough to present a hazard, e.g., 4 feet or longer. 33 FMSHRC at 2518, 2523, 2532. Here, the concern about shorter boards was described by Ramsey with respect to a piece of equipment of a certain configuration, the end loader, an articulated vehicle on which a tire was approximately 4 feet away from the operator's cab. The potential for injury was described as a board being thrown out from under the spinning tire into the operator's compartment. The tire could nearly come into contact with the operator when the vehicle was fully articulated. However, the end loader, the only vehicle described as having that particular configuration, had metal and rubber belt fenders around the tire, which Ramsey implicitly conceded would stop a short board. Tr. III 102-03. In addition, while it certainly is possible that a smaller board could be pushed back by a spinning tire on a piece of equipment "squirring" to get through deep mud, there would need to be some significant gap between the tire and the compartment before a board would be a concern. If the tire were in close proximity to the cab, mud, debris, or boards, which would move away from a spinning tire at a tangent, would pass under the operator's cab. Moreover the area in question was relatively flat, straight and passable, such that significant articulation of a vehicle would have been highly unlikely.

Ramsey's primary concern was the 16-foot board, which he believed presented a potential for a fatal injury. He had read about the 1990 accident that prompted the issuance of the safeguard, and believed that it was reasonably likely that the long board would cause a fatal injury by impalement. As with the inspectors who issued bridge board safeguard violations at issue in the prior case, his determination appears to have been based almost exclusively on the fact of the 1990 accident. 33 FMSHRC at 2523. He stated that he marked every bridge board safeguard violation as fatal. Tr. III 121. An AmCoal official testified in the prior hearing that all MSHA inspectors marked such violations fatal. JX-1 at 295.

As noted in the 2011 Decision, the 1990 accident was a highly unusual incident that occurred under very specific conditions. While it is not outside the realm of possibility that a fatal impalement-type injury might occur with a long board, it is highly unlikely that such an event would occur. 33 FMSHRC at 2523. There, the presence of multiple boards of appreciable length, in a very muddy, wet travelway, where operators of heavy equipment had to struggle to climb a grade as the travelway emerged from under an overcast, was found to be S&S. Here, there was a single, partially dislodged board, 16 feet in length, in a relatively flat, passable, travelway with 6"-12" of mud.

The 16-foot board was longer than the wheel-to-cab distance of any piece of equipment discussed at either hearing. Consequently, as situated, it could almost certainly not have been cantilevered up into the cab of a piece of mobile equipment as in the 1990 accident. The fact that it most likely remained attached to the bridge, rendered such an occurrence even more unlikely. It is significant that the board was protruding up above the travelway surface some 12"-18". While a ram car or another piece of heavy equipment would most likely have pushed it down, pushed it out of the way, or broken it off, there was a potential for it to enter the open riders' compartment of a smaller vehicle, such as a golf cart. Ramsey was concerned about such an occurrence. However, Robert Bretzman, another MSHA inspector with extensive mining experience, who issued a similar bridge board safeguard violation, opined that injuries to operators of open vehicles like golf carts would not be reasonably likely because they could see and avoid bridge boards. Tr. III 177-78. *See* discussion of Citation No. 8426154, *infra*.

AmCoal places considerable emphasis on the fact that, in the more than 20 years since the 1990 accident, bridge boards have not caused any injuries at Galatia or any other mines where they have been used. The Secretary countered, citing *Elk Run Coal Co., Inc.*, 27 FMSHRC 899, 906 (Dec. 2005), that the absence of an injury-producing event when a cited practice has occurred does not preclude an S&S determination. AmCoal, in turn, points out that in *Elk Run* the Commission was careful to add, "[t]his is not to say that a history of roof falls in a mine is not pertinent to the consideration of the reasonable likelihood of an injury." *Id.* at 906.⁴² AmCoal argues that, in light of the

⁴² In support of this observation, the Commission cited as examples two cases in which
(continued...)

lengthy period during which no bridge board injuries occurred, the Secretary has failed to establish a reasonable likelihood that the hazard contributed to “will cause injury,” citing *Musser Engineering*, 32 FMSHRC at 1281.

It is clear that the absence of an injury-producing event while a cited practice has occurred does not preclude an S&S finding. However, relevant accident history can and should be considered in the S&S determination. While there is no evidence that the specific condition cited by Ramsey had existed for an appreciable length of time, similar conditions have existed almost daily for over 20 years following the 1990 accident. There was general agreement that large numbers of wooden bridges have been used in Galatia’s wet/muddy travelways prior to and after the 1990 accident, and that high volumes of heavy mobile equipment traffic exact a heavy toll on the bridges, such that broken and dislodged bridge boards were almost constantly lying in travelways, visible or covered.⁴³ Violations of the bridge board safeguard have been cited, not infrequently, by MSHA inspectors, and AmCoal personnel, who have been trained to remove bridge board hazards, have no doubt removed a large number of boards over the years. Bretzman testified that AmCoal was well aware of the importance that MSHA placed on compliance with the bridge board safeguard, and that citations would be issued whenever loose or dislodged bridge boards were found in travelways. Tr. III 179-80.

Despite what was most likely frequent exposure of numerous equipment operators to various sized pieces of bridge boards in travelways, there have been no serious injuries caused by bridge boards since 1990; in fact, there have been no injuries at all. This is true even though bridges installed prior 2005 were much more fragile, and prone to breaking up. In addition, bridges have been used in other wet/muddy mines, and there is no evidence of bridge board related injuries in such mines. Tr. III 117-19. The tragic accident in 1990 established that loose or dislodged bridgeboards in travelways present a safety hazard. While it demonstrated that the hazard could cause a serious injury, it does not establish that such an injury would be reasonably likely to occur.

The subject condition existed for an unknown length of time. There is no evidence from which it could be determined how long the board had been dislodged. It was not noted during the preshift examination that was conducted between 4:00 a.m. and 8:00 a.m. that morning, a few hours before the citation was issued. Ex. R-60 at 24-25.

⁴²(...continued)

judges erred in failing to consider histories of roof falls and unstable roof in making S&S determinations. *Lion Mining Co.*, 18 FMSHRC 695, 699 (May 1996); *Youghioghenny & Ohio Coal Co.*, 9 FMSHRC 2007, 2012 (Dec. 1987).

⁴³ At the prior hearing, Stephen Willis, AmCoal’s manager of health and safety, testified that hundreds of bridges had been used at the Galatia mine, that damage by heavy equipment was “ongoing” and “never ends,” and that clean-up of loose and dislodged bridge boards was going on “constantly.” JX-1 at 277-79.

Since there is no evidence to establish that it had been dislodged at some earlier point in time, I find that it was dislodged after the preshift examination had been conducted, most likely by the mobile equipment traffic associated with the morning shift change and supplying the new shift. Under normal continued mining conditions, the hazardous condition could have been expected to continue to exist until the next preshift examination, i.e., 12:00 p.m. to 4:00 p.m. The condition was obvious, and the long board should have been identified and removed during that examination.

Considering the length of time that the violation had existed and would have continued to exist under normal continued mining operations, less than one shift, the lengthy history of similar conditions having resulted in no injuries, and the nature of the specific condition, I find that the hazard contributed to was unlikely to cause a lost work days injury and was not S&S.

Negligence

Ramsey determined that AmCoal's negligence was moderate. AmCoal contends that its negligence was no more than low, arguing that the Secretary offered no evidence that anyone at AmCoal knew about the dislodged boards before the citation was issued. Ramsey could not determine how long the boards had been in the travelway. Tr. III 112; Ex. G-18. Their presence had not been noted during the preshift examination that was conducted that morning. Ex. R-60 at 24-25. However, he had issued a citation for a violation of the bridge lumber safeguard one month earlier, and would have spoken to mine management officials about it. Consequently, the Secretary contends that AmCoal was on notice of a need for greater compliance efforts with respect to the bridge board standard.

At the earlier AmCoal hearing, it was established that virtually any piece of heavy equipment can break lumber from a bridge simply by maneuvering through one of the muddy areas where bridges are typically located. Loose or dislodged bridge boards may remain in the mud, virtually invisible until disturbed by a passing vehicle. JX-1 at 256. AmCoal was well aware of the problems posed by bridges, and provided training on the dangers posed by bridge boards and the obligation to comply with the safeguard by removing them from travelways. AmCoal had been cited for 67 violations of the general safeguard standard in the preceding 2 years. However, as Ramsey conceded, there were over 20 safeguards in effect at the mine. There is no evidence as to which, if any, of those violations involved loose bridging lumber, with the exception of the citation that Ramsey had issued a month earlier. AmCoal was well aware of the hazards posed by loose or dislodged bridging lumber, and had taken steps to address that hazard. Compliance with the safeguard was an ongoing topic of training. The fact that a citation related to bridging lumber had been issued one month earlier, and that other violations had been issued under the broad safeguard standard, did not significantly enhance AmCoal's negligence with respect to this violation.

The presence of crib ties and cap boards, in Ramsey's words "scattered through there," is troubling. Tr. III 127. While they are not within the applicable scope of the safeguard, they were pieces of wood lying in the travelway that could possibly have been considered to be debris that should have been removed under the previously discussed safeguard.⁴⁴ The presence of those boards, along with the two bridge boards that Ramsey cited, at least suggests that AmCoal should have been paying more attention to its obligation to remove dislodged bridge boards from travelways.

I find that AmCoal's negligence was moderate.

Citation No. 8426154 (LAKE 2011-184)

Citation No. 8426154, was issued by MSHA inspector Robert Bretzman⁴⁵ on September 2, 2010, pursuant to section 104(a) of the Act, and alleges a violation of 30 C.F.R. § 75.1403. It charges Respondent with violating the previously discussed bridge board safeguard. The violation was described in the "Condition and Practice" section of the citation as follows:

The 6W Longwall Travelway was not kept free of debris, the travelway was also wet and muddy. A broken bridge board was along the side of the travelway. The bridge board had been run over by mobile equipment. The part of the board which was exposed was approximately 42 inches long by 8 inches wide. Standard 75.1403 was cited 67 times in two years at mine 1102752 (67 to the operator, 0 to a contractor).

Ex. G-21.

Bretzman determined that the violation was reasonably likely to result in a fatal injury, that it was S&S, that one person was affected, and that the operator's negligence was moderate. A regularly assessed civil penalty in the amount of \$5,080.00 was proposed for this violation.

⁴⁴ Crib ties are square or rectangular pieces of lumber that are stacked to make a crib. They are typically 4"x4" or 4"x6" and 3 or 4 feet long. Cap boards are wooden wedges driven between the crib and the mine roof. Some of the crib ties and cap boards were in the travelway, and some had been thrown to the side. Tr. III 128-29.

⁴⁵ Bretzman has over 25 years of experience in the coal mining industry, much of it as a maintenance supervisor. He also was responsible for setting up longwall panels, and maintaining travelways to facilitate that activity. He joined MSHA in 2007, and has been trained as a special investigator. Tr. III 147-49.

The Violation

Bretzman was part of an MSHA team that intended to inspect AmCoal's longwall mining operation on September 2, 2010. A team was used in order to minimize down time for the high-production longwall mining machinery. As he traveled up the 6 West longwall travelway, the mantrip went through a wet, muddy area. AmCoal had placed gravel in the middle of the travelway in an attempt to repair it. Bretzman was a passenger, riding on the right side of the vehicle, and saw a loose, dislodged bridge board on the right side of the travelway. He measured the exposed portion of the board. It was 42 inches long and 8 inches wide. An additional part of the board, of unknown length, was buried in the mud. The board was flagged, to prevent further travel in the area, and Bretzman proceeded inby to participate in the longwall inspection. When he returned, he was told that the board had been removed, and he terminated the citation.

As with the previous bridge board citation, AmCoal does not dispute the fact of the violation. It challenges the gravity and negligence designations and the amount of the penalty.

Significant and Substantial

The fact of the violation has been established. A measure of danger to safety, a discrete safety hazard, was contributed to by the failure to re-secure or remove the loose, dislodged piece of lumber from the travelway, i.e., that a person using the travelway would be injured by the board. An injury inflicted by this relatively lengthy board, that could impale an operator or passenger, would be reasonably serious. The primary issue in the S&S analysis is whether the hazard contributed to by the violation was reasonably likely to result in an injury.

Bretzman was unable to determine how long the board, which had been covered at one time, had been exposed. Tr. III 167. Mine examiners who had passed through the area on previous shifts noted the muddy conditions and work being done to remedy those conditions. Ex. R-59 at 24-30. As Bretzman noted, AmCoal management was well aware of the importance that MSHA placed on compliance with the bridge board safeguard. Tr. III 167. Supervisors had passed through the area in conjunction with the shift change. The exposed board was obvious. It most likely was dislodged, or became exposed, as a result of the shift change traffic, and most likely would have been removed before or during the next examination, i.e., by the end of the shift. Consequently, the hazard would have existed for less than one shift.

Bretzman knew the miner who was killed in 1990, and he was familiar with the facts of that bridge board accident. Tr. III 151. It obviously was a major factor in his determination that the board could cause a fatal injury, because he was not aware of any other injuries occurring due to the presence of loose or dislodged bridge boards. Bretzman related that there have been incidents, including injuries, related to bolts,

pieces of wood and other debris being run over by mobile equipment. Tr. III 162. He had been struck by debris that had been run over by a vehicle he was riding in, although he did not suffer an injury resulting in lost work days. Tr. III 160, 173. He viewed the high volume of traffic as a significant consideration in determining that an injury was reasonably likely, because of the number of persons that would have been exposed to the hazard. Tr. III 177-78.

In general, there have been high volumes of traffic on most, if not all, of the Galatia mine's travelways. As noted above, hundreds of wooden bridges have been placed in wet and muddy areas, and mobile equipment has frequently dislodged pieces of lumber from those bridges. Yet, there have been no injuries attributable to loose and dislodged bridge boards in more than 20 years, with the exception of the 1990 incident.

As with the previous citation, considering the length of time that the violation had existed and would have continued to exist under normal continued mining operations, less than one shift, and the lengthy history of similar conditions having resulted in no injuries, I find that the hazard contributed to was unlikely to cause a lost work days injury and was not S&S.

Negligence

Bretzman rated AmCoal's negligence as moderate. However, he noted that he could have rated the negligence higher because the board was found at the beginning of the shift and supervisors had been through the area. Tr. III 161. The Secretary adds that AmCoal should have been on notice of a need for greater compliance efforts because of numerous citations for safeguard violations, including the issuance of two citations for violations of the bridge board safeguard within the past month.

If the dislodged board had been obvious when the area had been examined, or when supervisors passed through, AmCoal's negligence could well have been high. However, Bretzman could not determine when the board had become exposed. Tr. III 167. Consequently, there is insufficient evidence to support a finding that the examiner or other supervisors were highly negligent. It was noted on the citation that the general safeguard standard had been violated 67 times in the past 2 years. However, violations of the more than 20 safeguards in effect at the mine did not significantly enhance AmCoal's negligence with respect to this bridge board safeguard violation.

Nor do the citations for violations of the bridge board safeguard establish prior notice on the facts of this case, because they do not necessarily evidence a need for greater compliance efforts. Bridge boards can be broken loose, or previously dislodged bridge boards can be pushed to the surface, by any of the numerous pieces of heavy equipment using the travelways of the large Galatia mine. AmCoal's obligation under the safeguard is to re-secure or remove such boards, and it had taken substantial steps to meet its obligation, in the form of periodic training. MSHA's enforcement efforts, of

which AmCoal was well aware, further emphasized the need for compliance. Ramsey was unable to tell when the bridge boards he cited on July 19 and August 23, had been dislodged. While it is possible that he was not the first individual to have observed the boards, the areas had been examined not long before the citations were issued and no hazards were noted. In short, the presence of the bridge boards in the travelways, in itself, does not compel a conclusion that AmCoal should have done something more than it was doing to comply with the safeguard. Neither inspector identified additional measures that AmCoal should have employed to find and remove bridge boards.

The citation was based on the presence of one bridge board. That board could have been dislodged or brought to the surface shortly before Bretzman found it. It was visible for some period of time before it was found, but that time period is unknown. I find AmCoal's negligence to have been low to moderate.

The Appropriate Civil Penalties

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

Section 110(i) of the Mine Act grants the Commission the authority to assess all civil penalties provided under the Act. 30 U.S.C. § 820(i). It further directs that the Commission, in determining penalty amounts, shall consider:

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

30 U.S.C. § 820(i).

Under this clear statutory language, the Commission alone is responsible for assessing final penalties. *See Sellersburg Stone Co. v. FMSHRC*, 736 F.2d at 1151-52 (“[N]either the ALJ nor the Commission is bound by the Secretary’s proposed penalties . . . we find no basis upon which to conclude that [MSHA’s Part 100 penalty regulations] also govern the Commission.”). While there is no presumption of validity given to the Secretary’s proposed assessments, we have repeatedly held that substantial deviations from the Secretary’s proposed assessments must be adequately explained using the section 110(i) criteria. *E.g., Sellersburg Stone*, 5 FMSHRC at 293; *Hubb Corp.*, 22 FMSHRC 606, 612 (May 2000); *Cantera Green*, 22 FMSHRC at 620-21 (citations omitted). A judge need not make exhaustive findings but must provide an adequate explanation of how the findings contributed to his or her penalty assessments. *Cantera Green*, 22

FMSHRC at 622. In addition to considering the statutory criteria, the judge must also set forth a discernible path that allows the Commission to perform its review function. *See, e.g., Martin Co. Coal Corp.*, 28 FMSHRC 247, 261 (May 2006).

Although all of the statutory penalty criteria must be considered, they need not be assigned equal weight. *Thunder Basin Coal Co.*, 19 FMSHRC 1495, 1503 (Sept. 1997). Generally speaking, the magnitude of the gravity of a violation and the degree of operator negligence are important factors, especially for more serious violations for which substantial penalties may be imposed. *Musser Engineering*, 32 FMSHRC at 1289 (judge justified in relying on utmost gravity and gross negligence in imposing substantial penalty); *Spartan Mining Co.*, 30 FMSHRC 699, 725 (Aug. 2008) (appropriate for judge to raise a penalty significantly based upon findings of extreme gravity and unwarrantable failure); *Lopke Quarries, Inc.*, 23 FMSHRC 705, 713 (July 2001) (judge did not abuse discretion by weighing the factors of negligence and gravity more heavily than the other four statutory criteria).

Findings on Penalty Criteria

Good Faith - Operator Size - Ability to Continue in Business

The parties stipulated that AmCoal abated the violations timely and in good faith, and that the proposed penalties would not affect its ability to remain in business. Tr. 5-6. The parties did not stipulate to the size of AmCoal as an operator. However, forms reflecting calculations of penalty assessments were filed with the petitions and indicate that AmCoal is a very large operator, as is its controlling entity, and I so find. AmCoal's good faith abatement efforts should be considered a minor mitigating factor in the penalty assessment process. The fact that it is a very large operator and that the proposed penalties would not affect its ability to remain in business, while not aggravating factors, indicate that a penalty should be higher than that which would be imposed on a smaller operator.

History of Violations

AmCoal's history of violations is reflected in several exhibits. A report generated from MSHA's database, typically referred to as an "R-17" shows closed violations with a final order date between January 14, 2009 thru April 13, 2010. Ex. G-28. The report reflects that 889 violations became final in that time period, 135 of which were S&S, and 7 of which were specially assessed. Another report shows all violations issued between July 14, 2008 and July 14, 2010. Ex. G-30. Copies of some of the citations issued for roof and rib control violations were also introduced into evidence. Ex. G-29. I accept the figures reflected in the reports as accurate. However, the overall violation history is deficient in that it provides no qualitative assessment, i.e., whether the number of violations is high, moderate or low. *See Cantera Green*, 22 FMSHRC at 623-24.⁴⁶

⁴⁶ This is particularly disconcerting because, in denying Respondent's motion to compel, (continued...)

Qualitative violations' history information can be found on the forms reflecting calculations of the proposed assessments. The Secretary's Part 100 regulations for regular penalty assessments take into account two aspects of an operator's violation history, the "total number of violations and the number of repeat violations of the same citable provision of a standard in a preceding 15-month period." 30 C.F.R. § 100.3(c). Only violations that have become final are used in the calculations. For total violation history, points used in the penalty calculation are assigned on the basis of the number of violations per inspection day, ranging from 0 points for 0 to 0.3 violations per day to 25 points for in excess of 2.1 violations per day. Forms reflecting regular penalty assessments for three of the litigated violations in Docket No. LAKE 2011-184 reflect an assessment of 10 points for AmCoal's overall violation history.

I find that AmCoal's overall history of violations, as relevant to these violations, was moderate, and should be considered a neutral factor in the penalty assessment process.

Gravity - Negligence

Findings on gravity and negligence are set forth in the discussion of each violation.

The Secretary's Penalty Assessment Process – Special Assessments vs. Regular Assessments

The Secretary specially assessed penalties for seven of the litigated violations. The special assessments totaled \$161,200.00, which is 245% higher than the total of \$46,694.00 that would have resulted from the regular assessment process. AmCoal argues that the Secretary's secretive special assessment process arbitrarily subjects it to substantially enhanced penalties, and deprives it of due process. While, as explained below, AmCoal's arguments are ultimately unavailing because the Commission imposes civil penalties *de novo*, the Secretary's determination to specially assess a civil penalty has significant practical consequences. In AmCoal's words, "the large disparity between the proposed special assessments and what would have resulted under the regular assessment guidelines, make informal resolution of such matters almost impossible and make time consuming and costly trials much more likely." Rsp. Br. at 7.

In addition, Commission ALJs are obligated to explain any substantial divergence between a penalty imposed and that proposed by the Secretary. As explained in *Sellersburg Stone Co.*, 5 FMSHRC 287, 293 (Mar. 1983), *aff'd*, 736 F.2d 1147 (7th Cir. 1984):

When . . . it is determined that penalties are appropriate which substantially diverge from those originally proposed, it behooves that Commission and its judges to provide a sufficient explanation of the bases underlying the penalties

⁴⁶(...continued)

the absence of qualitative information in the typical violation history reports was highlighted, and the parties were instructed that the statutory penalty criteria should be regarded as substantive elements of their respective cases, and should not be treated as afterthoughts. Order Denying Motion to Compel, (November 15, 2012).

assessed by the Commission. If a sufficient explanation for the divergence is not provided, the credibility of the administrative scheme providing for the increase or lowering of penalties after contest may be jeopardized by an appearance of arbitrariness.

The lack of transparency in the Secretary's special assessment process, as discussed below, coupled with the Secretary's refusal to disclose the bases for specially assessing a penalty,⁴⁷ can frustrate attempted explanations. A review of the Secretary's penalty assessment procedures may assist in understanding problems that may be posed by special assessments.

Through notice and comment rulemaking, the Secretary has promulgated regulations specifying the "Criteria and Procedures for Proposed Assessment of Civil Penalties." 30 C.F.R. Part 100. Those regulations provide two options for determining the amount of a civil penalty to be assessed by the Secretary, regular assessment and special assessment. 30 C.F.R. §§ 100.3, 100.5(a), (b). Penalties for the vast majority of violations are determined through the "regular assessment" process, whereby penalty points are assigned pursuant to criteria and tables that reflect the factors specified in sections 105(b) and 110(i) of the Act.⁴⁸ 30 C.F.R. §100.3. Under the regulations, penalty points are assigned based on the size of the operator and the operator's controlling entity; the operator's history of previous violations; the operator's history of repeat violations of the same standard; the degree of the operator's negligence; and, the gravity of the violation, including the likelihood of an occurrence of an event against which a standard is directed, the severity of injury or illness if the event were to occur, and the number of persons potentially affected if the event were to occur. A penalty amount is determined by applying the total of the points assigned to a "Penalty Conversion Table," which specifies penalties ranging from \$112.00 for 60 or fewer points, up to the statutory/regulatory maximum of \$70,000.00 for 144 or more points. That figure may then be adjusted by reducing it by 10% if the operator demonstrated good faith in abating the violation. 30 C.F.R. §100.3(f). A further reduction may

⁴⁷ Operators frequently seek production of documents used in the special assessment process, specifically the "Special Assessment Review Form ("SARF")," which contains the issuing inspector's recommendation as to the appropriateness of a special assessment and his reasons therefore, as well as the recommendations of supervisors up the chain of command. The Secretary consistently objects to production on grounds of relevance and deliberative process privilege. As noted in an order denying a motion to compel production of SARFs, Commission Judges have split on whether the forms are discoverable. *Big Ridge, Inc.*, 34 FMSHRC ___, Order Denying Respondent's Motion to Compel, (November 9, 2012) (ALJ). AmCoal's motion to compel production of SARFs in these cases was denied. Order Denying Motion to Compel (November 15, 2012).

⁴⁸ A report reflecting AmCoal's history of violations showed that 889 violations had become final during the pertinent period, 865 of which had been regularly assessed. Ex. G-28. An additional 17 violations had received small "single penalty" assessments, an option no longer available.

occur if the operator can demonstrate to MSHA's District Manager that the penalty will adversely affect its ability to continue in business. 30 C.F.R. §100.3(h).

The regulations also provide that MSHA may elect to waive the regular assessment process if it determines that conditions warrant a special assessment. 30 C.F.R. §100.5(a), (b). The regulations do not further explain what conditions may warrant a special assessment.⁴⁹ Nor do they identify how the amount of a special assessment will be determined, other than to state that "the proposed penalty will be based on the six criteria set forth in 100.3(a). All findings shall be in narrative form." *Id.* The narrative findings for special assessments are typically brief and conclusory. They include a reference to the gravity of the violation, e.g., "serious," the negligence of the operator, e.g., "high," and relate that "[b]ased on the six criteria set forth in 30 CFR 100.3(a) and the information available to the Office of Assessments, it is proposed that" the operator be assessed the following civil penalty. *E.g.* Ex. R-13. Additional information can be gleaned from a "Special Assessment Narrative Form," which reflects a calculation of both a regular assessment and the special assessment for a violation. Both calculations follow the format of the regular assessment process, except that additional points are assigned in the special assessment for gravity and negligence factors.⁵⁰ The resulting penalty points totals are then compared to the Penalty Conversion Table. A range for a proposed special assessment is established by adding and subtracting 25% from the table result, and the proposed special assessment is selected from within that range. For example, the special assessment calculation for Citation No. 8423567 resulted in a penalty point total of 128, for which the table specified a penalty of \$25,810. The range for the special assessment was \$19,300 to \$32,200, and the proposed special assessment was \$25,800. A regular assessment for the violation was calculated as \$7,579. Ex. R-14.

Method for Determining the Amount of Penalties for the Litigated Violations

The purpose of explaining significant deviations from proposed penalties is to avoid the appearance of arbitrariness. Similarly situated operators, determined to be liable for violations of similar gravity, negligence and other penalty criteria, ideally should not be assessed significantly different penalties. Absent some guideline, however, a judge has no quantitative reference point to aid in specifying a penalty within the current statutory/regulatory range of \$1.00 to \$70,000.00. The Secretary's regulations for determination of a penalty amount by a regular assessment,

⁴⁹ In 2007, the Secretary substantially amended the penalty regulations, significantly increasing penalties for most violations, eliminating the single penalty assessment, and deleting language from section 105(a) that specified eight categories of violations "that would be reviewed to determine whether a special assessment is appropriate," including, "[v]iolations involving an extraordinarily high degree of negligence or gravity or other unique aggravating circumstances." Ex. R-36, *30 C.F.R. Part 100 Final Rule*, 72 Fed. Reg. 13,592, 13,621 (March 22, 2007).

⁵⁰ There is also a slight difference in treatment of the good faith abatement factor.

30 C.F.R. §100.3, take into consideration all of the statutory factors that the Commission is obligated to consider under section 110(i) of the Act. The product of that regular assessment formula provides a useful reference point that would promote consistency in the imposition of penalties by Commission judges.⁵¹

Accordingly, in determining penalties for the litigated violations, the penalty produced by application of the Secretary's regular assessment formula will be used as a reference point, and adjusted depending on the particular findings with respect to the statutory penalty criteria. The tables and charts in the regulations provide a limited number of categories for some factors. For example, the table for operator's negligence consists of five gradations, ranging from "No negligence" to "Reckless disregard." 30 C.F.R. §100.3(d). In reality, however, the degree of an operator's negligence will fall on a continuum, dictating that adjustments will generally be required. Other unique circumstances may dictate lower or higher penalties. Violations involving "extreme gravity" and/or "gross negligence," or, as stated in the former section 105(a), "an extraordinarily high degree of negligence or gravity, or other unique aggravating circumstances," may dictate substantially higher penalty assessments. A party seeking a reduced or an enhanced penalty must assume the burden of producing evidence sufficient to justify any requested adjustment. Where the Secretary urges a penalty higher than that derived by reference to the regular assessment process, e.g., a higher penalty resulting from the special assessment process, he will have the burden of establishing the appropriateness of the higher penalty, based upon the statutory penalty criteria.

In conclusion, whether the Secretary proposes a regularly or a specially assessed penalty is not relevant to the Commission's determination of a penalty amount. While AmCoal's arbitrariness and due process arguments are unavailing,⁵² its concerns about the practical implications of the Secretary's determination to specially assess a violation, especially when the assessment is not based upon extreme gravity and/or gross negligence, are well founded, as evidenced by these proceedings.

⁵¹ See *Magruder Limestone Co., Inc.*, 35 FMSHRC ___ (May 21, 2013) (ALJ) (slip op. at 27) (regular assessment regulations provide a helpful guide for assessing an appropriate penalty that can be applied consistently).

⁵² AmCoal argued that the absence of criteria specifying what violations would be specially assessed, and how special assessments would be determined, renders the special assessment process impermissibly vague in violation of the due process clause, citing *FCC v. Fox Television Station, Inc.*, 132 S.Ct. 2307, 2317 (2012). It also argued that the process cannot pass muster under the Commission's reasonably prudent person test, described in *Lanham Coal Co.*, 13 FMSHRC 1341, 1343-44 (Sept. 1994). However, as the Secretary pointed out, the *FCC* and *Lanham* cases involved substantive standards, not penalties, and AmCoal did not challenge the language of any of the mandatory standards.

Docket No. LAKE 2011-183

Citation No. 8424958

Citation No. 8424958 alleged a violation of the roof and rib control standard, that was reasonably likely to result in a lost work days injury to one person, was S&S and the result of AmCoal's moderate negligence. AmCoal withdrew its contest to the citation and special findings, and challenged only the amount of the penalty. A specially assessed civil penalty in the amount of \$7,700.00 was proposed for this violation.⁵³ Ex. R-13. The calculation of the proposed special assessment is set forth on a Special Assessment Narrative Form. Ex. R-14. That form also demonstrates that a penalty of \$2,282.00, would have been assessed under the regular assessment formula contained in the Secretary's Part 100 regulations, 30 C.F.R. Part 100.

In proposing an enhanced penalty, the Secretary argues, in essence, that the gravity of the violation was more serious and AmCoal's negligence was higher than charged in the citation. In addition, he contends that the imposition of higher penalties is warranted to discourage AmCoal's "knowingly passive" approach to addressing particular hazards that repeatedly occur. As noted previously, Reynolds' testimony on the gravity of the violation varied somewhat from what he had recorded in his contemporaneous notes. He testified that the condition presented a hazard of rocks falling from the roof and, since the area was "heavily traveled" there was an "increased risk to that many miners." Tr. II 31-35. In contrast, his notes reflect that most traffic bypassed the area, one person, the material man, was identified as being affected by the violation, and that miners traveled the area "at least once per shift," observations more consistent with the assessment of gravity in the citation. Ex. G-32.

This violation involves neither extreme gravity, nor gross negligence, factors that have justified imposition of substantial penalties in other cases. Nor has the Secretary presented evidence sufficient to justify a finding that AmCoal demonstrated a knowingly passive approach to addressing known hazards.⁵⁴ As noted above, however, the inspector's determination of

⁵³ In March 2010, MSHA implemented a Rules to Live By program ("RTLB") that placed increased enforcement emphasis on certain standards that had been more frequently cited in fatal accident investigations from 2000 - 2008. Ex. G-31. Under the RTLB program, violations of the subject standards were to be reviewed for possible special assessment of penalties. Because section 75.202(a) was one of "those standards for increased attention," Reynolds prepared and forwarded a Special Assessment Review Form, and the violation was ultimately specially assessed. Tr. II 8. AmCoal's motion to compel production of the SARF over the Secretary's objection on grounds of deliberative process privilege and relevance was denied.

⁵⁴ MSHA's violation history report shows that 69 roof/rib control violations became final in the pertinent 15-month period, six of which involved high negligence. AmCoal notes that the Secretary's penalty assessment regulations provide for enhanced penalties for repeat (continued...)

moderate negligence was conservative. Damage to the bolts most likely occurred over a considerable period of time. While additional bolts were most likely added to compensate for some of the damaged bolts, the area clearly presented ongoing roof control issues and should have been closely examined, especially because it was immediately adjacent to a significant prior roof fall.

Considering the factors enumerated in section 110(i) of the Act, and guided by the Secretary's regulations governing regular assessments, I impose a penalty in the amount of \$4,500.00 for this violation.

Citation No. 7575299

Citation No. 7575299 alleged a violation related to exposed electrical conductors on a power cable in the bottom maintenance shop, that was reasonably likely to result in a fatal injury to one miner, and was attributable to AmCoal's high negligence. AmCoal withdrew its contest to the violation and the findings on gravity. It challenged the negligence determination and the amount of the penalty. AmCoal's negligence was found to be moderate, rather than high. A specially assessed civil penalty of \$47,000.00 was proposed by the Secretary. In contrast, a penalty of \$14,334.00 would have been proposed if the violation had been regularly assessed. Ex. R-14.

The Secretary argues that the extreme levels of gravity and negligence warrant heightened penalties. The gravity of the violation was very serious, but not extreme. AmCoal's negligence was moderate. These factors, alone, or in combination, are not comparable to those found to have justified substantial enhancements of penalties in the cases cited above. If the assessment calculations are adjusted to reflect moderate negligence, the result would be a special assessment of approximately \$14,743.00, and a regular assessment of \$4,329.00. Both calculations include a significant enhancement for the serious gravity of the violation. They are 232% higher than if the reasonably likely injury would have resulted in lost work days rather than a fatality. Considering the factors enumerated in section 110(i) of the Act, and guided by the Secretary's regulations governing regular assessments, I impose a penalty in the amount of \$7,500.00. Citation No. 7575300

Citation No. 7575300 alleged a violation of a safeguard that required that travelways be kept as free as practicable from wet and muddy conditions that could affect control of mobile equipment. It was alleged that the violation was reasonably likely to result in a lost work days injury to three miners, and was attributable to AmCoal's high negligence. AmCoal's challenge to the violation was rejected. However, it was found that the violation was unlikely to result in an injury, was not S&S, and that AmCoal's negligence was moderate, rather than high. A

⁵⁴(...continued)

violations, and that 8 penalty points were assigned for repeat violations in both the regular and special assessment calculations. Ex. R-14. That factor produced an increase of 90% in both the regular and special assessment calculations.

specially assessed civil penalty of \$25,800.00 was proposed by the Secretary. A penalty of \$6,997.00 would have been proposed if the violation had been regularly assessed. Ex. R-14. Applying the reductions in the level of gravity and negligence would produce a penalty in the range of \$425.00 under the Secretary's Part 100, regular assessment regulations. The relatively low gravity of the violation and the moderate level of negligence would not justify a substantially enhanced penalty. The Secretary argues that a substantial penalty is necessary to prompt AmCoal to address such conditions, which it "has the means and ability to avoid." Sec'y. Rp. Br. at 8. Such considerations are essentially reflected in the analysis of AmCoal's negligence with respect to the violation. It employed several measures to address the chronic conditions, most sanctioned by the MSHA inspector who wrote the citations. As to other possible actions, the Secretary did not establish that AmCoal had knowledge of the conditions sufficiently in advance to have effectively employed such measures. Upon consideration of the above, and the factors enumerated in section 110(i) of the Act, I impose a penalty in the amount of \$2,000.00.

Citation No. 7575301 also alleged a violation of the wet, muddy travelway safeguard that was reasonably likely to result in a lost work days injury to two miners, and was attributable to AmCoal's high negligence. AmCoal's challenge to the violation was rejected, and it was found that the violation was unlikely to result in an injury, was not S&S, and that AmCoal's negligence was moderate, rather than high. A specially assessed civil penalty of \$21,900.00 was proposed by the Secretary. A penalty of \$ 5,962.00 would have been proposed if the violation had been regularly assessed. Ex. R-14. Applying the reductions in the level of gravity and negligence would produce a penalty in the range of \$363.00 under the Secretary's Part 100, regular assessment regulations. The relatively low gravity of the violation and the moderate level of negligence would not justify a substantially enhanced penalty. Considering the factors enumerated in section 110(i) of the Act, I impose a penalty in the amount of \$1,500.00.

Citation No. 8423567 alleged a violation of the rib and roof control standard that was reasonably likely to result in a lost work days injury to one miner, and was attributable to AmCoal's high negligence. AmCoal did not challenge the violation. It was found that the violation was unlikely to result in an injury, was not S&S, and that AmCoal's negligence was low to moderate, rather than high. A specially assessed civil penalty of \$25,800.00 was proposed by the Secretary. A penalty of \$7,579.00 would have been proposed if the violation had been regularly assessed. Ex. R-14. Applying the reductions in the level of gravity and negligence would produce a penalty in the range of \$309.00 under the Secretary's Part 100, regular assessment regulations.

The Secretary urges the imposition of substantially enhanced penalties for this violation based upon the high negligence allegation and the overarching "deterrence" theme, i.e., to discourage AmCoal from taking a "wait and see" approach to known problems. As noted above, however, AmCoal's negligence was found to be low to moderate, in part, because the examination records showed that hazardous rib conditions were being identified, reported and addressed. The low to moderate level of negligence, and the relatively low level of gravity, would not justify a substantially enhanced penalty. Considering the reductions in the level of

negligence and gravity, and the factors enumerated in section 110(i) of the Act, I impose a penalty in the amount of \$1,000.00.

Docket No. LAKE 2011-184

Citation No. 8424040 alleged a violation of the standard requiring that bathing facilities, change rooms, and sanitary toilet facilities be maintained in clean and sanitary condition. It was alleged that the violation was reasonably likely to result in lost work days injuries to 10 miners, that the violation was S&S, and that AmCoal's negligence was high. However, the violation was found to have been unlikely to result in an injury to one miner, it was not S&S, and AmCoal's negligence was moderate. A regularly assessed civil penalty of \$15,570.00 was proposed by the Secretary. Applying the reductions to the gravity and negligence factors in the Secretary's regular assessment calculation would result in a penalty in the range of \$243.00. Considering the above, and the factors enumerated in section 110(i) of the Act, I impose a penalty in the amount of \$500.00.

Citation No. 8427602 involved a miner's failure to wear protective goggles when using a torch to cut metal rods. The violation was alleged to be S&S, reasonably likely to result in a permanent injury, and the result of AmCoal's high negligence. A regularly assessed civil penalty of \$5,961.00 was proposed by the Secretary. The violation was found not to be S&S, unlikely to result in a permanent injury, and that AmCoal's negligence was low to moderate. Those findings would result in a penalty in the range of \$243.00 under the Secretary's regular assessment regulations. Considering the factors enumerated in section 110(i) of the Act, I impose a penalty in the amount of \$500.00.

Citation No. 8426154 alleged a violation of the safeguard standard, specifically the safeguard requiring the removal of loose and dislodged pieces of bridging lumber from travelways. It was alleged that the violation was reasonably likely to result in a fatal injury to one miner, that it was S&S, and that AmCoal's negligence was moderate. A regularly assessed civil penalty of \$5,080.00 was proposed for this violation. However, it was found that the violation was unlikely to result in a lost work days injury, and that it was not S&S. Those findings would result in a penalty in the range of \$309.00 under the Secretary's regular assessment regulations. Considering the factors enumerated in section 110(i) of the Act, I impose a penalty in the amount of \$500.00.

DOCKET NO. LAKE 2011-242

Citation No. 8424517 also alleged a violation of the bridging lumber safeguard, that was reasonably likely to result in a fatal injury, was S&S and that AmCoal's negligence was moderate. A specially assessed civil penalty of \$18,700.00 was proposed for this violation. Ex. R-30. If the violation had been regularly assessed, the proposed penalty would have been \$5,504.00. Ex. R-31. There is no explanation in the record as to why this citation was specially assessed, whereas Citation No. 8426154, which alleged a violation of the same standard and reflects the same gravity and negligence determinations, was not. The SARF for this violation,

which was apparently mistakenly filed along with the petition, lends support to AmCoal's arbitrary assessment argument. The "serious or aggravating circumstances" asserted to justify the inspector's recommendation for a special assessment consisted of "[t]his mine has been cited 67 times for violation of this standard/safeguard. The mine has also experienced a fatality resulting from the condition cited." This is somewhat misleading, because the 67 violations were not of the bridging lumber safeguard, but were violations of the general safeguard standard, i.e., any of over 20 safeguards in effect at the mine. While there was a fatality due to a bridgeboard, it occurred in 1990, under conditions that were dissimilar to those cited, and the fact that there have been no injuries since 1990 attributable to bridge boards is not mentioned. The violation was found to be unlikely to result in a lost work days injury and was not S&S. Those findings would result in a penalty in the range of \$335.00 under the Secretary's regular assessment regulations. Considering the factors enumerated in section 110(i) of the Act, I impose a penalty in the amount of \$500.00.

ORDER

Citation No. 8423568 is **VACATED**. Citation No. 8424958 is **AFFIRMED**. Citation Nos. 7575299, 7575300, 7575301, 8423567, 8424040, 8427602, 8426154 and 8524517 are **AFFIRMED as modified**. Respondent is **ORDERED** to pay civil penalties in the total amount of \$18,500.00 within 45 days.

/s/ Michael E. Zielinski
Michael E. Zielinski
Senior Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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June 13, 2013

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 2010-1727
Petitioner,	:	A.C. No. 05-04591-228196-01
	:	
v.	:	Docket No. WEST 2011-278
	:	A.C. No. 05-04591-237614-01
	:	
BOWIE RESOURCES, LLC,	:	
Respondent	:	Bowie No. 2 Mine

DECISION

Appearances: Jeffrey M. Leake, 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

These cases are before me upon petitions for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration (“MSHA”), against Bowie Resources, LLC (“Respondent” or “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 “Act” or “Mine Act”). The parties introduced testimony and documentary evidence at a hearing held in Glenwood Springs, Colorado, and filed post-hearing briefs.

Bowie operates the Bowie No. 2 Mine in Delta County, Colorado. Two section 104(a) citations were adjudicated at the hearing and four citations were settled at the hearing. The Secretary proposed a total penalty of \$23,500.00 for the two citations that were adjudicated.

I. BASIC LEGAL PRINCIPLES

A. Significant and Substantial

The Secretary alleges that the violations discussed below were of a significant and substantial (“S&S”) nature. An S&S violation is a violation “of such nature as could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard.” 30 U.S.C. § 814(d) (2006). A violation is properly designated S&S, “if, based upon the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature.” *Cement Div., Nat’l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981). In order to establish the S&S nature of a violation, the

Secretary must prove: “(1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard – that is, a measure of danger to safety – contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury will be of a reasonably serious nature.” *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984); *accord Buck Creek Coal Co., Inc.*, 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power Co., Inc.*, 861 F. 2d 99, 103 (5th Cir. 1988) (approving *Mathies* criteria).

It is the third element of the S&S criteria that is most difficult to apply. The element is established only if the Secretary proves “a reasonable likelihood the hazard contributed to will result in an event in which there is an injury.” *U.S. Steel Mining Co., Inc.*, 7 FMSHRC 1125, 1129 (Aug. 1985). An S&S determination must be based upon the particular facts surrounding the violation and must be made in the context of continued normal mining operations. *Texasgulf, Inc.*, 10 FMSHRC 498, 500 (Apr. 1988) (quoting *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574 (July 1984)). “The Secretary need not prove a reasonable likelihood that the violation itself will cause injury.” *Cumberland Coal Resources, LP*, 33 FMSHRC 2357, 2365 (Oct. 2011) (citing *Musser Engineering, Inc. and PBS Coals, Inc.* 32 FMSHRC 1257, 1281 (Oct. 2010)).

The S&S nature of a violation and the gravity of a violation are not synonymous. The Commission has pointed out that the “focus of the seriousness of the violation is not necessarily on the reasonable likelihood of serious injury, which is the focus of the S&S inquiry, but rather on the effect of the hazard if it occurs.” *Consolidation Coal Co.*, 18 FMSHRC 1541, 1550 (Sept. 1996). The Commission has emphasized that, in accordance with the language of section 104(d)(1), 30 U.S.C. § 814(d)(1), it is the contribution of a violation to the cause and effect of a hazard that must be S&S. *U.S. Steel Mining Co.*, 6 FMSHRC at 1575. With respect to citations or orders alleging an accumulation of combustible materials, the question is whether there was a confluence of factors that made an injury-producing fire and/or explosion reasonably likely. *UP&L*, 12 FMSHRC 965, 970-71 (May 1990). Factors that have been considered include the extent of the accumulation, possible ignition sources, the presence of methane, and the type of equipment in the area. *UP&L*, 12 FMSHRC at 970-71; *Texasgulf*, 10 FMSHRC at 500-03.

B. Negligence

The Secretary defines conduct that constitutes negligence under the Mine Act as follows:

Negligence is conduct, either by commission or omission, which falls below a standard of care established under the Mine Act to protect miners against the risks of harm. Under the Mine Act, an operator is held to a high standard of care. A mine operator is required to be on the alert for conditions and practices in the mine that affect the safety or health of miners and to take steps necessary to correct or prevent hazardous conditions or practices. The failure to exercise a high standard of care constitutes negligence.

30 C.F.R. § 100.3(d).

II. DISCUSSION WITH FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Citation No. 8470097; WEST 2010-1727

On May 26, 2010, MSHA Inspector Brad Allen issued Citation No. 8470097 under section 104(a) of the Mine Act, alleging a violation of section 75.1725(c) of the Secretary's safety standards. The citation states, in part:

The mine operator failed to ensure that repairs or maintenance shall not be performed on machinery until the power is off and the machinery is blocked against motion. . . . [T]his inspector observed a miner standing in the conveyor of the [Stamler feeder breaker] removing wire from the pick breaker while the power was energized (as evidenced by discussion with the miner who stated the machine was not locked out, but the breaker on the machine was kicked and the switch (conveyor) was turned off). Neither of these switches were visible from the miner's position at the pick breaker and neither provided means to prevent turning the switches on. . . .

(Ex. G-21). Inspector Allen determined that an injury was reasonably likely to occur and that such an injury could reasonably be expected to be fatal. Further, he determined that the violation was S&S, the operator's negligence was moderate, and that one person would be affected. Section 75.1725(c) of the Secretary's safety standards provides that "[r]epairs or maintenance shall not be performed on machinery until the power is off and the machinery is blocked against motion" 30 C.F.R. § 75.1724(c). The Secretary proposed a penalty of \$7,100.00 for this citation under his special assessment regulation. 30 C.F.R. § 100.5.

1. Summary of Evidence

At the time of the inspection, Inspector Allen observed a miner performing maintenance inside of a Stamler feeder breaker. (Tr. 128). The miner was in a bent-over position cutting wire off the pick breaker. *Id.* Inspector Allen testified that a feeder breaker is a large machine that feeds coal into a pick breaker which crushes the coal. *Id.* After talking with the miner, the inspector learned that the power at the circuit breaker was off and the conveyor switch was neutral, but the pick breaker on the feeder breaker was not locked and tagged out. (Tr. 134).

The inspector testified that the citation was S&S because there was a reasonable likelihood of significant injury. (Tr. 145, Ex. G-22). The inspector believed that it would be easy for a miner to start a feeder breaker not blocked against motion while another miner was performing maintenance on the machine. (Tr. 138). Once the feeder breaker is energized and a miner is working inside the machine there is reasonable likelihood that the miner will be fatally entangled. (Tr. 136). Inspector Allen indicated that locking out and tagging out the feeder breaker would remove the possibility that anyone else could start the machine and it would block it against motion. *Id.*

The inspector testified that the efforts of the miner to prevent the pick breaker from being turned on were a mitigating factor and the mine operator's negligence was moderate. (Tr. 146; Ex. G-22).

Christopher Solaas was the miner performing maintenance on the pick breaker when the citation was issued. (Tr. 167). Mr. Solaas testified that he did not lock out and tag out the pick breaker because he was not doing electrical work. (Tr. 170). Mr. Solaas believed that he effectively blocked the equipment against motion due to the precautionary measures he took and the photo eyes mounted on the feeder breaker that prevented the pick breaker from running continuously. (Tr. 173-174). Mr. Solaas asserted that locking out and tagging out a piece of equipment simply prevents miners from using that equipment. (Tr. 182).

2. Summary of the Parties' Arguments

The Secretary argues that Respondent violated section 75.1725(c) because a miner performed maintenance on a pick breaker when the feeder breaker was not blocked against motion. The Secretary cites the standard which requires that repairs or maintenance shall not be performed on machinery until the power is off and the machinery is blocked against motion. (Sec'y Br. 14). Inspector Allen issued a citation when he observed a miner performing maintenance on a pick breaker that was not blocked against motion. *Id.*

The Secretary further asserts that the violation was S&S because it met the four elements of the *Mathies* standard. There was a violation of section 75.1725(c), the violation exposed the miner to a discrete safety hazard of fatal entanglement, and there was a reasonable likelihood of injury because it would be relatively easy for another miner to inadvertently start the feeder breaker while the miner in question was performing maintenance inside the pick breaker. (Sec'y Br. 18). Inspector Allen testified that there were a number of different ways that the feeder breaker could be turned on and fatally entangle a miner performing maintenance on the pick breaker. *Id.*

The Secretary maintains that the violation was the result of Respondent's moderate degree of negligence. (Sec'y Br. 20-21). The Secretary believes that the miner took remedial measures to ensure that the feeder breaker could not be turned on, but the mine operator had notice of MSHA's stringent protocols in regard to blocking the machine against motion. *Id.*

Respondent argues that no violation of section 75.1725(c) occurred because the cited standard does not require power to be locked and tagged out. (Bowie Br. 6). Respondent believes that the cited standard only requires that the power be off. *Id.* If the standard required lock out/tag out procedures, it would have used those terms. *Id.* Mr. Solaas indicated that the feeder breaker was deenergized because the circuit breaker was pulled and the selector switch was in an off position. (Bowie Br. 7-8).

Respondent also maintains that lock out/tag out procedures can be required for electrical work, but such procedures have no application to blocking machinery against motion. (Bowie Br. 7). Certain MSHA regulations specifically require lock out/tag out for electrical work. *Id.* Respondent states that it is undisputed that the miner was not performing electrical work on the feeder. *Id.*

Respondent contends that the court should reject the Secretary's argument that turning off the power was insufficient to block against motion. (Bowie Br. 9). Respondent contends that such interpretation is contrary to the language of the Secretary's Program Policy Letter ("PPL"). *Id.* Respondent relies upon numbered paragraph one in the PPL, which suggests different ways to block the motion of machinery. (Ex. G-24 at 2). Respondent maintains that because the miner undertook protective measures to block the motion of the machine as described in the PPL, the citation should be vacated.

3. Discussion and Analysis

I find that Citation No. 8470097 was a violation of section 75.1725(c) because a miner performed maintenance on a pick breaker when the feeder breaker was not blocked against motion. The inspector observed a miner in a bent-over position, who was not visible from any direction except from the hopper end, cutting wire off the pick breaker. The miner was performing maintenance when cutting and removing wire from the pick breaker.

Although the miner turned off the circuit breaker and the conveyor switch on the machine was in neutral, the feeder breaker was not blocked against motion. I credit the inspector's testimony that Bowie violated the safety standard because the only way to block the feeder breaker against motion was to lock out the machine. (Tr. 136). The machine was not blocked against motion because the miner only opened the circuit breaker and put the conveyor switch in neutral. Such actions did not "block" the machine from motion. *Id.* Some machinery that is locked out could still injure a miner based upon the forces of gravity or stored mechanical energy, but in this case locking out the feeder breaker would effectively block all motion.¹

Respondent argued that section 75.1725(c) only requires machinery to be deenergized and blocked against motion, but not locked out and tagged out. Respondent relied upon *Island Creek Coal Co.*, where the Commission, in a split decision, let the judge's dismissal of a citation stand and held that the standard requires that machinery be blocked against motion, but not locked out and tagged out, which is covered by an electrical standard. 22 FMSHRC 823,825 (July 2000). The *Island Creek* decision is distinguishable from this case because the Secretary is not arguing that the safety standard requires that machinery be locked out, but argues that under the facts presented here locking out the feeder breaker was the only option available to prevent the movement of the pick breaker in the feeder. In *Island Creek Coal Co.*, the Secretary argued that locking and tagging out a machine was an integral requirement of 75.1725(c). In this case, however, the Secretary argued that by failing to lock out and tag out the feeder, Respondent had not blocked the machine against motion. Indeed, former Commissioner Verheggen stated in *Island Creek* that the Secretary "could simply have argued before the judge that the operator violated section 75.1725(c) because it failed to block the belts against motion, [but he] chose instead to erroneously argue that the 'blocked against motion' requirement was equivalent to a 'lock and tag out' requirement developed for electrical work." 22 FMSHRC at 833. Thus, because another miner could have closed the circuit breaker and activated other switches to start

¹ For example, locking out a machine that uses hydraulics or compressed air may not block components of that machine against motion. In such an instance other blocking devices would be required.

the machine in this case, Respondent had not blocked the feeder breaker against motion.² The standard requires that the operator do more than simply stop, shut down, or deenergize machinery before maintenance is performed; it requires the operator to affirmatively *block* the machinery against motion. The Secretary's PPL does not change that requirement.

I find that the Secretary did not establish that the violation was S&S. Although the Secretary established the first two elements of the *Mathies* test, evidence presented by Bowie shows that an injury was unlikely. In order for the feeder breaker to start moving, several steps would have been necessary. A miner would have needed to activate several different switches. In most instances, the belt would have to be started at the same time unless the feeder was operated in manual mode. (Tr. 183, 191-92). It was highly unlikely that anyone would take such actions and it is also unlikely that if someone did try to start the feeder that Mr. Solaas would not have noticed. One of the switches that required activation was on the feeder near Solaas. While it was possible that all these steps could be completed while Solaas was in the feeder, it was highly unlikely.

I find that the gravity was serious because, if the feeder were activated, Solaas would have received very serious injuries and such injuries could have been fatal. I find that the violation was a result of Respondent's moderate negligence. The cited violation posed a dangerous hazard to the miner performing maintenance on the pick breaker and the operator should have known that more was required to block the motion of this machine.

The citation is hereby **MODIFIED** to a non-S&S violation of section 75.1725(c). A penalty of \$2,000.00 is appropriate for this violation.

B. Citation No. 8470076; WEST 2011-278

On May 3, 2010, Inspector Allen issued Citation No. 8470076 under section 104(a) of the Mine Act, alleging a violation of section 75.220(a)(1) of the Secretary's safety standards. The citation states, in part:

² Commission Judge McCarthy recently issued a decision that included an excellent discussion of the problems the Secretary has created for himself when citing an electrical standard in situations where it does not apply. In that case, the Secretary attempted to use an electrical standard (section 56.12016) to protect miners from hazards presented by the movement of mechanical parts while equipment is being repaired. *MacGruder Limestone Company, Inc.*, 35 FMSHRC ___, slip op. at 15-18, No. CENT 2010-1256-M (May 21, 2013). Judge McCarthy, following decades of precedent, vacated the citation because the cited safety standard protects miners against the dangers of electric shock and electrocution while maintenance is being performed rather than the hazard of becoming entangled in the moving parts of equipment. *Id.* The instant case is different, however, because section 75.1725 is not an electrical safety standard but was drafted to require that machine parts be blocked to prevent movement. Although section 75.1725 does not require that equipment be locked out or tagged out when maintenance is performed, it does require that machinery be blocked against motion and, under the facts of this case, the only way that motion can be affirmatively blocked is by attaching a lock on the breaker for the feeder.

The mine operator failed to follow page 20 of the roof control plan, approved by the District Manager. The Continuous Mining Machine operator in the 1st West active mining section . . . cutting coal in the #3 face inby crosscut 17 did not observe the “Red Zone” safety precautions. This Inspector observed the continuous Mining Machine Helper approach the remote controlled Joy Continuous Mining Machine . . . while backing away from the face and the operator failed to stop the machine. A brief period after, the Continuous Mining Machine Operator and helper as well as the safety person were standing near the bumper, inby the tail of the machine and the operator started the continuous mining machine pump motor and was preparing to tram inby, endangering himself and two other miners. This creates a crushing hazard to miners.

(Ex. G-2). Inspector Allen determined that an injury was highly likely to occur and that such an injury could reasonably be expected to be fatal. Further, he determined that the violation was S&S, the operator’s negligence was moderate, and that three persons would be affected. Section 75.220(a)(1) of the Secretary’s regulations requires operators to “develop and follow a roof control plan, approved by the District Manager, that is suitable to the prevailing geological conditions and the mining system to be used at the mine.” 30 C.F.R. § 75.220(a)(1). The Secretary proposed a penalty of \$16,400.00 for this citation under her special assessment regulation. 30 C.F.R. § 100.5.

1. Summary of Evidence

On May 3, 2010, Inspector Brad Allen issued Citation No. 8470076 as a violation of section 75.220(a)(1) because several miners entered the “red zone” while the continuous mining machine “CMM” was in operation, which the Secretary contends violates the mine’s roof control plan. (Tr. 19, Ex. G-2). The red zone is often called the “danger area” or “danger zone.”

Inspector Allen walked into the No. 3 face and, from 100 feet away, observed the CMM operator backing the machine away from the face. (Tr. 21). Inspector Allen testified that he observed the continuous mine helper “CMH” approach the CMM to retrieve the miner cable as the CMM backed out of the face. *Id.* By approaching the CMM, as it was in operation, the CMH had entered the red zone. *Id.* Inspector Allen continued walking toward the CMM, where he observed the CMM operator stopping the machine. (Tr. 26). He then observed the CMM operator, the CMH, and a Bowie safety manager standing near the bumper of the machine. *Id.* The Inspector testified that the three miners were positioned in a small space, approximately 4 to 5 feet wide, between the CMM and the rib wall. (Tr. 28). Inspector Allen was standing 20 feet from the CMM when the CMM operator began tramping, or actually moving the CMM, while all three miners were positioned in that same area. (Tr. 30).

The inspector testified that the citation was S&S because the cited violation was reasonably likely to cause a serious injury. (Tr. 63). He marked the location of the CMM operator, the CMH, and the Bowie safety manager in relation to the CMM in Government Exhibit 6, which shows the miners in an area that he designated as a red zone. (Tr. 24-26, Ex. G-6). He testified that the red zone is a dangerous area whenever the CMM is in operation. (Tr. 67). The inspector issued the citation because any miner that is in a red zone while the CMM is

in operation violates the roof control plan. *Id.* Inspector Allen indicated that the roof control plan required that “during mining and place changing cycles” all employees must be under permanent roof support and not exposed to sudden movement of the mining equipment or other pinch points. (Tr. 33, Ex. G-3).

The inspector designated this citation as fatal because the violation of the roof control plan exposed the miners to pinch points around the CMM. (Tr. 67, Ex. G-2). He believed that the position of the miners while the CMM was in operation would expose them to sudden movement and that they could be crushed between the CMM and the rib. (Tr. 34). Inspector Allen determined that the violation resulted from the mine operator’s moderate negligence. (Ex G-2). He believed that the way the CMM operator was running the machine near the two other miners and himself was careless, reckless, and dangerous. (Tr. 88).

During cross-examination, Inspector Allen testified that, at the time he observed the alleged violation of the roof control plan, the CMM was mining in the straight, not turning a crosscut. (Tr. 69-70). The citation specifically alleges that Bowie failed to follow page 20 of the roof control plan. (Ex. G-3). That provision of the plan depicts a CMM turning a crosscut to the left and one to the right, but does not depict a CMM mining straight ahead. (Tr. 70-72). Inspector Allen testified that the section of Government Exhibit 6 that he marked to show the position of the miners was not included in the roof control plan at the time he issued the citation. (Tr. 71).

The Inspector testified that in the body of the citation, he described the CMM as *preparing* to tram when he observed the three miners standing near the bumper of the machine. (Tr. 80, Ex. G-2). In Inspector Allen’s field notes, he describes the CMM as *beginning* to tram (Tr. 81, Ex. G-20). Inspector Allen also testified that he did not describe in his field notes which side the helper was on, what he was doing, or how far away he was from the CMM when the machine was in operation. *Id.*

Inspector Allen testified that the roof control plan is somewhat vague as to the exact areas where the red safety zones exist around a CMM. (Tr. 83, Ex. G-19). The day after this inspection, Inspector Allen recommended that the roof control plan be modified to include all red zone diagrams as well as the itemized list of safety precautions to follow while miners are working around CMMs at the mine. *Id.* The inspector testified that he made these recommendations on a Plan Review form dated May 4, 2010, and agreed that the roof control plan was vague concerning this issue. *Id.*

Kyle Ledger was the CMM operator at the mine in the No. 3 entry when the citation was issued. (Tr. 98). Mr. Ledger testified that the mining cable came out of the right side of the CMM, but crossed over to the left side of the machine. (Tr. 94). At that time, he was standing on the left side of the CMM. Ledger testified that at the time the inspector arrived he was in the process of taking cut No. 2 from the left side of the entry. *Id.* He then finished that cut and backed the CMM up and positioned it on the right side to take cut No. 3. (Tr. 95). As he backed up the CMM, he testified that he stayed behind the tail of the CMM. *Id.* Once the CMM was repositioned, he shut the machine off and helped move the cable out of the way against the left rib. (Tr. 95-97). He then began to move the CMM toward the face on the right side of the entry when the Inspector flagged him to stop. *Id.* Mr. Ledger testified that at no time was he, the

CMH, or the Bowie safety manager in the red zone, which was on the right side of the CMM, while the machine was in operation. (Tr. 96-99).

2. Summary of the Parties' Arguments

The Secretary argues that Bowie violated section 75.220(a)(1) because several miners entered the "red zone" in the No. 3 entry while the CMM was in operation. The Secretary cites the roof control plan, which requires that during mining all employees must be under permanent support and not exposed to sudden movements of the mining equipment or other pinch points. (Sec'y Br. 8). Inspector Allen testified that three miners were exposed to sudden movements of the CMM while in operation. *Id.*

The Secretary maintains that the violation was S&S because it met the four elements of the *Mathies* test. There was a violation of the mandatory safety standard, the action of the CMM operator created a discrete safety hazard to miners that were in the red zone, and injury to the three miners was reasonably likely because the miners were positioned between the CMM and the coal rib when the CMM was tramming. (Sec'y Br. 9-11). The Secretary believes that there was a reasonable likelihood that the hazard contributed to would have resulted in a serious injury because Inspector Allen testified that if the CMM were to suddenly pivot into the three miners the resulting injuries would have been significant or fatal.

The Secretary asserts that the violation was the result of Respondent's moderate negligence. (Sec'y Br. 11-12). Inspector Allen testified that he believed that the CMM operator was careless but he was not acting as an agent of the operator. The Secretary states that Bowie had notice of the dangers related to CMMs and notice of MSHA's intent to enforce section 75.220(a)(1). *Id.*

Respondent argues that no violation of section 75.220(a)(1) existed because the roof control plan only applies to a CMM turning a crosscut, not mining into a straight. (Bowie Br. at 16-17). The CMM was mining into a straight when Inspector Allen observed the alleged red zone violation so Respondent believes there was no violation of the roof control plan. *Id.*

Respondent also argues that it did not violate the cited provision of the roof control plan as the plan is interpreted by the Secretary. (Bowie Br. at 19, Ex. G-3). The CMM operator testified that at no time was he, the CMH, or the Bowie safety manager in the red zone while the CMM was in operation. (Bowie Br. at 20-23)

Respondent asserts that the roof control plan was ambiguous because it did not include red zone diagrams or descriptions that included the conditions at issue. (Bowie Br. at 19-20). The roof control plan did not incorporate MSHA's red zone drawings that the inspector relied upon at the hearing with the result that the citation must be vacated. *Id.*

3. Discussion and Analysis

I find that the Secretary did not establish a violation of section 75.220(a)(1) because the cited provision of the roof control plan was ambiguous when applied to the facts of this case. The inspector specifically cited a violation of page 20 of the roof control plan. That page only shows diagrams of CMMs turning into entries from crosscuts. The two diagrams depict a CMM turning a crosscut to the left and a crosscut to the right, but do not depict a CMM mining straight

into a heading as occurred here. In order to show that a plan provision is not ambiguous, the Secretary must satisfy its burden by establishing that the provision was intended to apply to CMMs mining into a straight. See *Jim Walter Resources, Inc.*, 9 FMSHRC 903 (May. 1987). The language of the plan that references the two diagrams is on page 11 of the plan. It states, in pertinent part, “[w]hen turning a crosscut, personnel shall remain under permanent roof support and out of the danger areas as shown on page [20] of the plan.” (Ex. G-3, p. 11).³ The two diagrams show situations in which the CMM is turning. Nothing in the diagrams or in the language of the plan that references the diagrams indicates that red zones are created when the CMM is operating on the straight with the tail piece directly behind the CMM. The CMM was not turning a crosscut at the time the inspector observed the conditions.

In his brief, the Secretary referred to a provision of the plan that was not cited by the inspector or otherwise referenced in the citation. This section of the roof control plan states that “[a]t all times during the mining and place changing cycle, all employees will be under permanent support and not exposed to sudden movement of the mining equipment or other pinch points.” (Ex. G-3, p. 11). The inclusion of this provision in the plan creates an ambiguity because it is inconsistent with the language related to the diagrams on page 20.

The Secretary also supported the inspector’s assertion that the miners were in an area designated as a red zone by referring to Government Exhibit 6. (Tr. 24-26, Ex. G-6). This exhibit, entitled “Red Zones Are No Zones,” includes eleven diagrams that illustrate red zones when a CMM is positioned for different types of cuts. The exhibit used by Inspector Allen to show the miners’ location is not controlling because the particular diagram on the exhibit he referenced was not included in the mine’s roof control plan. (Tr. 118-19; Ex. G-3). It is noteworthy that the inspector testified that he believed that the plan was vague as to the exact procedures for red zone safety and he recommended that the plan be modified to include red zone diagrams that accurately depict the use of CMMs at this mine. (Tr. 83; Ex. G-19).

In *Jim Walters*, the Commission held that in plan violation cases, the Secretary “must establish that the provision allegedly violated is part of the approved and adopted plan that the cited condition or practice violates the provision.” 9 FMSHRC at 907. The Commission also held that the Secretary must dispel any ambiguity in the plan by “establishing the intent of the parties on the issue through credible evidence as to the history and purpose of the provision and evidence of consistent enforcement.” *Jim Walter Resources, Inc.*, 28 FMSHRC 579, 589 (Aug. 2006) (citations omitted). In the present case, the drawings on page 20 of the plan and the interpretative language on page 11 seem to suggest that a red zone only exists under the plan when a CMM is turning into a heading. A different provision in the roof control plan and her exhibit with eleven red zone diagrams seem to suggest that danger zones around CMMs should be much more extensive and that they should apply whenever the CMM is in operation. I find that the intent of the parties is not at all clear on this issue and the Secretary did not present credible evidence to clear up this ambiguity. The Secretary did not present evidence as to the

³ The page numbers on the copy of the roof control plan submitted by the parties were missing on some pages. In addition, in some cases the pagination was ambiguous. In this decision, page 11 refers to the page entitled “XI Safety Precautions during Mining” and page 20 refers to the page with two diagrams showing a CMM turning from a crosscut into the entry being mined.

history and scope of the roof control plan with respect to red zones or relating to any previous enforcement activity concerning red zones. Inspector Allen noted that he had never observed miners working in the red zone around a CMM during previous inspections at this mine. (Tr. 87).

I find that the Secretary did not satisfy his burden of proving that the conditions Inspector Allen observed on May 3, 2010, violated the Mine's roof control plan. As a consequence, the Secretary did not establish a violation of 75.220(a)(1). Citation No. 8470076 is hereby **VACATED**.

III. SETTLED CITATIONS

On May 16, 2013, I granted the Secretary's motion to approve partial settlement in these cases. I approved the settlement of Citation Nos. 8470080, 8470098, and 8470323 in WEST 2010-1727 and Citation No. 8470075 in WEST 2011-278. I ordered Bowie to pay a total penalty of \$7,900.00 for those four settled citations.

IV. 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 considered the Assessed Violation History Reports, which are not disputed by Bowie. (Exs. G-1 & 21). At all pertinent times, Bowie was a large mine operator. The violations were abated in good faith. The penalty assessed in this decision will not have an adverse effect on Bowie's ability to continue in business. The gravity and negligence findings are set forth above.

V. ORDER

Based on the criteria in section 110(i) of the Mine Act, 30 U.S.C. § 820(i), I assess the following civil penalties:

<u>Citation No.</u>	<u>30 C.F.R. §</u>	<u>Penalty</u>
WEST 2010-1727		
8470097	75.1725(c)	\$2,000.00
WEST 2011-278		
8470076	75.220(a)(1)	VACATED
	TOTAL PENALTY	\$2,000.00

For the reasons specified in this decision, the citations are **MODIFIED** or **VACATED** as described above. Bowie Resources, LLC, is **ORDERED TO PAY** the Secretary of Labor the sum of \$2,000.00 within 30 days of the date of this decision.⁴

/s/ Richard W. Manning
Richard W. Manning
Administrative Law Judge

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RWM/jm

⁴ 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

1331 Pennsylvania Avenue N.W. Suite 520 N
Washington, D.C. 20004-1710
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June 14, 2013

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA),	:	Docket No. WEST 2010-470-M
Petitioner	:	A.C. No. 26-02630-204647-01
v.	:	
	:	Docket No. WEST 2011-73-M
GOPHER CONSTRUCTION INC.	:	A.C. No. 26-02630-233808
Respondent	:	
	:	
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Docket No. WEST 2011-863-M
ADMINISTRATION, (MSHA),	:	A.C. No. 26-02630-250694 A
Petitioner	:	
v.	:	
	:	
DONALD TIBBALS, employed by	:	Mine: Mull Lane
GOPHER CONSTRUCTION, Inc.	:	

DECISION

Appearances: Joseph M. Lake, Esq. and Cheryl L. Adams, Esq., Office of the Solicitor, U.S. Department of Labor, San Francisco, California for the Petitioner
Donald W. Tibbals, *pro se*, and Jacob Lake, *pro se*, Fernley, Nevada for the Respondent.

Before: Judge Moran

In this decision under the Federal Mine Safety and Health Act, (“Mine Act” or “Act”) Gopher Construction, (“Gopher”), at its Mull Lane Pit, was cited by MSHA for alleged violations of berm standards found at 30 C.F.R. § § 56.9300 and 56.9301. For the latter standard, MSHA also contends that Donald Tibbals, the owner of Gopher, knowingly violated that provision, and on that basis seeks personal liability against him under section 110(c) of the Act. Gopher denied all charges, asserting not only that the standards had not been violated but also that MSHA did not have jurisdiction over Mull Lane, as the operation had closed. An evidentiary hearing was held on September 20, 2012 in Sparks, Nevada.

For the reasons which follow, the Court finds that there was jurisdiction under the Mine Act and it upholds the violations charged to Gopher, while significantly reducing the penalties for those violations from the amounts proposed by the Secretary. As for the section 110(c) charge, the Court dismisses that matter, finding that Mr. Tibbals did not knowingly violate the standard.

The Issue of MSHA Jurisdiction

At the outset of addressing this issue, the Court notes that there is essentially no factual dispute over *the activity* observed by the Inspector at the time he was at the Mull Lane Mine. Rather, the jurisdictional dispute involves whether, despite that activity, the mine had “closed” vis-a-vis MSHA’s jurisdiction over that activity.

MSHA Inspector Jason Jenó inspected Gopher’s Mull Lane Mine on October 15, 2009 as part of a regular, or “EO1,” inspection. Upon arriving, he observed “approximately three miners on the mine site,” and also saw some haul trucks in the back. To him, “[i]t looked like they were moving some material [adding that there was] “an excavator operating as well.” Tr. 37. Based on what he saw, the Inspector “assumed [the trucks] were getting loaded by the excavator and then hauling material to a location to dump it.” He stated that the trucks “were backing up on [a stockpile] and dumping material over the edge.” Tr. 37.¹ The Inspector described Mull Lane as a typical sand and gravel operation. Tr. 29-30. He added that, based on information given him by Gopher employee Alan Skinner, Gopher was “moving raw material from a corner of their pit and were moving it over to a staging area, or a stockpile, to be crushed, to have a crusher come in and crush it down at a later date [for sale].” Tr. 139-140. From that conversation, it was Inspector Jenó’s understanding that there was a dispute between Gopher and the BLM and that Gopher had to get some material moved out of the way. Tr. 46. It was also the Inspector’s “understanding” that Gopher was moving the material down and that they were going to crush it at some later time. Tr. 46. Although the Inspector could not recall if he included Skinner’s remarks in his notes, he affirmed that, apart from that, he still would have cited the operation because he believed that the mine was not closed but rather was operating. Observing what he considered to be dangerous dumping activity, the Inspector issued an imminent danger order and noted violations related to that activity. The day after observing the alleged violations, the Inspector returned to the mine to serve the citations, viewing, in terms of activity on that second day “some customer trucks being loaded out . . .” Tr. 194.

¹ The Inspector drew a diagram, sketching an aerial view of the mine site as it appeared on the date of his inspection. Tr. 40, Gov. Ex 44. Describing the activity as a “circular process,” he explained that trucks were being loaded by an excavator, traveling down the haul road, and upon reaching the stockpile area, they would back up to the stockpile, until they were right to the edge of it and then dump their loads. Following the dumping, the trucks would then make several turns, come down a ramp and return to the loading area. Tr. 41.

Respondent has challenged MSHA's jurisdiction on the grounds that its Mull Lane operation had closed and therefore that the activity observed by the Inspector was construction activity, not mining. Although not formally testimony, the Court notes the following from the opening remarks of Mr. Tibbals at the hearing. These are mentioned because they may be deemed as admissions and also because Mr. Tibbals, who is not an attorney, acted *pro se* and because there is largely no dispute about his opening remarks. In fact, the Court concludes that accepting Mr. Tibbals' opening statement about Gopher's activity, but not accepting the assertions about *the effect* of that activity, establishes, together with the record as a whole, that Gopher's cited activity was plainly mining and therefore under MSHA's jurisdiction.

In his opening remarks, Gopher's Mr. Tibbals acknowledged that the Bureau of Land Management ("BLM") is the neighbor of Mull Lane pit. The BLM property has a use permit from the Nevada State Department of Transportation ("NDOT") on that land and they use it to extract gravel for highway projects. Mull Lane mines on its side and BLM mines on its side.² Tibbals stated that the last time NDOT did a job there, they left a 1 to 1 slope, that is a slope of 30 feet down on a 1 to 1 slope. Asserting that high school students travel along the fence line separating Mull Lane from the BLM site, Tibbals was concerned that a student could be injured because of that steep incline. This prompted him to discuss his concerns with BLM in April 2008. His suggestion was to eliminate the steep pinnacle separating the two property lines. Once BLM accepted his proposal, they "started back in the Mull Lane pit," that is, they opened it up to accomplish the goal of establishing a 3 to 1 slope in place of where the 1 to 1 slope existed. Thus, Gopher's purpose was to do a "safety reclamation." Tr. 20-21. As Gopher's mining business had already stopped, Gopher rented the crushing equipment and began re-sloping the pit. Tibbals emphasized that the material they were removing was from BLM land but it was not intended for crushing nor for anything else. *Id.* Thus, Tibbals maintained that the order of events was that it filed a mine closure on the first of October and then began getting ready to put the fence line in. Tr. 22. He further explained in his opening that there was insufficient material to establish the fence line, so they brought in an excavator and two haul trucks to accomplish that. Accordingly, Gopher maintains that at that point in time it was acting as a contractor and that it had a contractor's license to build the boundary line fence. Papers were filed with MSHA, closing the mine. Tr. 22. Although the mine is closed, Tibbals acknowledged that occasionally they go to the site with a loader and load material from there for local deliveries. Tr. 24. However, it labeled this activity as a load-out site, and not a crushing or mining site. Gopher maintained that the site is already mined out so that the prospect of further mining there is highly doubtful, as that would require taking material from BLM property. Tr. 24.

In sum, the Court finds, on either of two theories, that MSHA jurisdiction was established. First, there is ample evidence that Gopher continued to "mine," per its contract with BLM. Additional discussion about this follows. Second, even if viewed strictly as a re-sloping activity, that plainly falls within reclamation activity. The mining process is not so narrowly

² Mr. Tibbals stated that BLM owns the property but leases it to the Nevada Department of Transportation for aggregate purposes. Tr. 24.

construed so as to end when the last shovelful of material is removed from its natural deposit. Such a conclusion would be artificial and illogical. This is because the mining process continues as the minerals are relocated. The process also continues with any necessary steps to shut down the mining site, whether that is a temporary or permanent status.

DOL 17 is the statement MSHA Inspector Van Wey obtained from Mr. Tibbals. Tr. 219. The Petitioner acknowledges that Gopher had submitted a mine closure notice “about a couple of weeks before [the inspection in issue here].” Tr. 233-234. Van Wey was asked whether, if Gopher was moving material and building a fence line, and doing some excavating, and otherwise working along the border between the two properties, whether that would be considered mining activity. Tr. 235. He responded that he would consider such activity as part of the mining process, as reclamation has been considered to be part of that process. He noted that the area that was being excavated *was created because of the mine site* and that if the mine were not there, the fence line issue would never have been created. Accordingly, it was his view that reclamation activity, taking down this particular area to re-establish a fence line, was a direct result of mining activity. Accordingly, he would consider that to be mining activity. Tr. 235. The Court agrees.

Challenging Inspector Van Wey’s statement that Gopher was mining, the Inspector was asked by the Respondent about DOL 30 at page 4, where Mr. Skinner responded that the operation was “putting in a fence.” Tr. 261. The Inspector did agree that, if he were to come upon this operation, putting aside that it is a mining operation, and he observed someone moving material to put in a fence, he would not find that sufficient to consider it as mining. Tr. 262. However, he added that if he saw individuals working on a stockpile, and dumping there, he would consider that mining. Tr. 262. Even that activity, however, that is, backing up to a stockpile and dumping would only be mining at a mine site. Tr. 263. The Court finds that examining the fence activity in isolation, ignoring the context of that activity, would create an inaccurate picture.

The Respondent’s Exhibit B, their contract with BLM to construct a new fence line, was used in an effort to counter the Secretary’s contention that Gopher was mining. The Court asked some questions about this last issue. It posed to the witness, “If in fact Gopher Construction sends a letter to BLM in April 2008 in which they talk about that they would like to close [their] pit and use the property for other purposes, if [the inspector] accept[s] that as an accurate statement, on what basis did [he] determine that the mine was still in operation at the date of these citations?” Tr. 265. The Inspector’s responded that MSHA considers activities such as the fence line, to be part of the reclamation process, with the reminder that this area was created as a mine. Tr. 265.

Gopher’s owner, Mr. Tibbals, testified and, as he was acting *pro se*, his testimony was presented in a narrative form. His testimony largely tracked his opening remarks. He stated that Gopher and the Bureau of Land Management/ Nevada Department of Transportation shared a property line. His concern was “the fence line [which] had a foot of dirt on each side of the fence line and a near vertical slope on each side.” Tr. 270. Tibbals repeated that the mine

closure was filed October 1, 2009. After that, the mine was in “construction mode” and it was in that mode “to finish the toe of the slope and to put a fence in for BLM.” Tr. 272. Tibbals stated that mining has never resumed at Gopher after that date. Tr. 273. If one were to visit the site today, one would see stockpiles of material on the site, including the stockpile that was discussed at this hearing. Tr. 273. No heavy equipment is present there. The “construction mode” was completed in November 2009. He added that the fence project took only ten days to complete. Tr. 274. Mr. Tibbals does continue to own the property but that, as of November 2009, the operation has not sold any product, nor done anything with the materials on it. Some existing material, which he stated had been previously processed, had been delivered. He admitted that some 60,000 tons of gravel, which has commercial value, remains at the site and that it could be sold if the economy recovers. Tr. 274- 275.

On cross-examination Mr. Tibbals agreed that Gopher had a contract to purchase materials from BLM. Tr. 293, DOL 26, at page 4. The contract the government is referring to was to purchase land or property from BLM’s site, abutting the Gopher mine. Tr. 293-294. Under that contract, dated October 4, 2008, Gopher removed some 31,000 cubic yards of material from BLM property. Tr. 294. When the Court inquired as to the relevance of this activity, occurring as it did more than a year before the citations in issue here, the government asserted that the reclamation process occurring here was as a result of this removal process the year before. Tr. 295. The fence line, Mr. Tibbals agreed, was the property line between Gopher and the BLM property. Tr. 295. That material, removed from BLM property was crushed by Gopher, but it has not yet been sold. Tr. 296. If the economy rebounds, it is Gopher’s intention to sell that material. Tr. 297.

Gopher was getting ready to install the fence line but had not yet started doing that at the time of the inspection. This was its obligation under the contract with BLM. Tr. 297. As reflected at Exhibit B, under provisions four and five, Gopher was responsible for establishing a fence line after removing the material from BLM’s property. Tr. 299. Thus, the connection between Gopher’s mining activity and the fence line is undeniable. That removed material has been stockpiled but not crushed nor sold. Tr. 299. DOL 28 shows sales by Gopher during the week of the inspection in issue and that material was sold from the Mull Lane pit at that time.

Inspector Jenó stated that when he went to the mine site, he was not aware that the mine had been closed nor that paperwork associated with that closing had been submitted to MSHA. Tr. 82. Respondent’s Exhibit A was admitted and it reflects that the Respondent did in fact submit such closure paperwork, dated October 1, 2009. Tr. 83.³ However, it is noted that Gopher described its operation as “temporarily closed.” *Id.* As mentioned earlier, it is Gopher’s position that, on October 15, 2009, Gopher Construction was operating *as a construction*

³ The same exhibit is reflected in Gov. Ex. 25., albeit without a second page to it. That second page is apparently simply a confirmation that the facsimile transmitting the information was successfully sent. Tr. 85.

company at Mull Lane for the purpose of constructing a fence line, pursuant to Gopher's contract with the Bureau of Land Management. R's Br. at 2.⁴ Gopher admits that, in constructing the fence line, it used heavy equipment to move earthen material for the purpose of establishing that fence line. *Id.* at 3. Gopher emphasizes that the establishment of the fence line was its "sole purpose" for entering the mine site. Accordingly, it asserts that it was present at Mull Lane "with the intent to construct a fence line and only that." *Id.* at 3 (emphasis added). In this respect, Gopher points out that Gopher Construction also operates as a licensed construction company in Nevada, holding a Nevada Contractor License, and it maintains that it was acting in that capacity on October 15, 2009. Thus, Gopher argues that it operates in two capacities; as the operator of sand and gravel mines and as a construction company and building contractor. *Id.* at 2-3.

Gopher does not take issue with the assertion that reclamation activity is within MSHA's jurisdiction. It simply contends that it was not doing reclamation work at the time of the alleged violation. Instead, as just mentioned, it was acting as a site contractor, simply moving earth to construct the fence line between its land and that of BLM. Thus, it contends that its role was then confined to that of a building contractor in furtherance of carrying out its contractual obligation with the BLM.⁵ Gopher adds that the material was moved during the construction of the fence line and then dumped into an existing stockpile. That stockpile, it declares, was never to be crushed. In support of that claim, Gopher states that, even now, that material remains in the stockpile and it has never been crushed, nor sold. R's Br. at 3. In its Response Brief, Gopher notes that it does not take issue with the claim that the cited activity comes within the ambit of interstate commerce. R's Response Br. at 3. Instead, as noted before, Gopher's jurisdictional challenge is directed to whether mining was being conducted. It notes again that its mining operations at the site had been suspended since October 1, 2009. It was after that closing that Mr. Tibbals instructed his crew to begin constructing the fence line per the contract with the BLM. Thus, Gopher maintains that, as soon as it closed the mine, it began construction of the fence and that an additional motivation for that work was Mr. Tibbals' concern over the safety of local high school students who walk along that fence line. R's Response Br. at 3-4.

The Secretary agrees that to be subject to the Mine Act, a site must meet the definition of a mine and that the activity must affect interstate commerce. Sec. Br. at 7, citing 30 U.S.C. §802(h)(1), 30 U.S.C. § 803. Looking to the pertinent provision, a mine is defined as "an area of land from which minerals are extracted in nonliquid form" and "lands, excavations . . . slopes, equipment, machines, tools, or other property . . . used in, or to be used in, or resulting from the work of extracting such minerals from their natural deposits in nonliquid form." The Secretary places emphasis on the words "*or resulting from* the work of extracting such minerals from their

⁴ Respondent's brief was not paginated. Page number references reflect the Court's page count.

⁵ The Court would point out however, that Gopher did not simply appear on the scene as a fence contractor. There was a history there and that history was mining.

natural deposits in nonliquid form” portion of that definition. *Id.* at 7. The Secretary also points out what is indisputable – it was the intent of Congress to broadly construe the Act’s definition of a “mine.”⁶

Here, the Secretary contends that Gopher was so excavating minerals from their natural deposits, with the intent to crush and sell that material. It also contends that the material was being excavated as part of reclamation work at the Mull Lane site, in order to restore the land to its original contour. Sec. Br. at 8, citing *Donovan v. Carolina Stalite Co.*, 734 F. 2d 1547, 1554 (D.C. Cir. 1984). The Secretary points to Gopher’s contract with the United States Bureau of Land Management (“BLM”) to “purchase and remove 31,000 cubic yards of sand and gravel from BLM’s land . . . [and in order to accomplish that agreement] Gopher used a dozer, feeder, crusher, and other equipment [to remove the] sand and gravel off of BLM land [and] into the Mull Lane pit and [then] to process [that] material.” *Id.* Thus, the Secretary contends that Gopher’s extraction and processing of the sand and gravel makes its site a mine.⁷ *Id.* at 9.

The Secretary further asserts that “[a]fter Gopher removed and processed the sand and gravel from BLM’s property, Gopher’s contract required [it] to re-establish a fence line between Mull Lane and BLM’s neighboring property.” On the date of the MSHA inspection in issue here, Gopher determined that more material was needed to establish the fence line and an excavator and two haul trucks were being used at that time to build that fence line. *Id.* at 9. It is the Secretary’s position this work “to restore the land and re-establish the fence line was reclamation activity subject to MSHA’s jurisdiction.” *Id.* Accordingly, the Secretary returns to the “*resulting from*” language to support its contention that the cited activity was reclamation work. *Id.* at 10, citing a host of administrative law judge decisions upholding jurisdiction over reclamation activities. Restating its argument, the Secretary contends that, as the Respondent was excavating and moving material resulting from its prior extraction of minerals from their natural deposits, this constituted mining activity, in the form of reclamation work. The Court agrees that, at a minimum, reclamation work was occurring.

⁶ In this regard, the Secretary observes that the Senate Report for the Mine Act provided that “it is the Committee’s intention that what is considered to be a mine and to be regulated under this Act be given the broadest possible interpretation, and it is the intent of this Committee that doubts be resolved in favor of inclusion of a facility within the coverage of the Act.” Sec. Br. at 8, citing S. Rep. No. 181, 95th Cong., 1st Sess. 14 (1977), reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2nd Sess., Legislative History of the Act, at 602.

⁷ The Secretary cites *Central Concrete Products*, 12 FMSHRC 102 (1990), *Valley Rock Sand & Gravel*, 4 FMSHRC 113 (1982), and *Cedar Lake Sand & Gravel*, 480 F. Supp. 171 (E.D. Wisconsin 1979), but all for a proposition that is undisputed: sand and gravel operations meet the definition of a mine.

Though noted earlier in this decision, as MSHA field office supervisor Troy Van Wey, expressed: “[the] area that was being excavated was created because the mine site’s there. If the mine site wasn’t there, it would never have been created. So reclamation, taking this particular area to re-establish a fence line, was a direct result of mining activity.” Sec. Br. at 11, Tr. 235. Accordingly, with the fence line and associated activity, work was still needed to be done to bring the property back to its pre-mining state, restoring it to its original contour. Therefore, the Secretary contends, MSHA’s jurisdiction continued. The Secretary adds that “Gopher was [also] excavating minerals in nonliquid form on the date of the inspection and there is evidence that Gopher intended to crush this material.” *Id.* at 12. As crushing is part of the processing of sand and gravel before the finished product may be sold to customers, the Secretary offers that this “evidence” constitutes an additional basis to conclude that this excavating was mining activity, leading to such material entering commerce. *Id.*

Interstate Commerce.

Respondent’s owner, Don Tibbals, while stating that he has been operating Gopher *Construction* since 1978, acknowledged that he has been in the surface mining industry for over 45 years. Operating a total of 5 open pit sand and gravel mines, Gopher informed that two of its operations, including the “Mull Lane Pit” operation (“Mull Lane”), which is the subject of this litigation, were not presently operational. The Mull Lane Pit has been closed since 2009 and, as noted, Gopher submitted to MSHA notification that operations at that site had ceased.

The Secretary asserts that Gopher’s mining operation affects interstate commerce.⁸ Citing Section 4 of the Mine Act, the Secretary notes both that the provision covers mining activities which affect commerce and that the authority to so regulate such interstate commerce is to be broadly construed. As this is a plain and inarguable point of law, there is no purpose served to a further discussion and the Court agrees that, on multiple grounds, Gopher’s activity affected interstate commerce. In fact, Gopher subsequently dropped this argument. Rather, the sole jurisdictional issue in dispute is whether Gopher was engaged in mining.⁹

⁸ Here Gopher has conceded that a rock quarry comes within the “expansive definition of the term “mine” and it withdrew the claim that its activity was not interstate commerce.

⁹ It is noted that one argument, made to distinguish an activity from mining, is the claim that a “borrow pit” is involved. The 1979 *MSHA/OSHA Interagency Agreement*, (“*Agreement*”) describes such borrow pits as “an area of land where the overburden, consisting of unconsolidated rock, glacial debris, or other earth material overlying bedrock is extracted from the surface. Extraction occurs on a one-time basis or intermittently as need occurs, for use as fill materials by the extracting party in the form in which it is extracted. No milling is involved, except for the use of a scalping screen to remove large rocks, wood and trash. The material is used by the extracting party more for its bulk than its intrinsic qualities on land which is relatively near the borrow pit. Thus, if earth is being extracted from a pit and is used as fill

(continued...)

A few additional observations are made about Gopher's notification of the mine closing and its contract with BLM. As noted, per Gopher's Exhibit A, its mine closing letter to MSHA's Elko, Nevada office on October 1, 2009 lists the mining operation at its Mull Lane Pit as "temporarily closed." Exhibit B, which relates to Gopher's contract with BLM informs, in a letter dated April 15, 2008, that Gopher wanted to "close our pit and use the property for other purposes." That letter continues that "[i]n order to [close the pit] it would benefit all parties if [Gopher] were to remove the slope and put a new fence line on [Gopher's] property." Gopher stated it was "willing to pay a small Royalty on approval of 50,000 cy of removed material."¹⁰ Subsequently, the Nevada Department of Transportation wrote to Gopher on February 3, 2009 regarding the removal of "the mineral aggregates" from that pit, per BLM Contract No. NVN-085629. The letter noted that Gopher was authorized to remove 31,000 cubic yards and that the material was to be removed so that a 3:1 slope would result. February 3rd letter, attached Gopher's contract with BLM. That contract is described as a "Contract for the Sale of Mineral Materials." Thus, BLM was selling mineral materials (sand and gravel) in the quantity of 31,000 cubic yards to Gopher for a selling price of \$16,275.00. Gopher signed this contract on September 4, 2008. Distinct from Gopher's Exhibit B, the contract within that exhibit has its

⁹(...continued)

material in basically the same form as it is extracted, the operation is considered to be a "borrow pit." For example, if a landowner has a loader and uses bank run material to fill potholes in a road, low places in the yard, etc and no milling or processing is involved, except for the use of a scalping screen, the operation is a borrow pit. MSHA, US. Dep't. Of Labor, Program Policy Manual, Section 4, I.4-3 (1996) and MSHA-OSHA Interagency Agreement, 44 Fed. Reg. 22827 (1979). Cases interpreting the borrow pit as a very narrow exception include *Secretary of Labor v. State of Alaska, Department of Transportation*, 33 FMSHRC 1550, 2011 WL 3794325, June 15, 2011 (Judge Miller), and *Kerr Enterprises., Inc.*, 26 FMSHRC 953, 957 (Dec. 2004) (ALJ)(*"Kerr"*) and *New York State Department of Transportation*, 2 FMSHRC 1749, 1761 (July 1980) (ALJ). (State entity that extracts and screens sand for use as a traction control material in winter operates a mine and did not qualify for the "borrow pit" jurisdictional exception). Although the operator used a scalping screen to remove wood debris from earthen material at an extraction pit, the operation did not qualify for the borrow pit exception because the material was sold for use in a variety of purposes that were not bulk fill related.

The evidence does not support that the activity at issue here could be considered as a borrow pit, but even if, for the sake of argument, it was assumed to be one, the *Agreement* provides that borrow pits located on mine property are not part of OSHA's jurisdiction. Accordingly, the Court concludes that the "borrow pit" exception, which is a very narrow exception to jurisdiction, essentially limited to using nearby bulk material for fill, was clearly not involved here.

¹⁰ From the same Exhibit B, on October 28, 2008, Gopher noted that it was authorized to remove 31,000 CY in order to eliminate a peak or pinnacle between the two properties but that it needed to remove an additional 19,000 CY to complete the project.

own distinct Exhibit “B.” The contract’s Exhibit B contains three salient pieces of information, at stipulations 2, 4, and 5, which inform about Gopher’s activity. Stipulation 2 provides that Gopher is entitled to “extract and remove mineral materials from the public lands only [and that] [p]rocessing, segregation, and stockpiling of mineral materials on the public lands are not authorized under [the] contract.” Stipulation 4 informs that Gopher “will be responsible for the cost of restoration and reestablishment of the existing center-west 1/16 corner, Sec. 24, T. 20N, R. 24E, that must be removed to facilitate material removals from the contract area. The operator will also be responsible for the restoration or reestablishment of any additional survey monuments, corners, or accessories that are destroyed in the course of operations.” Finally, and most importantly with regard to this litigation, Stipulation 5 provides that “[t]he operator will be responsible for replacing the boundary fence that must be removed to facilitate material removals from the contract area. The boundary fence must be of the same construction as that which resides on site at present, which is 3 strand barbed wire with T-posts.”

A reading of these papers from Respondent’s Exhibit B leads to the inescapable conclusion that Gopher’s activity regarding the fence line cannot be fairly characterized in the manner urged by Gopher as “construction” work. Clearly, this activity was inextricably related to Gopher’s mining activity and at the very least constituted reclamation activity. Accordingly, the Court concludes that Gopher was engaged in mining at the time of the cited violations.

The Alleged Violations

Docket No. WEST 2011 73 M

On October 15, 2009 Gopher was issued Citation No. 6387450, a section 104(d)(1) citation for violating 30 C.F.R. 56.9301. Gov. Ex 1. MSHA proposed a \$6,624.00 civil penalty for this. The cited standard, entitled, “Dump site restraints,” provides: “Berms, bumper blocks, safety hooks, or similar impeding devices shall be provided at dumping locations where there is a hazard of overtravel or overturning.” “Berm” is a defined term, found at 30 C.F.R. § 56.2, as “a pile or mound of material along an elevated roadway capable of moderating or limiting the force of a vehicle in order to impede the vehicle’s passage over the bank of the roadway.”

Docket No. WEST 2011 863 M – The 110(c) action against Mr. Tibbals

On October 15, 2009, Donald W. Tibbals was issued a section 104(d)(1) citation arising out of the same facts from Docket No. WEST 2011 73M, next above. The Secretary seeks a \$3,700.00 civil penalty for this.

Docket No. WEST 2010 470-M

Also on October 15, 2009, Gopher was issued a section 104(d)(1) order for violating 30 C.F.R. 56.9300(b). Order No. 6387451. Entitled “Berms or guardrails,” it requires that “(a) Berms or guardrails shall be provided and maintained on the banks of roadways where a drop-off exists of sufficient grade or depth to cause a vehicle to overturn or endanger persons in

equipment. (b) Berms or guardrails shall be at least mid-axle height of the largest self-propelled mobile equipment which usually travels the roadway.”¹¹

Findings of Fact

Docket No. WEST 2011-73 M

Inspector Jenó addressed Citation No. 6387450, which relates to Docket WEST 2011-73 M. Referring to his earlier testimony in connection with the jurisdiction issue and regarding the activity of the haul trucks he observed at the site, the Inspector again stated that he saw a haul truck backing up to the edge of a stockpile that was being created, and witnessed “material sloughing out from underneath the tires, as the truck was backing up to the edge.” Tr. 49. Seeing the truck’s rear axle starting to sink in the soft ground, Inspector Jenó thought that the truck was going to go all the way over the edge.¹²

¹¹ The full text of standard 30 CFR § 56.9300 provides, (with bold print added for subsection b), “Berms or guardrails. **SAFETY DEVICES, PROVISIONS, AND PROCEDURES FOR ROADWAYS, RAILROADS, AND LOADING AND DUMPING SITES** (a) Berms or guardrails shall be provided and maintained on the banks of roadways where a drop-off exists of sufficient grade or depth to cause a vehicle to overturn or endanger persons in equipment. (b) Berms or guardrails shall be at least mid-axle height of the largest self-propelled mobile equipment which usually travels the roadway. (c) Berms may have openings to the extent necessary for roadway drainage. (d) Where elevated roadways are infrequently traveled and used only by service or maintenance vehicles, berms or guardrails are not required when all of the following are met: (1) Locked gates are installed at the entrance points to the roadway. (2) Signs are posted warning that the roadway is not bermed. (3) Delineators are installed along the perimeter of the elevated roadway so that, for both directions of travel, the reflective surfaces of at least three delineators along each elevated shoulder are always visible to the driver and spaced at intervals sufficient to indicate the edges and attitude of the roadway. (4) A maximum speed limit is posted and observed for the elevated unbermed portions of the roadway. Factors to consider when establishing the maximum speed limit shall include the width, slope and alignment of the road, the type of equipment using the road, the road material, and any hazardous conditions which may exist. (5) Road surface traction is not impaired by weather conditions, such as sleet and snow, unless corrective measures are taken to improve traction. (e) This standard is not applicable to rail beds.”

¹² The Inspector stated that photograph 11-2 shows the vertical edge in the back. As this was not evident to the Court, the Inspector drew a circle around the area of the vertical drop-off he was describing. Tr. 157. Adding to his testimony, the Inspector marked on Exhibit 44, using a green ink marker, to indicate where the trucks were coming to the edge and dumping, as well as the trucks’ backing up direction. The Inspector also marked on the exhibit the approximate location where he was standing alongside Mr. Skinner. Tr. 59. Although the word “stockpile”
(continued...)

This situation prompted him to issue an oral imminent danger order to Gopher employee, Alan Skinner.¹³ Tr. 49. Mr. Skinner advised that the road had been built a few days earlier by Mr. Tibbals himself and that the work crew had been instructed to dump the loads off the stockpile in the manner that the Inspector had observed. That is, the drivers were instructed to bring the truck's rear axle right to the edge until it started to sink in the ground and then to stop and dump.¹⁴ Tr. 52. Inspector Jenó stated that, at this dumping location, there was no berm present. According to the Inspector, Mr. Skinner related that he had brought up the subject with Mr. Tibbals regarding the matter of installing some berms or dump site restraints at the stockpile (i.e. dumping) area and, as discussed later, for the other violation, along the haul road, to make them safer, but that Mr. Tibbals turned down the suggestion, telling him to continue with the procedure that he had instituted, as described above. As discussed later, the Court views this oral recounting as at odds with Mr. Skinner's statement to the MSHA Investigator. Gov. Ex. 30.

Later, Inspector Jenó spoke with Mr. Tibbals about this matter and he advised that the method the Inspector had observed was as he had directed his workers to operate. Tr. 54. Mr. Tibbals rejected the Inspector's suggestions to build a dump restraint or to dump on the ramp itself because, according to the Inspector's retelling, that would require another piece of

¹²(...continued)

appears on this Exhibit, that term actually refers to a ramp area. Accordingly, the Inspector's use of the word "stockpile" was meant to convey the area where the trucks backed up and therefor not what one typically imagines when that term is used. Tr. 60. The whole area, the Inspector explained, was a ramp and the trucks backed up on that ramp, with the ramp being about the width of four or five of the trucks using it. Tr. 60. Using "X's," the Inspector marked to show where the material was ending up. Tr. 63. Gov. Ex. 44. The letter "B" was added to the Exhibit by the Inspector to show where the rear tires of the truck were positioned at the dumping point. Tr. 64. Inspector Jenó also testified about several photographs he took at the time in issue. Tr. 65-66. Gov. Ex. 3, at page 4 of 5. This photo shows the tracks created by the haul truck which he observed on that date. As noted, it was the observation of the trucks' dumping activity that caused the Inspector to issue the imminent danger order. Although the Court expressed that the subject photograph did not appear to show that there was much of a drop-off from the point where the tire tracks end, the Inspector informed that the loader was "20 feet just down on the slope on the other side of that." Tr. 68. The Court notes that the photograph does vividly display the "sinking action" created by the trucks' tires as they backed up to the dumping point. Gov. Ex. 3 at page 5 of 5, another photograph, depicts where the Inspector was standing when he saw what he believed to be an imminent danger and it also shows the area where the trucks were backing up and dumping over the edge. The Court notes that from this vantage point *one can appreciate* that the 20 foot drop-off was significant. Tr. 72.

¹³ Mr. Skinner was also identified as the "lead man." That person directs the workforce when the foreman or the owner is not present. Tr. 51.

¹⁴ Skinner told the Inspector that the trucks were dumping approximately 20 loads per day, per shift. Tr. 53.

equipment and consequently Tibbals would have to pay another individual. Tr. 54. In a subsequent conversation between Jenó and Tibbals about this issue, but this time with Inspector Jenó's Supervisor participating in the conference call, Mr. Tibbals reiterated that, in his view, the berms¹⁵ that were present were more than adequate.

Based on his observations, the Inspector concluded that standard 56.9301 was being violated, on the grounds that the standard requires dump restraints where equipment is dumping over the edge, or near an edge, in order to prevent overtravel. Tr. 72. He marked the gravity as "highly likely," with that determination factoring the number of trucks making dump trips throughout the day, a number which he estimated to be about 20 times. In the Inspector's view, the idea that a truck would back up until its rear axle was right at the drop-off edge and at which point that axle would then start to sink in the loose, uncompacted, material, was in clear violation of the standard's requirements. Tr. 73. The circumstances were aggravated because, in the Inspector's view, that material could give-way at any moment. He also believed that a fatality could result, as a consequence, if a vehicle were to go off the edge and overturn. Tr. 73.

Inspector Jenó did agree that the material absorbed the tires when the truck backed up and that the tires did sink into the material. Tr. 92. The Inspector further conceded that, based on a photograph within DOL 3, the tire tracks appear to have sunk some six to eight inches into the soil. Tr. 99. In the Court's view this sinking appears to be more than six to eight inches, but certainly, DOL 3 at photograph 4 of 5, shows this sinking action occurred. Speaking to Gopher's contention that the dumping location was on an incline, while the Inspector could not recall the steepness of the incline as the trucks backed up the ramp to the dumping point, he did agree that the trucks were backing up an incline in that dumping process. Tr. 93. However, the Inspector expressed that the fact there is an incline as one backs up does not constitute an exception to the requirement to provide a berm. Tr. 93. Nor, he added, is there an exception from the requirement to provide a berm if a truck, when backing up, is sinking in the material from its own weight as it moves back to the edge. Tr. 94. As discussed *infra*, the Court agrees with both of these conclusions. The Inspector did not agree with the suggestion that when a haul truck sinks into material, that action constitutes an impeding device, because the truck could still travel over the edge.¹⁶ Tr. 95. Had the truck applied a "little more power," he believed, it would have gone over the edge. The Inspector admitted that, with regard to the vertical area where he contended there was no berm, he did not take a photograph of that condition. Tr. 175.¹⁷

¹⁵ This reference to berms, the Inspector explained, related to the other violation involving the issue of the need for berms to be installed along the road.

¹⁶ As discussed later, the Court agrees that the sinking action is not a similar impeding device but not with the Inspector's reasoning that it did not meet the standard because a truck could still go over the edge. An impeding device is only that. To "impede" means to interfere with or slow the progress of something. It does not suggest an absolute barrier.

¹⁷ The Court noted that the Inspector stated that he did not walk in that area because of
(continued...)

As Inspector Jenó agreed that, before one reaches the edge of the material, there was a build-up of material where those tire tracks ended, the Court inquired why that build-up did not constitute a berm. Tr. 142. The Inspector stated that the build-up observed was created by the weight of the truck backing up, just before the truck stopped. He did not consider this to constitute a berm because it was not a pre-existing impeding device. Rather, it was created as the trucks operated, backing up. When asked how high the truck-created build-up was, the Inspector estimated it to be 16 to 18 inches, but it was noted that the trucks' mid-axle height was 30 inches. Per section 56.9300, berms are required to be at least of mid-axle height. Thus, although the Inspector conceded that the next truck then arriving at the dump location would come up against the berm just created by the prior truck's activity, it would still not be of sufficient height because it was not of mid-axle. Tr. 144. The Inspector's overriding point was that tires sinking into material does not provide an impeding device. Tr. 146.

The Secretary contends that rather than any berm being present, Gopher's activity of backing up might have created some loose mounds of material but that this was merely incidental to that work and in any event it did not create a berm or similar impeding device.¹⁸ Sec's Opp. at 5.

As noted, Respondent Tibbals' view is that the practice he instituted at the dumping location, where a truck operator, upon seeing his truck's wheels sinking into the soft material, would then stop the truck, satisfies the standard. Respondent's theory is that, by the truck sinking into the ground, that action satisfied the standard on the basis that it created an impeding device. An alternative theory, the Respondent also argues that a berm doesn't stop a truck in any event. Rather, in Gopher's view, it is the truck operator that stops the truck. This alternative theory is rejected by the Court as plainly contrary to the standard's requirement.

In its Response Brief, Gopher repeats its defense and adds some additional arguments to this charge. It points to DOL 3.1, a photograph, as the "exact conditions" observed by the Inspector and from that contends that the photo demonstrates that trucks stop about 3 feet from the edge of the dump site where a berm was created by the impeding device of the material, and began to dump [its] load. Thus, Gopher contends that the photo demonstrates both the truck

¹⁷(...continued)

concerns about the integrity of the material there. The Court also noted that there is no requirement that photos be taken to establish a violation. Tr. 177-179.

¹⁸ Although the Secretary concedes that a berm is not an absolute barrier to preventing overtravel, it must "be capable of restraining a vehicle through reasonable control and guidance of vehicular motion." Here, it contends, the loose, uncompacted, material, created in the process of backing up, could not achieve that. Sec's Opposition at 5. Nor were these alleged "berms," such as they were, in place before the dumping activity. Instead they were created by the sinking action of the truck's weight as it would back up to the edge.

stopping 3 feet from the edge of the dump site “with an impeding device and this resulted in a berm,” thereby satisfying the standard’s requirements. Gopher contends that if its arrangement does not amount to an impeding device, then MSHA needs to clarify its standard so that the mining community can understand what is acceptable. R’s Response Br. at 4. Further, it discounts the testimony of the MSHA Inspectors that its arrangement did not meet the standard as simply “the personal testimony of two individuals” expressing their interpretation of the standard, and nothing more. It also argues that, as the dictionary definition of “impede” means to bar or hinder progress, its arrangement meets the wording of the standard.¹⁹ *Id.* at 5.

Gopher also emphasizes that MSHA Inspector Jenó omitted that the standard in issue, 30 C.F.R. 56.9301, allows “other similar impeding devices.” R’s Response Br. at 2. Again, it is Gopher’s position that, in compliance with that provision, its trucks approached the 6 to 7 percent inclined ramp to the dump site and when the driver observed the truck’s rear tires “reach the impeding device shown in DOL 3.1 they would stop and dump their loads.” *Id.* Gopher also points to a MSHA Handbook at pg. 15, and Section G, Safe dumping practices near the edge of a stockpile. There, under “*good practices*,” it advises that “[t]he top of the dump should be kept sloped a small amount, perhaps 2 to 3 percent, so that in backing up to dump, the trucks will be going up a slight grade.” *Id.* at 3. Gopher asserts that it bettered that advice, by having a 6 to 7 percent inclined slope up to the dumping point and it views this slope to be an additional impeding device. The Court rejects this contention as unsupported by the standard. An incline is plainly not a “similar impeding device.”

Gopher has also maintained that the berm in issue was mid-axle height. R’s Br. at 3. Mr. Tibbals stated that he acted as a spotter and that when the haul truck’s rear tires “started to settle in the soft material” the trucks were directed to stop at that point and to dump their loads. Thus, Gopher states that it implemented this procedure and considered it to be “training.” It asserts that the truck operators felt very comfortable with this procedure. Gopher believes that its procedure fell well within the MSHA guidelines because its method of using the sinking action of material to warn the haul truck operator that it was safe to stop and dump their loads constitutes an impeding device. Gopher adds that MSHA’s Guidelines acknowledge that these devices are not intended to stop a truck a haul truck from going over the edge or from overtravel or overturning, but rather to alert a driver that he is at the stop and dump point. Thus, Gopher maintains that it “constructed the required impeding device and administered [the] required training . . . as to the safest method of dumping their loads in [that] location.” R’s Br. at 4.

¹⁹ Gopher also refers to MSHA’s Dump Point Inspection Handbook, noting first that the Handbook was never presented to it until after the hearing in this matter. Gopher’s position in reaction to the Handbook is twofold: first, since the handbook had not previously been presented to it, it should not be used to establish the government’s interpretation of the alleged violations, and second, Gopher should only be held to the requirements of the standard, as set forth in the Code of Federal Regulations, and not the handbook. R’s Response Br. at 5. However, as noted *infra*, Gopher refers to the Handbook itself where it believes it aids its arguments. This decision is made apart from the Handbook and therefore moots this contention of Gopher.

Gopher believes that if MSHA will only permit specific impeding devices, the agency needs to identify them. *Id.* at 6.

The Court observes that for the sinking process to be considered as a compliance method, one would have to conclude that this constituted a *similar* impeding device. The Court is of the view that a sinking action, although it may serve to alert or warn a truck driver as to the point to stop and dump the load, cannot be considered to be such a “similar impeding device.”²⁰ As noted by Judge Miller in *Sec. v. Eureka Rock*, 34 FMSHRC 476, 2012 WL 894520, (Feb. 21, 2012), “Administrative regulations are generally subject to the same principles of construction as statutes. *Miller v. United States*, 294 U.S. 435, 442 (1935). In analyzing the rules of statutory construction, the Supreme Court of the United States has stated that the established canon of construction is that similar language contained within the same section of a statute must be accorded a consistent meaning.” *Nat'l Credit Union Admin. v. First Nat'l Bank & Trust Co.*, 522 U.S. 479, 501 (1998). The Supreme Court has further held that “there is a natural presumption that identical words used in different parts of the same acts are intended to have the same meaning. *Atlantic Cleaners & Dryers, Inc. v United States*, 286 U.S. 427 (1932). Furthermore, in *Morton Int'l Inc.*, 18 FMSHRC 533 (Apr 1996), this Commission held that “regulations should be read as a whole giving comprehensive, harmonious meaning to all provisions”. *Id* at 536.” So too, in *Tamko Roofing Products v. Sec. of Labor*, 27 FMSHRC 829, 2005 WL 3198668, (Nov. 2005)(Judge Melick), it was noted that “[u]nder the rule of statutory and regulatory construction, *ejusdem generis*, when specific examples set forth in a statute or regulation are followed by general words, the general words are construed to embrace only objects *832 similar in nature to the specific examples. *Garden Creek Pocahontas Company*, 11 FMSHRC 2148 (November 1989); 2A Sutherland Statutes and Statutory Construction § 47.17 (6th ed.).”²¹

Accordingly, the Court determines that the “sinking action” which occurred here does not constitute a “similar impeding device” and that the standard was violated. However, that determination is a very different matter from issues of intentional conduct and unwarrantability.

In terms of the negligence associated with this citation, the Inspector considered it to be “reckless disregard” because Mr. Tibbals had both ordered and observed the procedure, which the Inspector viewed to be a dangerous dumping practice. Tr. 74. While the Inspector’s testimony was imprecise on this, the Citation issued to Gopher, as distinguished from the 110(c)

²⁰ The Solicitor’s attorney stated that he was unaware of any MSHA policy statement explaining the term “similar impeding devices.” Tr. 148.

²¹ Although the judge applied the principle to find that “counterweights [were] not of the same or similar nature as the specific items listed in the standard i.e. “gears, sprockets, chains, drive, head, tail, and take-up pulleys, fly wheels, couplings, shafts, [and] fan blades” all of which have the potential for creating dangerous pinch points and/or entanglements [, and that] [c]ounterweights [were] therefore not within the scope of items covered by the standard,” the rule applies both to exclude as well as include categories. *Id.*

action against Mr. Tibbals, listed the negligence as “high,” and not as “reckless disregard.” Also considered by the Inspector in this regard was Mr. Tibbals’ rejection of Mr. Skinner’s expressed concerns about the dumping practice. Tr. 74. The same considerations also led the Inspector to conclude that the violation was an unwarrantable failure. The Inspector determined that this practice had been going on for “approximately two days.” Tr. 74. This matter was specially assessed. Tr. 75-76. Gov. Ex. 4.

Inspector Jenó also marked this Citation as “significant and substantial” and an “unwarrantable failure.” A significant and substantial (“S&S”) violation is described in section 104(d)(1) of the Act as a violation “of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard.” 30 U.S.C. § 814(d)(1). A violation is properly designated S&S “if, based upon the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature.” *Cement Div., Nat’l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981). The Commission has explained that “[i]n order to establish that a violation of a mandatory safety standard is significant and substantial under *National Gypsum*, the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard--that is, a measure of danger to safety--contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature. *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984) (footnote omitted); see also, *Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 135 (7th Cir. 1999); *Austin Power, Inc. v. Secretary*, 861 F.2d 99, 103-04 (5th Cir. 1988), aff’g *Austin Power, Inc.*, 9 FMSHRC 2015, 2021 (Dec. 1987) (approving *Mathies* criteria).

“Unwarrantable failure,” has been defined by the Commission as “aggravated conduct constituting more than ordinary negligence.” *Emery Mining Corp.*, 9 FMSHRC 1997 (Dec. 1987). The Commission has stated that whether a citation is an “unwarrantable failure” is a question that should be evaluated based on the facts and circumstances in each case, and in light of each of the following factors: 1) the length of time that the violation has existed; 2) the extent of the violative condition; 3) whether the operator has been placed on notice that greater efforts were necessary for compliance; 4) the operator's efforts in abating the violative condition; 5) whether the violation was obvious or posed a high degree of danger; and 6) the operator's knowledge of the existence of the violation. *Consolidation Coal Co.*, 22 FMSHRC 340 (Mar. 2000); *IO Coal Co.*, 31 FMSHRC 1346 (Dec. 2009).

As noted, the violation has been established. Gopher’s “sinking action” did not constitute a “similar impeding” device. The violation was also “S&S.” The discrete safety hazard was the risk of vehicle overtravel and overturning if it were to go beyond the edge of the dumping location. The Court relies upon the Inspector’s opinion to support its conclusion that there was a reasonable likelihood that absence of a similar impeding device would contribute to the occurrence of an injury. Apart from the Inspector’s opinion, it is obvious that the absence of such a device would so contribute to an injury. Finally, if the event were to occur, such injury would be of a reasonably serious nature. This conclusion is also reached on the basis of the

Inspector's opinion as well as the obviousness of the result if a truck were to go over the dump site edge.

The Court does not believe, however, that this violation was an "unwarrantable failure" for a number of reasons. The violation was not of long duration, and its extent was limited to this single dumping location. The condition was immediately abated. More importantly, there was a genuine, though misguided, conclusion on Gopher's and Mr. Tibbals' part, that its method satisfied the standard. Respondent makes no contention that it did not know of the need for an impeding device. Rather, it erroneously concluded that its method equated to such a device. As DOL 3, 4 of 5, shows, there was a significant sinking action which had an impeding effect, albeit not one that satisfied the standard. Credibility necessarily plays a role in the Court's conclusions for this issue, as well as for the related conclusion, to be addressed next, to the section 110(c) charge. Having concluded that Gopher and more particularly, Mr. Tibbals, genuinely, and not completely unreasonably, concluded that his method satisfied the standard, the Court finds that there was moderate negligence involved. It bears emphasis however that, in the future, and now being well-informed about the requirements for compliance, Mr. Tibbals must apply a less creative approach to compliance for this standard or be at high risk for a significantly higher penalty.

Upon consideration of all the statutory criteria,²² the Court imposes a civil penalty of \$2,000.00.

Docket No. WEST 2011-863 M ; the section 110(c) matter

The Secretary maintains that Donald Tibbals violated section 110(c) of the Mine Act, contending that he knowingly authorized, ordered or carried out the violation of 56.9301. There is no 110(c) charge associated with the roadway berm violation under section 56.9300(b). For this alleged violation, associated as it is with Citation No. 6387450, the dump site restraint violation, the Secretary seeks a penalty of \$3,700.00 be assessed against Mr. Tibbals. Gov. Ex. 8.

²² Raising an economic hardship consideration, Gopher describes itself as a small family business and asserts that, if the proposed fines were imposed, it will make it "extremely hard" to remain in business. Thus, it contends that such fines would place the employment of family members and "over 20 miners and their families [at risk of being] without employment." R's Response Br. at 10. No genuine issue was presented to establish that the proposed penalties here would affect the ability of the mine to continue in business, as Gopher never provided any documents to back up such a claim. Tr. 197. That aside, the Court did express, upon evaluating the testimony of Mr. Tibbals, that it concluded Gopher runs a responsible operation, and that it is an operation that cares about the safety of its miners. Tr. 203. DOL 32, relating to the mine's citation history, was also part of the record and it was considered for penalty purposes. The mine's production history, as recorded in form 5002, per DOL 42, is another document that was considered. Tr. 195.

Mr. Tibbals' response to the section 110(c) citation is in accord with Gopher's contentions for that associated matter. Consistent with those arguments, Mr. Tibbals reiterates that he provided what was required by MSHA standards and Guidelines under that underlying provision. This included instructing and showing his employees how to dump in a safe manner. R's Br. at 4-5. It notes that no one was injured and contends that no employee voiced safety concerns over the procedure that was employed. *Id.* at 4. Accordingly, Mr. Tibbals contends that he acted in a responsible manner, careful to avoid placing any miners in harm's way and that, from his perspective, no penalty should be assessed. *Id.* at 5. Mr. Tibbals further submits that his testimony demonstrates that he did not knowingly and willingly place his employees in any hazardous or dangerous situations.²³ Further, it notes that the statement of Alan Skinner to MSHA does not support the contention that this matter was a knowing violation. Skinner did not say anything about the issue because he did not feel that the practice was unsafe, believing that there was no hazard involved. Gov. Ex. 30 at 4.

Section 110(c) states: "Whenever a corporate operator violates a mandatory health or safety standard ... any director, officer, or agent of such corporation who knowingly authorized, ordered, or carried out such violation, failure, or refusal shall be subject to the same civil penalties ..." 30 U.S.C. § 820(c). An individual is subject to personal liability under section 110(c) if he is "in a position to protect employee safety and health [and] fails to act on the basis of information that gives him knowledge or reason to know of the existence of a violative condition." *Kenny Richardson*, 3 FMSHRC 8, 16 (Jan. 1981), *aff'd* on other grounds, 689 F.2d 632 (6th Cir. 1982), *cert. denied*, 461 U.S. 928 (1983). The Commission noted in *Secretary v. Matney, employed by Knox Creek Coal Corp.*, 34 FMSHRC 777, 2012 WL 1799023, April 25, 2012, that "The proper legal inquiry for determining liability under section 110(c) is whether the corporate agent knew or had reason to know of a violative condition. *Kenny Richardson*, 3 FMSHRC 8, 16 (Jan. 1981), *aff'd* on other grounds, 689 F.2d 632 (6th Cir. 1982), *cert. denied*, 461 U.S. 928 (1983); accord *Freeman United Coal Mining Co. v. FMSHRC*, 108 F.3d 358, 362-64 (D.C. Cir. 1997). To establish section 110(c) liability, the Secretary must prove that an individual knew or had reason to know of the violative condition, not that the individual knowingly violated the law. *Warren Steen Constr., Inc.*, 14 FMSHRC 1125, 1131 (July 1992) (citing *United States v. Int'l Minerals & Chem. Corp.*, 402 U.S. 558, 563 (1971)). **6. The Commission has explained that "[a] person has reason to know when he has such information as would lead a person exercising reasonable care to acquire knowledge of the fact in question or to infer its existence." *Id.* (citation omitted). In addition, section 110(c) liability is generally predicated on aggravated conduct constituting more than ordinary negligence. *BethEnergy Mines, Inc.*, 14 FMSHRC 1232, 1245 (Aug. 1992).

²³ In its Response Brief, relating to the section 110(c) charge, Mr. Tibbals, repeats that he never authorized or directed his employees to dump in an unsafe manner. With many family members employed by Gopher, he argues that it is false to suggest that he would ever put such relatives in a dangerous position. The Response Brief then repeats the procedures, instruction and training Mr. Tibbals employed to ensure that the dump cycle was performed safely. R's Response Br. at 6.

In support of the Court's conclusions, it notes that, per Mr. Tibbals statement to the MSHA investigator on December 9, 2009, he related "spend[ing] 2 hours on October 13, 2009 observing and training[.] He stood as a spotter and instructed the haul truck operators to back up, watch their rear tires, and when the rear tires started to settle in the soft material to stop and dump their load. [The mine then] repeated this [practice for] several dump cycles and even had the operators park their trucks and observe the other truck dumping. . . . When the operators and [Tibbals] felt comfortable with the training [he] left the site and returned four hours later for another hour of observation. [He] returned twice the following day to observe the procedure[.] [E]veryone was comfortable and understood the procedure and any hazards that may be involved. ..." Gov. Ex. 17, at p. 9. This statement is consistent with Mr. Tibbals' testimony, as well as the Court's overall assessment that he was acting in misguided good faith, running an operation that did take into account safety considerations and in a manner which refutes the allegations of a section 110(c) violation.²⁴ It also contradicts the Secretary's claim that Mr. Tibbals was solely motivated to save time by employing his "ground sinking" method of restraint. Nevertheless, as noted, the Court did uphold the violation of 30 C.F.R. §56.9301 from Docket No. WEST 2011-73-M and imposed, upon consideration of all the statutory factors, a significant penalty.

For the reasons articulated above, relating to the underlying dump site restraint citation, the Court concludes that Mr. Tibbals did not have knowledge or reason to know that the procedure he employed failed to constitute a similar impeding device. Accordingly, with the caveat that future citations regarding berm related violations will not be viewed in such a lenient light, the Court vacates the section 110(c) matter.

Docket No. WEST 2010-470 M

Regarding the one matter involved with this docket, a section 104(d)(1) Order, No. 6387451, the Secretary seeks a penalty of \$2,976.00. Tr. 147. Gov. Ex 9 and 10. This citation was also issued on October 15, 2009 and, as noted earlier, it pertains to an alleged violation of 56.9300(b), another berm-related standard. This condition was in a separate, but adjacent, location from the aforementioned dump site citation. In the Court's estimation, DOL exhibit 11 represents the best photographs among the photographic exhibits to gain an appreciation of this condition cited for this Order. At this location, the Inspector observed "where there were no berms alongside the roadway where the haul trucks had been traveling." Tr. 150. The Inspector identified this distinct area as "the ramp and going down." Tr. 150. As just mentioned, it was near the area where the truck drivers would back up to the stockpile and dump their loads. The cited road section had an approximate 15 foot slope and, at the location where the trucks would turn left upon leaving the dump point, there was a vertical drop-off of 8 to 9 feet. Tr. 151. Gov. photographs DOL 11. The Inspector marked the area where berms were needed with a zig-zag

²⁴ This observation by the Court is tied to the dump site violation. As noted, Mr. Tibbals was not charged with any 110(c) liability in connection with the other violation, involving the berm citation under section 56.9300.

blue line, and the letter “C” was added to the exhibit to identify the subject area for this citation. This was the only area where berms were needed, for this alleged violation. Tr. 153. The Inspector added that some of this area, about a 14 foot section, had berms of 18 to 20 inches in height but that the rest of that area had no berms. The bermed portions were constructed of dirt. Tr. 154. DOL photo 11-2 is a clear photo of the ramp. The Inspector was at ground level when he took photograph 11-2. As mentioned, trucks used this ramp when exiting the dump site.

Referring again to DOL Exhibit 9, the roadway, the Inspector stated that his concern was with one 100 foot area. He walked the ramp and observed that there were some areas along this 100 section with little or no berm along it. Tr. 161. The Inspector used a tape measure to determine the berm height in this area. Mid-axle height for the trucks using this area was about 30 inches. Here again, it was asserted that Mr. Alan Skinner, an employee at the Respondent’s operation, advised the Inspector that he had spoken with Mr. Tibbals about the need to install berms but that he was told the condition was adequate and that the road should continue to be used in its present state. Tr. 162. Because of the frequency of the road use, the Inspector believed that the gravity, that is the danger of overturning, was “highly likely.” Tr. 163-164. He added that since the drivers descending the ramp had to make a tight turn and because the roadway was only about 14 feet wide, if the turn was not made all the way, the risk of overtravel existed. Tr. 164. He believed that if this were to occur fatal injuries could result. Tr. 164. The Inspector also marked the negligence as “reckless disregard” for this citation, again because Mr. Tibbals was at the site and had constructed the road. Tr. 165. The condition had been present for about two days.

Upon cross-examination, the Inspector explained that his reference to 15 feet referred to the angle of the slope but that 25 feet was associated with the 100 feet, which included the horizontal and vertical line together. These were estimates on his part. Tr. 168.²⁵ In sum, it was the Inspector’s testimony that he found a 100 foot length, with a 15 foot slope, and that berms were absent from that area, as reflected on DOL 11-2. In response to the Court’s inquiry, the Inspector agreed that some areas had no berm at all and that other portions did have some berming but that nowhere was there berming of sufficient, that is to say, of mid-axle height. Tr. 175. The standard, 30 C.F.R. § 56.9300(b), requires that “Berms or guardrails shall be at least mid-axle height of the largest self-propelled mobile equipment which usually travels the roadway.”

²⁵ The Inspector was then directed to DOL 11-2 and a barrel which appears in that photo. There was general agreement that the barrel, which was a 50 gallon size, was about 35 inches tall. Tr. 169. Gopher’s intention in referencing the barrel was to show that the berms were of a height sufficient to meet the standard’s requirement. The Inspector then repeated that he was not contending that there was a 15 foot drop-off, but rather that it was a 15 foot slope. Tr. 169. This slope was then marked on that photo, as the Inspector circled the area, with a broken, or dotted line. Tr. 170. A green line was used for this marking, to indicate the 15 foot slope. Tr. 170.

Regarding its defense to the roadway berm requirement, Gopher notes that in the Secretary's photographic evidence at the hearing, a 55 gallon drum is depicted. That drum, Gopher states, has an approximate height of 36 inches. From this, Gopher concludes that "the distance of drop off based on [the picture of the drum] can only be an approx[imate] height of 36" over a 2% slope which falls within the MSHA Guidelines." R's Br. at 5. Restated, Gopher, using the photo of the drum as a reference point, contends that photo establishes that the berm in issue was high enough (i.e. at least 36" or more)" to satisfy the standard. In its Response Brief to the berm citation, Gopher repeats its contention that the 55 gallon drum pictured in DOL 11.2 is about 36" in height. Noting that the Inspector referred to an approximate 15 foot drop off, it contends that this estimate, based on the drum height reference, had to be inaccurate and that the drop off was "less than 36" with a less than 2% slope tapering back to ground level [and that this meets the requirements of 30 C.F.R. 9000(b). R's Response at 3. Further, in its Response Brief, Gopher contends that while the Inspector referred to two areas of concern, his citation only identified one area. Gopher states that, in abating this citation, the Inspector only required it dump two loads of material from a loader along the haul road, as reflected in DOL 11.3. Accordingly, Gopher is contending that the Inspector did not identify a second area of concern until his testimony at the hearing and that such claims should be rejected by the Court in evaluating whether there was a violation. R's Response Br. at 7. Although the Court considered these contentions, it concludes that the Secretary did establish the violation. Berms were needed and missing in the location identified by the Inspector.

Upon consideration of the record evidence, the Court concludes that the violation of 30 C.F.R. § 56.9300(b) was established. However, given that the section 104(d)(1) citation, No. 6387450, pertaining to Docket WEST 2011-73, was modified to a section 104(a) citation because it was not an unwarrantable failure, the Order here must also be modified to account for that change. This Order must also be modified because the Court finds that it too was not the result of an unwarrantable failure. Given the relatively short distance needing berming, the relatively short drop-off, and the short period of time that the roadway had been in operation, the Court believes that these considerations work to diminish the negligence involved. However, moving to the S&S designation, the testimony, including the frequency with which trucks were traveling the roadway, establishes that there was a reasonable likelihood that the absence of berms could contribute to a reasonably serious injury occurring, should a truck leave the roadway. In sum, the Court concludes that the violation was significant and substantial and of moderate negligence. For this, it imposes a civil penalty of \$1,500.00 penalty.

Summary

Based on the foregoing, the Court upholds Citation No. 6387450, but modifies it to a section 104(a) citation, finding the negligence to be "moderate" and that it was "significant and substantial. For this, a civil penalty of \$2,000.00 is imposed. For Order No. 6387451, the Court also finds that the violation was established, but that it was not an unwarrantable failure, but rather that moderate negligence was involved. Consequently, that Order is modified to a section 104(a) citation with a finding that it too was significant and substantial. As mentioned above, a civil penalty of \$1,500.00 is imposed. The section 110(c) matter has been vacated. It is hoped

that Mr. Tibbals will reflect upon the determinations made here, realize that harsher conclusions could have been reached, and make adjustments accordingly for his future mining activities.

Order

Within 40 days of the date of this decision, Respondent Gopher Construction, Inc. is **ORDERED TO PAY** a civil penalty in the total sum of **\$3,500.00**. Upon payment of the penalty, this proceeding is **DISMISSED**.

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

Distribution: (E-mail and Certified Mail)

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
1331 Pennsylvania Avenue, NW, Suite 520N
Washington, DC 20004

June 19, 2013

SECRETARY OF LABOR,	:	DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 2013-362-D
on behalf of REUBEN SHEMWELL,	:	MADI CD 2013-01
Complainant,	:	
v.	:	
ARMSTRONG COAL COMPANY, INC. &	:	Parkway Mine Surface Facilities
ARMSTRONG FABRICATORS, INC.,	:	Mine ID 15-19356
Respondents	:	

DECISION ON LIABILITY
AND
CEASE AND DESIST ORDER

Appearances: Matt S. Shepherd, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for the Secretary of Labor; Tony Oppgard, Esq., Lexington, Kentucky, for Reuben Shemwell; Mason L. Miller, Esq., and Adam K. Spease, Esq., Miller Wells, PLLC, Louisville, Kentucky, for Armstrong Coal Company, Inc., and Armstrong Fabricators, Inc.; and Daniel Z. Zaluski, Esq., Madisonville, Kentucky, for Armstrong Coal Company, Inc.

Before: Judge Feldman

Reuben Shemwell’s employment as a welder with Armstrong Coal Company and/or Armstrong Fabricators (collectively referred to as “Armstrong”) was terminated on September 14, 2011. Shemwell filed a discrimination complaint with the Mine Safety and Health Administration (“MSHA”) on January 23, 2012. Shemwell’s complaint initiated discrimination proceedings to determine whether his discharge was motivated, at least in part, by safety related activities protected under section 105(c)(1) of the Federal Mine Safety and Health Act of 1977 (the “Act” or “Mine Act”). Section 105(c)(1) provides in pertinent part:

No person shall discharge or in any manner discriminate against . . . or otherwise interfere with the exercise of the statutory rights of any miner . . . because such miner . . . has instituted or caused to be instituted any proceeding under or related to this Act . . . or because of the exercise by such miner . . . of any statutory right afforded by this Act.

30 U.S.C. § 815(c)(1).

During the pendency of MSHA's discrimination investigation, the Secretary of Labor ("the Secretary") applied for Shemwell's temporary reinstatement. In the temporary reinstatement proceeding, the Federal Mine Safety and Health Review Commission ("the Commission") determined that Shemwell's complaint was not frivolous. 34 FMSHRC 1580, 1582-83 (July 2012) (holding that substantial evidence supports a finding that Shemwell's complaint was not frivolously brought), *aff'g* 34 FMSHRC 1464 (June 2012) (ALJ). Armstrong recognizes the finality of the Commission's preliminary decision that Shemwell's complaint appears to have merit.¹ Oral Arg. Tr. 158-59.² Upon the culmination of MSHA's investigation, the Secretary declined to bring a discrimination complaint on Shemwell's behalf.

Following the Secretary's decision not to pursue Shemwell's discrimination case, on August 22, 2012, Armstrong filed a civil tort suit in the Commonwealth of Kentucky's Muhlenberg Circuit Court alleging that Shemwell's discrimination complaint brought before the Commission constitutes a "Wrongful Use of [Commission] Civil Proceedings."³ Circuit Court Complaint at 7, No. 12-CI-00897 (Aug. 22, 2012).

Currently before me is a January 8, 2013, discrimination complaint filed by the Secretary on behalf of Shemwell pursuant to section 105(c)(2) of Act.⁴ 30 U.S.C. § 815(c)(2). The Secretary asserts that Armstrong's civil suit in Kentucky violates section 105(c)(1) because it interferes with Shemwell's right to file a discrimination complaint. The Secretary filed an amended complaint on February 13, 2013, proposing a civil penalty of \$70,000.00 for Armstrong's alleged violation of the statute. Armstrong alleges that the civil suit cannot be

¹ A not frivolously brought finding is the equivalent of a determination that Shemwell's discrimination complaint "appears to have merit" or that there is a "reasonable cause to believe" Shemwell is the victim of discrimination. *Sec'y of Labor on behalf of Price v. Jim Walter Res., Inc.*, 9 FMSHRC 1305, 1306 (Aug. 1987), *aff'd* 920 F.2d 738, 747 & n.9 (11th Cir. 1990).

² Transcript references to the Oral Argument conducted at the Commission's headquarters on February 27, 2013, will be designated as "Oral Arg. Tr." Reference to the transcript of Shemwell's May 23, 2012, temporary reinstatement hearing will be designated as "Temp. Reinst. Tr."

³ The action brought in Kentucky was jointly initiated by Armstrong Coal Company, Inc. and Armstrong Fabricators, Inc.

⁴ Shemwell's January 23, 2012, complaint is the basis for a pending private 105(c)(3) discrimination case in Docket No. KENT 2012-1497-D, filed on August 27, 2012, that is not a subject of this proceeding. It is not uncommon for the Commission to find discrimination in a private proceeding brought by a miner despite the Secretary's determination not to pursue a complaint on the miner's behalf. *See, e.g., Ross v. Shamrock Coal Co.*, 15 FMSHRC 972, 974-76 (June 1993); *Meek v. Essroc Corp.*, 15 FMSHRC 606, 612-13 (Apr. 1993); *Womack v. Graymont Western US, Inc.*, 25 FMSHRC 235, 261-63 (May 2003) (ALJ); *Adkins v. Ronnie Long Trucking*, 21 FMSHRC 171, 176-77 (Feb. 1999) (ALJ).

a violation of the Mine Act because it is protected by the First Amendment right to petition. Armstr. Br. at 1. The First Amendment provides:

Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const. amend. I.

I. Statement of the Case

In addressing this matter, I am reminded of a landlord-tenant case in which it was alleged that there was excessive noise emanating from an apartment leased by Sokolow that was disturbing Levin, the lessee of the apartment below. *Louisiana Leasing Co. v. Sokolow*, 266 N.Y.S.2d 447 (Civ. Ct. 1966). Sokolow is reported to have said “this is my home, and no one can tell me what to do in my home.” *Id.* at 448-49. Although Sokolow was not evicted because it was determined that the noise from his apartment was not excessive, the Judge noted that property rights are not absolute because of the common law right of other tenants to quiet enjoyment. The Judge noted that there is “a prevalent notion that stems from the ancient axiom that a man’s home is his castle.” *Id.* at 449. However, the Judge indicated that, despite this prevailing notion, it must be remembered that “Mr. Sokolow’s castle is directly above the castle of Mr. Levin.” *Id.*

Louisiana Leasing illustrates that, in an orderly society, one cannot seek to exercise an asserted right if it interferes with the manifest right of another. Thus, one cannot commit slander, or hide behind an asserted First Amendment right after yelling “fire” in a crowded theater.

Yet, Armstrong asserts that it would have an unfettered First Amendment right to bring a civil suit against Shemwell even if the Commission ultimately determines Shemwell’s discharge was motivated by discrimination. Thus, Armstrong argues its civil suit cannot be held to violate section 105(c)(1) of the Mine Act. In this regard, Armstrong boldly proclaims that resolution of this case in favor of its asserted First Amendment right is “simple,” stating:

Armstrong, like every other person in the United States, has a sacred and fundamental First Amendment right to file a lawsuit against persons they believe have wronged them. No statute and no public interest, no matter how noble (such as the safety goals of the Mine Act), can infringe upon that right. And regardless of what this body thinks of the merits of Armstrong’s state court lawsuit, one thing is always true: Armstrong has a constitutional

right to file it, and by definition it therefore cannot be a violation of the Mine Act (or the Mine Act is unconstitutional). Like it or not, it is that simple.

Armstr. Br. at 1.⁵

As an initial matter, this Commission has been delegated by Congress to adjudicate cases brought under the Mine Act. 30 U.S.C. §§ 815(d), 823(a). The Commission is not required to adopt Armstrong's "like it or not" assertion of an absolute First Amendment right. Rather, as discussed below, longstanding case law, as well as the Mine Act and its legislative history, clearly reflect that Shemwell's statutory right to bring his discrimination case preempts Armstrong's civil tort claim regardless of whether the Commission ultimately grants or denies Shemwell's complaint.

Even if Armstrong's civil suit were not preempted because it is not in conflict with section 105(c)(1) of the Act, the civil suit is not protected by the First Amendment because it is both baseless and retaliatory.⁶ Thus, Armstrong's assertion of a "sacred and fundamental" constitutional right to file a state law suit, even if it conflicts with rights conferred by a federal statute, must be rejected.

⁵ The common element in this matter is Armstrong's attempt to elevate itself, on constitutional grounds, above the body delegated with adjudicative authority. In this regard, Armstrong asserts its unfettered right to petition cannot be infringed under any circumstances. For example, at Oral Argument, Armstrong maintained that it would also have the right to file a state tort suit against an employee filing a discrimination claim with the Equal Employment Opportunity Commission under Title VII (Pub. L. 88-352, as amended), or against employees filing applications for unemployment or workmen's compensation with state agencies under programs created by the Social Security Act (Pub. L. 271, 74th Cong. [H.R. 7260]; approved Aug. 14, 1935, as amended), based solely on a claim that the filings were not made in good faith. Oral Arg. Tr. 55-58.

⁶ The civil suit is baseless for several reasons, including the fact that it is contrary to state law. Requisite elements of a cause of action for "Wrongful Use of Civil Proceedings" in a Kentucky civil suit are absent. For example, a Kentucky cause of action for Wrongful Use of Civil Proceedings requires a finding in the allegedly misused proceeding in favor of the Plaintiff bringing the state tort action. *D'Angelo v. Mussler*, 290 S.W.3d, 75, 79 (Ky. App. 2009). However, a Commission decision concerning whether Shemwell is the victim of discrimination has yet to occur. In addition, Kentucky tort law requires that Shemwell's complaint lack probable cause. *Id.* This is contradicted by the Commission determination, for temporary reinstatement purposes, that Shemwell's complaint has not been frivolously brought. 34 FMSHRC at 1582-83.

II. Background

Reuben Shemwell was employed by Armstrong as a welder since April 19, 2010. 34 FMSHRC at 1467. In April 2011, Shemwell, after being overcome by fumes while welding, complained to David Lander, Armstrong's dragline manager, about the need for greater respirator protection. *Id.* at 1467-68. In response to Shemwell's complaint, Armstrong purchased new respirators. *Id.* at 1468. Within several weeks of Shemwell's protected safety complaint, Lander executed two verbal warnings in June 2011, admonishing Shemwell for excessive cell phone use. *Id.* The verbal warnings were followed by a July 22, 2011, written warning, advising Shemwell that he would be terminated by December 2011 if his cell phone use continued. *Id.* Lander subsequently recommended Shemwell's reassignment to Armstrong's fabrication shop where Oscar Ramsey, the manager of the shop, could observe Shemwell under closer supervision. *Id.* at 1469. Upon consultation with Human Resources Director Gary Phillips, Ramsey recommended Shemwell's September 14, 2011, discharge after reportedly observing Shemwell using his cell phone several times a day.⁷ *Id.*

Following his termination, Shemwell met with Ronnie Drake, Director of the Kentucky Office of Mine Safety and Licensing. Temp. Reinst. Tr. 152-53. Upon learning of the circumstances surrounding Shemwell's dismissal, Drake advised Shemwell to contact MSHA. Temp. Reinst. Tr. 152-53. Shortly thereafter, Shemwell telephoned Kirby Smith, an MSHA Special Investigator in District 10, located in Madisonville, Kentucky, who advised Shemwell to come to his office to file a complaint with the clerical processor. Temp. Reinst. Tr. 152-53.

⁷ Armstrong alleges Shemwell's termination could not have been motivated by discrimination because neither Ramsey nor Phillips had any knowledge of Shemwell's respirator complaint at the time of Shemwell's discharge. Armstr. Br. at 20. As an initial matter, it is not credible that Ramsey, the manager responsible for the welding of equipment, was unaware of the circumstances surrounding Armstrong's purchase of new respirators. In any event, the Commission has stated that "[a]n operator may not escape responsibility by pleading ignorance due to the division of company personnel functions." *William Metz v. Carmeuse Lime, Inc.*, 34 FMSHRC 1820, 1826 (Aug. 2012) (citing *Metric Constructors, Inc.*, 6 FMSHRC 226, 230 n.4 (Feb. 1984)). The Commission has similarly held that the small size of an operation supports an inference that an operator was aware of a miner's protected activity. *Morgan v. Arch of Ill.*, 21 FMSHRC 1381, 1391 (Dec. 1999). Lander was in direct communication with Ramsey. It is undisputed that Lander, the recipient of Shemwell's respirator complaint, initiated the disciplinary action that Ramsey ultimately relied upon to terminate Shemwell.

Shemwell filed his complaint at the District 10 office on January 23, 2012.⁸ Temp. Reinst. Tr. 152-53. At that time, April Marks, the complaint processor, transcribed on Shemwell's complaint the reason given to him by Armstrong for his discharge. Temp. Reinst. Tr. 156-57, 125-27. Namely, the complaint indicated that Shemwell was terminated for excessive cell phone use. Armstr. Br. Ex. 2. Smith interviewed Shemwell on January 26, 2012, at which time he determined Shemwell had a colorable claim of discrimination because he "had engaged in protected activity by reporting the harmful fumes and vapors emitted during the welding process." Temp. Reinst. Tr. 154-55. Smith testified that it was not uncommon for miners to lack awareness of the significance of their protected activity with respect to their rights under section 105(c). Temp. Reinst. Tr. at 157.

The Secretary subsequently filed an application for Temporary Reinstatement which was granted following an evidentiary hearing. Shemwell's temporary reinstatement ultimately was affirmed by the Commission in a decision that determined Shemwell's discrimination complaint was not frivolously brought. 34 FMSHRC at 1582-83. The Commission's Temporary Reinstatement decision was not appealed. Consequently, the Commission's not frivolously brought determination has become final. On July 27, 2012, the Secretary advised Shemwell that she had declined to bring a section 105(c)(2) discrimination complaint on his behalf. Armstr. Br. Ex. 3. Consequently, the temporary reinstatement was dissolved on September 13, 2012.⁹ 34 FMSHRC 2549 (Sept. 12, 2012) (ALJ).

Following the Secretary's decision not to pursue Shemwell's complaint, Armstrong filed the subject state civil tort action on August 22, 2012, seeking compensatory and punitive damages. Cir. Ct. Comp. at 9. The civil action is premised on a state tort cause of action for "Wrongful Use of Civil Proceedings." *Id.* at 7. Armstrong's tort action is based on its assertion that, regardless of the merits of his complaint, Shemwell did not believe he was discriminated

⁸ Section 105(c)(2) of the Act requires that discrimination complaints be filed within 60 days of the alleged adverse action. 30 U.S.C. § 815(c)(2). In the temporary reinstatement proceeding, Armstrong filed a Motion to Dismiss on grounds that Shemwell's complaint was untimely. Armstrong's motion was denied as there was no showing that it was prejudiced by the late filing of Shemwell's complaint. 34 FMSHRC 894, 899-900 (Apr. 2012) (ALJ). On appeal, the Commission stated that the timeliness of Shemwell's complaint should be resolved in the proceeding on the merits. 34 FMSHRC at 1582.

⁹ The rescission of Shemwell's reinstatement was based on a Court of Appeals decision concerning the interpretation of section 105(c) that reinstatement terminates if the Secretary declines to bring a discrimination complaint on behalf of the miner. *North Fork Coal Corp. v. FMSHRC*, 691 F.3d 735, 738 (6th Cir.) (Aug. 14, 2012). The rescission was not based on the merits of Shemwell's complaint. The Commission's decision that Shemwell's complaint was not frivolous remains the law of the case. Thus, as noted by the Secretary, rescission of the temporary reinstatement does not transform Armstrong into the prevailing party in the temporary reinstatement proceeding. Sec'y Resp. Br. at 9.

against when he filed his complaint on July 23, 2012. *Id.* at 5; Oral Arg. Tr. 32, 140. Therefore, Armstrong argues Shemwell intentionally initiated a false discrimination action for the sole purpose of imposing litigation costs on Armstrong, despite a final Commission reinstatement determination that Shemwell's complaint appears to have merit. Cir. Ct. Comp. at 5-6.

The Secretary filed this section 105(c)(2) discrimination proceeding on January 8, 2013. Oral Argument was conducted at the Commission's Headquarters in Washington, D.C. on February 27, 2013, at which time Armstrong maintained that "the First Amendment right to file . . . a petition in court trumps all other interests, statutes or rights." Oral Arg. Tr. 59. Specifically, Armstrong alleged that its Kentucky lawsuit cannot be a violation of section 105(c)(1) because it is immunized by its First Amendment right to file a petition, even if doing so interferes with Shemwell's statutory rights, even if Shemwell's complaint is ultimately found to be meritorious, and even if the state suit creates a chilling effect. Oral Arg. Tr. 32-34; 124; 133.

The essence of Armstrong's assertion is that it is Shemwell's right to file a complaint under the Mine Act that is preempted, rather than Armstrong's right to bring a state civil suit.

The Secretary argues that the state civil action is not protected by the First Amendment because it is preempted by the purpose of the Mine Act. Oral Arg. Tr. 105. Furthermore, even if it were not in conflict with the Mine Act, the Secretary argues the civil suit is not worthy of First Amendment protection because it is baseless and retaliatory. Oral Arg. Tr. at 175-77. The parties' Post Oral-Argument Briefs filed on May 10, 2013, and their response briefs filed on May 25, 2013, have been considered in the disposition of this matter.

III. Legal Framework for Discrimination

The anti-discrimination provisions of section 105(c) protect miners who exercise rights granted to them under the Mine Act. To establish a case of discrimination, Shemwell must demonstrate that the Kentucky civil suit is a prohibited adverse action in response to the exercise of his protected right to file a discrimination complaint. A miner alleging discrimination under the Act establishes a prima facie case of prohibited discrimination by proving that he engaged in protected activity, and that the adverse action complained of was motivated in any part by that activity. *Sec'y of Labor on behalf of Pasula*, 2 FMSHRC 2786, 2799 (Oct. 1980), *rev'd on other grounds*, 663 F.2d 1211 (3rd Cir. 1981); *Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 817 (Apr. 1981). The operator may rebut the prima facie case by showing that no protected activity occurred, or that the adverse action was in no part motivated by protected activity. *Robinette*, 3 FMSHRC at 818 n.20. If the operator cannot rebut the prima facie case in this manner, it nevertheless may defend affirmatively by proving that it would have taken the adverse action for the miner's unprotected activities alone. *Id.* at 817, *citing Pasula*, 2 FMSHRC at 2799.

The Commission has long recognized the important role of the section 105(c):

That Congress gave miners many valuable rights under the 1977 Mine Act clearly demonstrates the congressional view that their participation in the enforcement of the Act is essential to the achievement of safe and healthful mines. This is particularly true of the right to complain to the operator and to the Secretary of alleged dangers or violations. MSHA inspectors cannot be everywhere at once, nor can they be expected to be so familiar with every mine that they will become aware of every condition or practice in need of correction. The successful enforcement of the 1977 Mine Act is therefore particularly dependent upon the voluntary efforts of miners to notify either MSHA officials or the operator of conditions or practices that require correction.

Pasula, 2 FMSHRC at 2790.

The fundamental purpose of the Mine Act is clear. The statute declares, “the first priority and concern of all in the coal or other mining industry must be the health and safety of its most precious resource - the miner.” 30 U.S.C. § 801(a). With this in mind, the statute further states, “the operators of such mines with the assistance of the miners have the primary responsibility to prevent the existence of [unsafe] conditions and practices in such mines.” 30 U.S.C. § 801(e). In this regard, the Legislative History emphasizes the *raison d’être* of the 1977 Act:

If our national mine safety and health program is to be truly effective, miners will have to play an active part in the enforcement of the Act. The Committee is cognizant that if miners are to be encouraged to be active in matters of safety and health, they must be protected against any possible discrimination which they might suffer as a result of their participation.

S. Rep. No. 95-181, at 35-36 (1977), *reprinted in* Senate Subcomm. on Labor, Comm. on Human Res., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 623-24 (1978). Thus, to achieve this statutory goal, it is crucial that miners be sufficiently protected from retaliatory conduct to allow them to feel comfortable actively engaging in efforts to promote mine safety.

In the final analysis, the issue to be resolved in a discrimination proceeding is whether there was a discriminatory motive for the adverse action as claimed by the miner. Although a mine operator’s admission of discriminatory motive is rare, the grant of a discrimination complaint cannot be based solely on conjecture that adverse action was motivated by protected activity. In such circumstances, discrimination can be proven by circumstantial evidence such

as knowledge of protected activities, hostility towards protected activity, coincidence in time between the protected activity and the adverse action, and disparate treatment. *Sec'y of Labor on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2510 (Nov. 1981).

IV. Discussion and Evaluation

a. Statutory Violation

As a threshold matter, Armstrong asserts that Shemwell is not entitled to protection under section 105(c)(1) because he was no longer an employee of Armstrong when the state civil suit was filed, and therefore is not a miner for the purposes of the Act. Armstr. Br. at 13; Armstr. Resp. Br. at 5. Armstrong's assertion is without merit. Armstrong's state suit was filed on August 22, 2012, while Shemwell was temporarily reinstated to his employment with Armstrong, as the temporary reinstatement was not dissolved until September 13, 2012.¹⁰ Furthermore, even if Shemwell had not been temporarily reinstated, an individual retains his status as a miner under the Act where the asserted protected activity occurs during the miner's employment, or where the protected activity is the filing of a discrimination complaint after the miner has been discharged.¹¹

Having concluded that Shemwell has retained his status as a miner at all times relevant to this proceeding, the focus shifts to whether Armstrong's state suit constitutes a violation of section 105(c)(1). The operative language in section 105(c)(1) is that mine operators are prohibited from *interfering* with a miner's right to institute a discrimination proceeding under the

¹⁰ Armstrong asserts that Shemwell's temporary reinstatement dissolved on July 27, 2012, when the Secretary declined to pursue Shemwell's complaint. Armstr. Resp. Br. at 14. However, it is the Commission, not the Secretary, who has the authority to rescind an order granting temporary reinstatement. The Commission's rescission was effective as of September 13, 2012.

¹¹ Armstrong, primarily relying on the statement in Shemwell's January 23, 2012, complaint that he was terminated for excessive cell phone use, contends that the filing of the complaint did not constitute protected activity because it was filed in bad faith. Armstr. Br. at 11. To accept this proposition, one must conclude that state mining official Ronnie Drake and MSHA Special Investigator Kirby Smith, who encouraged Shemwell to pursue his complaint, are co-conspirators. Obviously, the assertion that there is a bad faith impediment to the protected nature of Shemwell's complaint, based on speculation that Shemwell believed he could not prevail, is without merit. It is ironic that Armstrong asserts that its own purported good faith motivation for filing its civil suit cannot be questioned, because "evidence of Armstrong's intent can only come from Armstrong itself." Armstr. Br. at 14.

Mine Act. The term “interfere” means “to be or create a hindrance or obstacle.” *The American Heritage Dictionary* 913 (4th Ed., 2009). It is uncontested that Armstrong’s initiation of its state suit was motivated by Shemwell’s exercise of his statutory right to initiate a discrimination proceeding.

With respect to whether the Kentucky civil suit seeking to recover compensatory and punitive damages from Shemwell serves as an impediment to Shemwell’s statutory right to seek redress as an alleged victim of discrimination, one need only look to the Supreme Court, which stated:

A lawsuit no doubt may be used by an employer as a powerful instrument of coercion or retaliation. As the [National Labor Relations] Board has observed, by suing an employee who files charges with the Board or engages in other protected activities, an employer can place its employees on notice that anyone who engages in such conduct is subjecting himself to the possibility of a burdensome lawsuit. Regardless of how unmeritorious the employer’s suit is, the employee will most likely have to retain counsel and incur substantial legal expenses to defend against it [citation omitted]. Furthermore, as the Court of Appeals in the present case noted, the chilling effect of a state lawsuit upon an employee’s willingness to engage in protected activity is multiplied where the complaint seeks damages in addition to injunctive relief [citation omitted]. Where, as here, such a suit is filed against hourly-wage [employees] or other individuals who lack the backing of a union, the need to allow the Board to intervene and provide a remedy is at its greatest.

Bill Johnson's Restaurants, Inc v. NLRB, 461 U.S. 731, 740-41 (1983).¹² Thus, it is abundantly clear that Armstrong's state suit is an adverse action that violates section 105(c)(1) of the Act because it interferes with Shemwell's statutory right to file a discrimination complaint.¹³

It is important to emphasize that Armstrong's civil suit is a violation of section 105(c)(1) regardless of the ultimate outcome of Shemwell's pending private discrimination complaint. Miners must be free to file safety related complaints regardless of whether they are ultimately determined to be meritorious. The denial of a complaint of discrimination by the Commission is based on a finding that the complainant failed to demonstrate, by a preponderance of the evidence, that he was discriminated against. *See Pasula*, 2 FMSHRC at 2799. It is not a finding that discrimination did not occur.

b. First Amendment Right to Petition

The question in this case is whether the First Amendment right to petition immunizes Armstrong from Mine Act liability for bringing a Kentucky civil suit which is facially discriminatory and prohibited by section 105(c)(1) of the Act. The First Amendment right to petition state courts is a fundamental element of the Bill of Rights. As a general proposition, state suits brought by employers against employees are protected by the right to petition unless they are preempted. *See, e.g., Bill Johnson's*, 461 U.S. at n.5 (noting that federally preempted lawsuits by employers may be enjoined); *California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 514 (1972) ("First Amendment rights are not immunized from regulation when they are used as an integral part of conduct which violates a valid [federal] statute"). Preemption is particularly relevant where, as in this case, enforcing one party's right to petition a state court would interfere with another party's right to petition a federal agency. 404 U.S. at 512 (noting that civil suits brought "to discourage and ultimately to prevent the respondents from invoking

¹² *Bill Johnson's* involves the following facts: a waitress filed a complaint with the NLRB alleging that she had been terminated in retaliation for engaging in pro-union picketing; her employer then filed a state suit alleging that the picketers had harassed customers, created a threat to public safety, and libeled the employer; the waitress then filed a second complaint with the Board alleging that the state civil suit had been filed in retaliation for protected activities. 461 U.S. at 733-35. In *Bill Johnson's*, the Court determined that the employer's civil suit was not preempted because retaliatory motive alone does not constitute a violation of the relevant provisions of the National Labor Relations Act, nor did the suit otherwise conflict with federal law. *Id* at 742-43 & n. 5. Although the restaurant's actions may have been retaliatory, the court determined, despite the burden placed on the defendant, an unpreempted state suit is entitled to First Amendment protection "unless . . . the suit has no reasonable basis." *Id.* at 755-56.

¹³ Once it has been established that a protected activity and an adverse action occurred, an operator may present an affirmative defense by demonstrating that it would have taken the adverse action regardless of the miner's protected activities. *Robinette*, 3 FMSHRC at 817. However, this defense is not available here, as the civil suit and Shemwell's discrimination complaint are inextricably linked. *See Cir. Ct. Comp.*, at 7.

the processes of the administrative agencies and courts” fall within an exception to the immunity provided by the First Amendment).

As discussed below, with regard to state suits brought by employers that are not preempted because they do not conflict with federal law, it is noteworthy that the Commission has looked for guidance to case law interpreting the National Labor Relations Act (“NLRA”). *See, e.g., Clifford Meek v. Essroc Corp.*, 15 FMSHRC 606, 616 (Apr. 1993) (recognizing that the Commission looks to case law interpreting relevant remedial provisions of the NLRA for guidance with respect to accomplishing the Mine Act’s remedial goals). Consistent with NLRA case law, the right to petition does not immunize suits which are both objectively baseless and subjectively motivated by an unlawful purpose. *BE & K Constr. Co. v. NLRB*, 536 U.S. 516, 531-32 (2002).

c. Preemption as a Bar to First Amendment Protection

The doctrine of preemption is derived from the Supremacy Clause of the Constitution, which provides that “[the] Constitution, and the Laws of the United States . . . shall be the supreme Law of the Land . . . any thing in the Constitution or Laws of any state to the contrary notwithstanding.” U.S. Const. art. VI, § 2. The supremacy of the “laws of the United States” applies to any federal law, including a regulation of a federal agency. Thus, the Federal Supremacy Clause trumps conflicting state law, including conflicting suits brought under state tort law. Preemption can either be express or implied.

With respect to express preemption, the Supreme Court has noted that Congress can insulate its statutory goals from state laws that undermine its legislative purpose by enacting statutes that explicitly preempt state law. *English v. General Electric Co.*, 496 U.S. 72, 78 (1990). With this in mind, Congress’ enactment of section 506(a) of the Mine Act explicitly states:

No state law . . . shall be superseded by any provision of this chapter or order issued or any mandatory health or safety standard, *except insofar as such State law is in conflict with this chapter or with any order issued* or any mandatory health or safety standard.

30 U.S.C. § 955(a) (emphasis added). Thus, the Mine Act recognizes, in essence, the sanctity of the First Amendment with respect to civil suits brought under state law, unless such suits interfere with the rights of miners granted under the statute. Armstrong’s reliance on the First Amendment as an absolute right that shields it from liability for violations of the Mine Act is misplaced, as it is inconsistent with the preemption provision of the statute.

Even if section 506(a) of the Mine Act was narrowly construed, such that Armstrong’s tort action was not expressly preempted, the tort action would still be precluded by implied preemption, also known as conflict preemption, if furtherance of the tort proceeding frustrates a

federal purpose.¹⁴ In this regard, longstanding case law notes that even if the state action were not explicitly preempted by statute, a state law is also preempted where it actually conflicts with or “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.” *English*, 496 U.S. at 79 (citing *Hines v. Davidowitz*, 312 US 52, 67 (1941)).¹⁵ As previously noted, the clear statutory language and legislative history reflect that the Mine Act is predicated on encouraging the cooperation and participation of both mine operators and miners in achieving a safe mining environment. The explicit statutory language and legislative history noted above need not be repeated. *See* Section III, *supra*.

In short, it is paramount that miners must be insulated from any chilling effect that would inhibit their willingness to report safety related concerns to mine management. Determining whether there is objective evidence of a chilling effect depends on whether the adverse action “reasonably tended to discourage miners from engaging in protected activities.” *Sec’y of Labor on behalf of Poddey v. Tanglewood Energy, Inc.*, 18 FMSHRC 1315, 1321 (Aug. 1996) (citing *Sec’y of Labor on behalf of Johnson v. Jim Walter Resources, Inc.*, 18 FMSHRC 552, 558 (Apr. 1996)). Can anyone deny that the prospect of a miner being sued in state court for filing a protected complaint that is pending before the Commission is a significant disincentive for miner participation? In this regard, since Armstrong contends it has a right to petition in state court even if the miner’s discrimination complaint is granted, Shemwell’s counsel correctly asserts:

every miner would know that even if he files and wins a discrimination complaint . . . he could still be dragged into a state court by his employer and interrogated about his *motivation* for having filed the complaint. It would be the rare miner who would

¹⁴ Armstrong’s tort action clearly frustrates the Act’s statutory goal of encouraging miner participation in matters of safety. However, tort actions related to a federal statute are not preempted when they do not conflict with the purposes of the statute. For example, by way of contrast, in *Wyeth v. Levine*, 555 U.S. 555 (2009), the plaintiff brought a failure-to-warn civil suit against a drug company under state tort law after she suffered irreversible gangrene requiring the amputation of an arm after being injected with the drug Phenergan. The drug company sought to preempt the state tort action, claiming it was immunized from such lawsuits because the drug warning label was approved by the Food and Drug Administration. The Court held that, while “some state-law claims might well frustrate the achievement of congressional objectives, this is not such a case.” *Id.* at 581.

¹⁵ The Supreme Court has also recognized federal preemption where state law “regulates conduct in a field that Congress intended the Federal Government to occupy exclusively.” 496 U.S. at 78-79. The Secretary asserts that field preemption applies, because the Act comprehensively regulates the filing of discrimination complaints by miners. *Sec’y Br.* at 14. However, section 506(a) does permit some state regulation of mining, and it is noteworthy that Kentucky has its own state agency governing mining. Whether Armstrong’s Kentucky civil suit is preempted under the doctrine of field preemption need not be addressed, in view of the fact that the civil suit is clearly preempted under the express and implied preemption doctrines.

file a discrimination complaint over health or safety issues under such circumstances.

Shemwell Br. at 8 (emphasis in the original). It is evident that the chilling effect of Armstrong's civil suit clearly frustrates the fundamental statutory goal of encouraging miner involvement in safety related matters.

With regard to the potential chilling effect, Armstrong argues that its civil suit would only discourage false and maliciously filed claims, and that section 105(c) does not protect claims made in bad faith. Armstr. Br. at 29; Armstr. Resp. Br. at 5-6. However, the D.C. Circuit Court has held that a miner who complained to MSHA's predecessor safety agency was protected against retaliatory action even if the complaint was made in bad faith. *Munsey v. FMSHRC*, 595 F.2d 735, 742, 745 (D.C. Cir. 1978); Sec'y Resp. at 2. In any event, the treatment of a fraudulent discrimination claim goes beyond the scope of this proceeding. The Commission has already determined that Shemwell's complaint is not frivolous, and, the full merits of Shemwell's complaint have yet to be adjudicated. Thus, the record is devoid of any evidence that Shemwell's claim has been fraudulently brought.

It should be noted that Armstrong makes several assertions in an attempt to avoid preemption which should not be ignored. As an initial matter, Armstrong argues that the Kentucky court is the only forum that could provide compensatory and punitive relief for Shemwell's alleged tort of "Wrongful Use of Civil Proceedings," as Congress did not delegate to the Commission the authority to award such relief.¹⁶ Armstr. Br. at 9. Armstrong misses the point. The exposure to compensatory and/or punitive damages would discourage miners from exercising their statutory rights. Thus, to allow a state court to grant monetary damages against a miner for filing a safety related complaint, a remedy that was not authorized by Congress in the Mine Act, would undermine the goal the Act seeks to accomplish - miner participation in safety matters. See, e.g., *San Diego Bldg. Trades Council v Garmon*, 359 U.S. 236, 246-47 (1959) (noting that "to allow the State to grant a remedy here which has been withheld from the NLRB only accentuates the danger of conflict").¹⁷ Moreover, the prospect of a multi-million dollar corporation instituting a civil suit that seeks to collect monetary damages from a rank-and-file

¹⁶ It is noteworthy that the NLRB has rejected a similar argument that the respondent had no forum for damages arising from false claims, stating that employers can bring evidence of the invalidity of employee's claims to the Board's attention, in which case the Board would withhold reinstatement and/or backpay. *Federal Security, Inc.*, 359 NLRB No. 1, 15-16 (2012).

¹⁷ Similarly, the Secretary asserts that "the fact that Congress chose not to . . . provide an avenue by which mine operators could recover damages against miners who file complaints in bad faith, reflects Congress' considered judgment about how risks of loss should be distributed between miners and mine operators." Sec'y Resp. Br. at 3.

miner for bringing a discrimination case before the Commission is unsettling.¹⁸ Rather, Armstrong's focus should be demonstrating in a relevant Commission proceeding that its discharge of Shemwell was not motivated by discrimination.

In addition, Armstrong asserts its First Amendment right to petition cannot be curtailed, arguing:

There is simply no basis in the language of the First Amendment for a finding that Congress may perform an end run around the protections of the Right to Petition by drafting legislation allegedly preempting that right. *Put differently, you can't preempt the First Amendment.*

Armstr. Br. at 6 (emphasis in the original).

Armstrong's focus is misplaced. The doctrine of preemption does not apply to constitutional rights. Rather, preemption applies, in appropriate circumstances, to state law, including tort actions. Thus, the issue to be resolved is whether the Kentucky suit is preempted because it is prohibited by the plain language of section 105(c)(1) of the Mine Act. As discussed above, a long line of case law reflects that preemption is a well-settled doctrine that is applied to preclude state actions when such actions violate or conflict with federal law. Armstrong's suit brought under Kentucky tort law conflicts with the Mine Act. Acceptance of Armstrong's proposition that the right to petition is absolute and immunizes its violation of the Act would, in effect, preempt the doctrine of preemption. In other words, Armstrong's assertion of its entitlement to an absolute First Amendment right ignores the fundamental belief of the framers of the Constitution in the supremacy of federal law expressed in Article VI. Armstrong's reliance on a First Amendment right must be rejected.

d. Baseless and Retaliatory

The facts in this case require preemption of the state civil suit because it is a *direct attack* on activity protected under section 105(c)(1) of the Act. However, there may be instances where employers have a subjectively genuine desire to test the legality of conduct that is *related to* protected activity. Under such circumstances, civil suits that constitute genuine petitioning are entitled to First Amendment protection. As a general matter, such civil suits are considered to be genuine if the employer's belief is both "subjectively genuine and objectively reasonable." *BE & K*, 536 U.S. at 533-34.

Thus, civil suits that do not conflict with federal law, although they are related to subject matter regulated by federal statute, are protected by the First Amendment provided that the civil

¹⁸ As reflected on its internet home page, Armstrong Energy, "through its 100% owned subsidiary Armstrong Coal, is a leading producer of steam coal in the Illinois Basin. Armstrong controls over 300 million tons of proven and provable coal reserves and operates seven mines in Western Kentucky." Armstrong Home Page, www.armstrongcoal.com.

action is not both baseless and retaliatory. For example, assume a mine operator is aware that a miner has filed a safety related complaint with MSHA. The mine operator has filed a suit for defamation against that miner, based on the miner's widespread dissemination of his claim that the mine operator's extracted material is adulterated and unfit for use. The miner claims the defamation suit is motivated, at least in part, by his safety related protected activity. The defamation suit is entitled to First Amendment protection if the suit is not baseless, even if it is retaliatory.¹⁹ See, e.g., *BE & K*, 536 U.S. 516 (holding that a civil suit brought by a construction contractor alleging that unions had intentionally delayed a project was not within the scope of the relevant provisions of the NLRA, and was protected by the First Amendment provided it was *not both* objectively baseless and subjectively motivated by an unlawful purpose.)

i. Baselessness

The Supreme Court has held that a lawsuit is objectively baseless if “no reasonable litigant could realistically expect success on the merits.” *Prof'l Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc.*, 508 US 49, 60 (1993). There are several reasons why Armstrong cannot realistically expect to succeed in Kentucky. The Commission has determined that Shemwell's complaint has not been frivolously brought. A not frivolously brought finding is the equivalent of a determination that Shemwell's discrimination complaint “appears to have merit” or that there is a “reasonable cause to believe” Shemwell is the victim of discrimination. *Sec'y of Labor on behalf of Price v. Jim Walter Res., Inc.*, 9 FMSHRC 1305, 1306 (Aug. 1987), *aff'd* 920 F.2d 738, 747 & n.9 (11th Cir. 1990). Armstrong does not dispute the finality of the Commission's determination. Oral Arg. Tr. 158-59. It is manifestly unreasonable for Armstrong to believe that it has a realistic chance to prevail in Kentucky, based on an alleged misuse by Shemwell of a Commission proceeding, when the Commission has finally determined that Shemwell's discrimination complaint appears to have merit. Shemwell having satisfied a “probable cause to believe” burden of proof before the Commission strips Armstrong of any realistic expectation that it could succeed on the merits in Kentucky.²⁰

The Commission looks to indirect evidence of discrimination, as mine operators rarely if ever admit to a discriminatory motive. *Chacon*, 3 FMSHRC at 2510. In this regard, irrespective of the Commission's final “not frivolous” determination, there is undisputed indirect evidence of discrimination sufficient to demonstrate that Shemwell's claim appears to have merit. Shemwell's complaints about fumes were directly communicated in April 2011 to Lander,

¹⁹ The First Amendment protection afforded civil suits, provided they are not baseless, even if they are retaliatory, is the functional equivalent of the affirmative defense enunciated in *Robinette*, 3 FMSHRC at 817, that miners can defend against discrimination by demonstrating that they would have taken the adverse action regardless of the protected activity. See n. 13, *supra*.

²⁰ It is worth noting, as a general matter, the Supreme Court has held that probable cause is an absolute defense to the common law tort claim of Wrongful Proceedings. *Prof'l Real Estate Investors*, 508 U.S. at 63.

who in June 2011 began a series of verbal and written disciplinary actions reportedly based on Shemwell's excessive cell phone use that ultimately culminated in his September 2011 discharge. Thus the facts establish knowledge of the protected activity,²¹ and coincidence in time between the protected activity and the adverse action - two of the elements of indirect evidence of discrimination in *Chacon*. Consequently, there is strong circumstantial evidence of discrimination that renders Armstrong's civil action baseless.

Regardless of the Commission's "not frivolously brought" determination and the indirect evidence reflecting the possibility of a discriminatory motive, Armstrong's civil suit is baseless because it fails to meet two essential elements of state tort law. First, the Kentucky tort of "Wrongful Use of Civil Proceedings" requires that the allegedly misused civil proceeding terminate in favor of the party filing the state tort action. *D'Angelo v. Mussler*, 290 S.W.3d, 75, 79 (Ky. App. 2009). It is undisputed that there has been no final Commission determination on the merits concerning whether Shemwell's discharge was motivated by discrimination. Oral Arg. Tr. 39. Thus, applying Kentucky law, Armstrong's civil suit is facially baseless, as it is premature because the Commission has yet to rule on Shemwell's complaint.²²

In addition, the civil suit is baseless because Kentucky law requires Armstrong to demonstrate that Shemwell's complaint lacked probable cause when it was filed before the Commission. *D'Angelo*, 290 S.W.3d at 79. As previously noted, a Commission "not frivolously brought" finding is substantively analogous to a proceeding that "appears to have merit" or a proceeding where there is "reasonable cause to believe" the claim alleged. *Jim Walter*, 9 FMSHRC at 1306. Armstrong's reliance on its self-serving assertion that Shemwell did not have reasonable cause to believe he was discriminated against, despite indirect evidence of a possible discriminatory motive, cannot be reconciled with Commission case law.²³

²¹ Armstrong's allegation that those involved in Shemwell's termination had no knowledge of his protected activity is lacking in merit. *See* n. 7, *supra*.

²² Armstrong asserts that the underlying proceeding terminated in Armstrong's favor when the Secretary issued a letter declining to pursue Shemwell's discrimination complaint. Armstr. Resp. Br. at 14. Neither the Secretary's decision not to pursue a discrimination proceeding on behalf of a miner, nor the dissolution of a temporary reinstatement order, terminates a discrimination proceeding before the Commission. In this regard, the court has noted that "the merits of the miner's discrimination complaint [can only be] resolved by an administrative law judge ("ALJ"), with further discretionary review provided by the Commission." *North Fork v. Gray*, 691 F.3d 735, 738 (6th Cir. 2012). Consequently, the subject discrimination proceeding is not terminated until there is a final determination on the merits of Shemwell's complaint.

²³ Armstrong contends that the Commission's reinstatement decision merely deals with the appearance of Shemwell's claim, regardless of its truth, and is therefore not a finding with respect to probable cause to believe. Armstr. Br. at 22; Armstr. Resp. Br. at 15. Armstrong's
(continued...)

In an attempt to demonstrate that its civil suit is meritorious, Armstrong relies on Shemwell's statement in his initial discrimination complaint that "I was discharged from my job for using my cell phone at work." Armstr. Br. Ex. 2. However, as mine operators rarely admit a discriminatory motive, it is essential that determining whether a miner has a colorable claim of discrimination must await the MSHA investigator's analysis of the circumstances surrounding the miner's discharge. To exclude MSHA participation in evaluating a complaint would reward mine operators who mislead miners by concealing their discriminatory intent. Thus, the operative date for determining the validity of Shemwell's complaint is January 26, 2012, when he met with Kirby Smith, rather than January 23, 2012, when the clerical assistant completed Shemwell's complaint application. In this regard, the Commission has stated, "it is the scope of the Secretary's investigation, rather than the initiating complaint, that governs the permissible ambit of the complaint filed with the Commission." *Sec'y on behalf of Dixon v. Pontiki Coal Corp.*, 19 FMSHRC 1009, 1017 (June 1997). Thus, when viewed in the context of MSHA's discrimination filing procedures, there is an inadequate basis for Armstrong's claim that Shemwell's complaint lacked probable cause, a required element for the Kentucky civil action.

Finally, to accept Armstrong's proposition that a litigant can sue an opponent solely on the assertion that a claim was insincerely brought would result in an endless series of frivolous lawsuits. It is ironic, if not hypocritical, that Armstrong maintains that its good faith motivation for filing its civil suit cannot be questioned, because "evidence of Armstrong's intent can only come from Armstrong itself." Armstr. Br. at 14. The gravamen of Armstrong's statement is that evidence of Shemwell's intent can only come from Shemwell himself. Thus, Armstrong's attack on Shemwell's motivation is based on mere speculation, with no meaningful indirect evidence of bad faith or fraudulent intent. In the final analysis, Armstrong's claim of "Wrongful Use of Civil Proceedings": lacks a predicate final Commission decision on the merits; is inconsistent with significant indirect evidence supporting a colorable claim of discrimination; and is inconsistent with Kentucky case law. As such, the civil suit is baseless, in that it is not objectively reasonable.

ii. Retaliation

Objectively baseless suits that are not subjectively genuine because they are motivated by an unlawful purpose are exempted from First Amendment protection. *BE & K*, 536 U.S. at 531. Such suits are deemed not to be genuine when they attempt to mask an unlawful retaliatory motive by disingenuously claiming the motive is to challenge the conduct that is the subject of the suit. Here, Armstrong is attempting to conceal its illegal interference with Shemwell's 105(c) rights by attacking in a state court action Shemwell's motivation for filing a discrimination complaint. However, Armstrong has failed to demonstrate any reasonable basis for asserting Shemwell's discrimination complaint constitutes an abuse of process. The Commission has determined that Shemwell's complaint is not frivolous. Moreover, Armstrong's state suit

²³(...continued)
contention is a distinction without a difference.

lacks a prerequisite element in that there has been no final adjudication of the complaint. Consequently, Armstrong's assertion of its First Amendment right as a shield to its manifest violation of section 105(c)(1), in the name of a "Wrongful Use of Civil Proceedings" action, is pretextual in nature.

The fact that Armstrong's civil suit is aimed at the act of filing the discrimination complaint, rather than challenging the merits of the complaint, is further evidence of a retaliatory motive. In fact, Armstrong has expressed a disinterest in the ultimate outcome of Shemwell's complaint, asserting it is justified in bringing the state action even if Shemwell ultimately prevails in the Commission discrimination proceeding. Oral Arg. Tr. 17, 19, 50-51, 133. Thus, the primary effect of the civil suit is to discourage future complaints, rather than to achieve vindication through defending against Shemwell's complaint. *See, e.g., Prof'l Real Estate*, 508 U.S. at 60-61 (finding that sham anti-trust litigation exists when the plaintiff has no reasonable expectation of prevailing, and the true purpose of the suit is to interfere with the business of a competitor).

Finally, Armstrong's civil suit seeks to recover compensatory and punitive damages from Shemwell. Suits to recover extreme damages have been deemed to be retaliatory in factually similar NLRB cases. *See, Petrochem Insulation, Inc. v. NLRB*, 240 F.3d 26, 33 (Ct. App. D.C. Cir. 2001). In the final analysis, Armstrong's civil suit is not subjectively genuine because, regardless of its ostensible purpose of recovering damages, its real purpose is to interfere with Shemwell's statutory right. *Bill Johnson's*, 461 U.S. at 740 (noting the potential retaliatory nature of state suits brought by employers seeking to recover compensatory damages against employees who bring charges under a federal statute).

V. Conclusion

In view of the above, Armstrong's civil tort action, brought in the Commonwealth of Kentucky's Muhlenberg Circuit Court, violates section 105(c)(1) of the Mine Act because it interferes with Shemwell's statutory right to file a discrimination complaint. In this regard, the civil suit is not protected by the First Amendment, as it is in violation of, and preempted by, federal law. Even if Armstrong's suit were not preempted, it is not protected by the First Amendment because it is both objectively baseless and motivated by the unlawful purpose of violating the anti-retaliation provisions of section 105(c)(1) with impunity.

VI. Interim Remedy - Cease and Desist Order

The Commission has been delegated broad remedial power to remove the burdens suffered by the victims of discrimination. The Commission, in *Sec'y of Labor on behalf of James Rieke v. Azko Nobel Salt, Inc.*, 19 FMSHRC 1254 (July 1997), citing the provisions of section 105(c)(2), the relevant legislative history, and its longstanding case law, recognized its broad authority to grant appropriate relief given the myriad of circumstances that confront miners who have experienced discrimination. It stated:

“The Commission shall have authority . . . to require a person committing a violation of this subsection 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 pay and interest.” 30 U.S.C. § 815(c)(2). As the Commission stated in *Secretary of Labor on behalf of Dunmire v. Northern Coal Co.*, 4 FMSHRC 126, 142 (February 1982), this is a “broad remedial charge” and that “so long as our remedial orders effectuate the purposes of the Mine Act, our judges and we possess considerable discretion in fashioning remedies appropriate to varied and diverse circumstances.” Thus, the Commission reviews the judge's remedial order for abuse of discretion and to ensure that it effectuates the purposes of the Mine Act.

The Mine Act's legislative history similarly indicates Congressional intent for expansive remedial relief to victims of discrimination:

It is the Committee's intention to protect miners against not only the common forms of discrimination, such as discharge, suspension, demotion, reduction in benefits, vacation, bonuses and rates of pay, or changes in pay and hours of work but also against the more subtle forms of interference

. . .

It is the Committee's intention that the Secretary propose, and that the Commission require, all relief that is necessary to make the complaining party whole and to remove the deleterious effects of the discriminatory conduct

S. Rep. No. 181, 95th Cong., 1st Sess. 36-37 (1977), *reprinted in* Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2nd Sess., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 624-25 (1978).

In accordance with these principles, the Commission endeavors to make miners whole and to return them to their status before the illegal discrimination occurred. *Secretary of Labor on behalf of Bailey v. Arkansas-Carbona Co.*, 5 FMSHRC 2042, 2056 (December 1983) “Unless compelling reasons point to the

contrary, the full remedial measure of relief should be granted to [an improperly] discharged employee.” *Arkansas-Carbona*, 5 FMSHRC at 2049 (quoting *Secretary of Labor on behalf of Gooslin v. Kentucky Carbon Corp.*, 4 FMSHRC 1, 2 (January 1982)).

Azko Nobel Salt, Inc., 19 FMSHRC at 1257-58.

In providing full remedial relief, the Commission has cautioned that “a miner should not be worse off than he otherwise would have been because he has chosen to vindicate his rights under the Mine Act.” *Id.* at 1259. In other words, Shemwell must be relieved, with all deliberate speed, of the financial burden and anxiety caused by having to defend a civil suit simply because he exercised his statutory right as a miner.

Ordinarily, affirmative steps required by a mine operator to relieve a miner of the effects of discrimination, such as back pay and reinstatement, must await a final decision on relief. Under such circumstances, the violative Kentucky tort action would remain unabated for several months, during which time the parties are entitled to file petitions for relief before an ultimate decision on relief can be issued.²⁴

This matter presents the novel question of whether an order requiring Armstrong to cease and desist its prosecution of its civil suit can be issued now, or, whether it must be delayed until a final decision on relief. A stay of implementation is, in effect, a delay in implementation. Consequently, it is helpful to apply the criteria for determining whether remedial action ordered to be taken by a mine operator in a Commission proceeding should be stayed to the issue of whether the cease and desist order should be delayed. The criteria are: (1) whether there is a likelihood of Armstrong prevailing on appeal; (2) whether Armstrong will be irreparably harmed if the cease and desist order is not delayed; (3) whether not delaying the cease and desist order creates an adverse effect on others; and (4) whether not delaying the cease and desist order is in the public interest. *See Kevin Baird v. PCS Phosphate Company, Inc.*, 33 FMSHRC 127, 128-29 (Feb. 2011) (citing *Virginia Petroleum Jobbers Ass’n v. Federal Power Commission*, 259 F.2d 921, 925 (D.C. Cir. 1958)).²⁵

²⁴ As provided herein, the parties have been given until July 30, 2013, to confer for the purpose of agreeing on the specific relief to be awarded, and until August 23, 2013, to file either a joint stipulation on relief or individual petitions for relief. Therefore a decision on relief would likely not be issued until October 2013.

²⁵ By way of analogy, it is noteworthy that under Commission Rule 45(f), a judge’s decision ordering temporary reinstatement will not be stayed, absent extraordinary circumstances, during the pendency of a Commission appeal. 29 C.F.R. § 2700.45(f). Similar to the considerations dictating the expeditious temporary reinstatement of a miner to achieve the resumption of the payment of his wages, expeditious action is required to relieve Shemwell of the ongoing harm caused by Armstrong’s violative civil suit.

With respect to the first factor, notwithstanding the propriety of preemption, having determined that the civil suit is baseless, it is not likely that Armstrong will prevail on appeal. With regard to irreparable harm, it is significant that Armstrong's suit is premature under Kentucky tort law, since no final decision has been issued in the Commission proceeding alleged to have been misused. Moreover, withdrawal of Armstrong's suit can be without prejudice, permitting Armstrong to once again bring its civil proceeding in the unlikely event Armstrong is ultimately successful on appeal. Turning to the third factor, the cease and desist order must not be delayed because to do so would have a chilling effect on similarly situated miners who would be discouraged from bringing safety related complaints. Finally, not delaying the cease and desist order is in the public interest because it will further the Mine Act's goal of ensuring that miners play an active role in achieving a safer working environment. Consequently, an order requiring Armstrong to cease and desist should not be further delayed.

Consistent with the Commission's broad remedial powers, it is unreasonable to permit Armstrong to continue to interfere with Shemwell's statutory right to file his discrimination complaint. Moreover, it is imprudent to further delay the removal of the chilling effect imposed on rank-and-file miners by allowing the civil suit to continue. Consequently, Armstrong shall be ordered to cease and desist prosecution of its Kentucky suit by filing an appropriate motion to dismiss, within 40 days of the date of this decision on liability.²⁶

ORDER

Accordingly, **IT IS ORDERED** that the discrimination complaint filed by the Secretary on behalf of Shemwell pursuant to section 105(c)(2) of the Act, as a consequence of Armstrong's civil suit for "Wrongful Use of Civil Proceedings," is granted.²⁷

IT IS FURTHER ORDERED that Armstrong, within 40 days of the date of this decision, cease and desist from prosecuting its civil suit brought against Shemwell in the Commonwealth of Kentucky's Muhlenberg County Circuit Court by filing an appropriate motion to dismiss.²⁸

²⁶ It is worth noting that providing Armstrong with a 40 day period to withdraw its state suit comports with the Commission's holding in *Cordero Mining, LLC*, 2011 WL 7144301, Docket No. WEST 2010-1773-D, slip op. (Dec. 2011), which requires that a mine operator be provided with a minimum 30 day period in which to request a stay before the Commission.

²⁷ The civil penalty to be assessed for this statutory violation will be addressed in the Decision on Civil Penalty and Supplemental Decision on Relief.

²⁸ The Secretary may consider imposition of a daily penalty pursuant to section 110(b) of the Act if Armstrong fails to timely withdraw its state civil suit. Section 110(b) provides for assessment of a civil penalty of up to \$7,500.00 for each day an operator fails to correct a violation for which a citation has been issued under section 104(a). Section 104(a) authorizes the Secretary to issue citations for violations of the Act or any order promulgated pursuant

(continued...)

This Decision on Liability is an interim decision. It does not become final until a Decision on Civil Penalty and Supplemental Decision on Relief is issued. Accordingly, **IT IS FURTHER ORDERED** that the parties should confer **before July 30, 2013**, in an attempt to reach an agreement on the specific relief to be awarded. Such relief may include, but is not limited to: appropriate attorney's fees associated with Shemwell's defense in the Kentucky civil suit; reimbursement of any other relevant expenses incurred by Shemwell; compensation for any impediment the civil suit may have caused with regard to Shemwell's ability to successfully procure equivalent employment in the mining industry, less any income earned from alternative employment;²⁹ and compensation for any demonstrable physical or emotional harm related to the civil action and reimbursement for any medical expenses related thereto.

If the parties agree to stipulate to the appropriate relief to be awarded they shall file a Joint Stipulation on Relief **on or before August 23, 2013**. An agreement concerning the scope and amount of relief to be awarded shall not preclude either party from appealing this decision.

If the parties cannot agree on the relief to be awarded, the parties **ARE FURTHER ORDERED** to file, **on or before August 23, 2013**, Proposals for Relief specifying the appropriate relief to be awarded. Any claim for reimbursement, or for health related issues, must be accompanied by documentary evidence. If separate Proposals for Relief are filed, I will confer with the parties to determine if there are disputed factual issues that require an evidentiary hearing.

/s/ Jerold Feldman
Jerold Feldman
Administrative Law Judge

²⁸(...continued)
to the Act. 30 U.S.C. §§ 820(b), 814(a). The determination in this proceeding that Armstrong's civil suit violates section 105(c)(1) of the Act is the substantive equivalent of a citation issued for a violation of the Act. Significant daily civil penalties may be needed to encourage companies with extensive financial resources to abate violations while they litigate or appeal their validity. *Thunder Basin Coal Co.*, 19 FMSHRC 1495, 1505 (Sept. 1997). Operators who choose not to abate violations while continuing to litigate must "be prepared to bear the consequences of that decision." *Id.*

²⁹ An administrative law judge has noted that a complainant may be awarded relief if his former employer interfered with his ability to obtain subsequent employment. *Joseph W. Herman v. Imco Services*, 4 FMSHRC 1540, 1549 (Aug. 1982) (ALJ).

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/tmw

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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June 20, 2013

NORTHSHORE MINING COMPANY, : CONTEST PROCEEDING
Contestant, :
v. : Docket No. LAKE 2010-361-RM
Citation No. 6492348; 01/12/2010

SECRETARY OF LABOR, : Northshore Mining
MINE SAFETY AND HEALTH : Mine ID. 21-00831
ADMINISTRATION (MSHA) :
Respondent :

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA) : Docket No. LAKE 2010-756-M
Petitioner, : A.C. No. 21-00831-219864-01

v. : Docket No. LAKE 2011-482-M
A.C. No. 21-00831-247106

: Docket No. LAKE 2011-664-M
A.C. No. 21-00831-252297

NORTHSHORE MINING COMPANY, :
Respondent. : Northshore Mining Company

DECISION

Appearances: Karen E. Bobela, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner;
Patrick W. Dennison, Esq., and Jason P. Webb, Esq., Jackson Kelly PLLC, Pittsburgh, Pennsylvania, for Respondent.

Before: Judge Manning

This case is before me upon a petition for assessment of civil penalty filed by the Secretary of Labor (the “Secretary”), acting through the Mine Safety and Health Administration (“MSHA”), against Northshore Mining Company (“Northshore” or “Respondent”) pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (the “Mine Act”). The parties introduced testimony and documentary evidence at a hearing held in Duluth, Minnesota and filed post-hearing briefs.

Northshore operates a plant at Silver Bay, Minnesota, that produces iron ore pellets from the taconite that it mines at the Babbit Mine. Eight section 104(a) citations and one section

104(d)(1) citation issued at the plant were adjudicated at the hearing. The plant is a “mine” under section 3(h)(1) the Mine Act. 30 U.S.C. § 802(h)(1).

I. BASIC LEGAL PRINCIPLES

A. Significant and Substantial

The Secretary alleges that the violations discussed below were of a significant and substantial (“S&S”) nature. An S&S violation is a violation “of such nature as could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard.” 30 U.S.C. § 814(d) (2006). A violation is properly designated S&S, “if, based upon the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature.” *Cement Div., Nat’l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981). In order to establish the S&S nature of a violation, the Secretary must prove: “(1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard – that is, a measure of danger to safety – contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury will be of a reasonably serious nature.” *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984); *accord Buck Creek Coal Co., Inc.*, 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power Co., Inc.*, 861 F. 2d 99, 103 (5th Cir. 1988) (approving *Mathies* criteria).

It is the third element of the S&S criteria that is most difficult to apply. The element is established only if the Secretary proves “a reasonable likelihood the hazard contributed to will result in an event in which there is an injury.” *U.S. Steel Mining Co., Inc.*, 7 FMSHRC 1125, 1129 (Aug. 1985). An S&S determination must be based upon the particular facts surrounding the violation and must be made in the context of continued normal mining operations. *Texasgulf, Inc.*, 10 FMSHRC 498, 500 (Apr. 1988) (quoting *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574 (July 1984)). “The Secretary need not prove a reasonable likelihood that the violation itself will cause injury.” *Cumberland Coal Resources, LP*, 33 FMSHRC 2357, 2365 (Oct. 2011) (citing *Musser Engineering, Inc. and PBS Coals, Inc.* 32 FMSHRC 1257, 1281 (Oct. 2010)).

The S&S nature of a violation and the gravity of a violation are not synonymous. The Commission has pointed out that the “focus of the seriousness of the violation is not necessarily on the reasonable likelihood of serious injury, which is the focus of the S&S inquiry, but rather on the effect of the hazard if it occurs.” *Consolidation Coal Co.*, 18 FMSHRC 1541, 1550 (Sept. 1996). The Commission has emphasized that, in accordance with the language of section 104(d)(1), 30 U.S.C. § 814(d)(1), it is the contribution of a violation to the cause and effect of a hazard that must be S&S. *U.S. Steel Mining Co.*, 6 FMSHRC at 1575. With respect to citations or orders alleging an accumulation of combustible materials, the question is whether there was a confluence of factors that made an injury-producing fire and/or explosion reasonably likely. *UP&L*, 12 FMSHRC 965, 970-71 (May 1990). Factors that have been considered include the extent of the accumulation, possible ignition sources, the presence of methane, and the type of equipment in the area. *UP&L*, 12 FMSHRC at 970-71; *Texasgulf*, 10 FMSHRC at 500-03.

B. Negligence and Unwarrantable Failure

The Secretary defines conduct that constitutes negligence under the Mine Act as follows:

Negligence is conduct, either by commission or omission, which falls below a standard of care established under the Mine Act to protect miners against the risks of harm. Under the Mine Act, an operator is held to a high standard of care. A mine operator is required to be on the alert for conditions and practices in the mine that affect the safety or health of miners and to take steps necessary to correct or prevent hazardous conditions or practices. The failure to exercise a high standard of care constitutes negligence.

30 C.F.R. § 100.3(d). The Commission has defined an unwarrantable failure as aggravated conduct constituting more than ordinary negligence. *Emery Mining Corp.*, 9 FMSHRC 1997, 2001 (Dec. 1987). Unwarrantable failure is defined by such conduct as “reckless disregard,” “intentional misconduct,” “indifference” or a “serious lack of reasonable care.” *Emery Mining Corp.*, 9 FMSHRC at 2003; *see also Buck Creek Coal, Inc.*, 52 F.3d 133, 136 (7th Cir. 1995). 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 e.g. Consolidation Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2000). Repeated similar violations are relevant to an unwarrantable failure determination to the extent that they serve to put an operator on notice that greater efforts are necessary for compliance with a standard. *Peabody Coal Co.*, 14 FMSHRC 1258, 1261 (Aug. 1992).

II. DISCUSSION WITH FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Citation No. 6556570; LAKE 2011-664-M

On February 23, 2011, Inspector William Soderlind issued Citation No. 6556570 under section 104(a) of the Mine Act, alleging a violation of section 56.12004 of the Secretary’s safety standards. The citation states, in part:

The heat lamp mounted on the electrical box was found hanging by its two inner conductors on the side of the box. The hole in the box had a sharp metal edge the conductor insulation was rubbing on, and the lamp would sway back and forth when the door to the box was opened. In this condition the lamp would not be grounded.

(Ex. G-V). Inspector Soderlind determined that an injury was reasonably likely to occur and that such an injury could reasonably be expected to be fatal. Further, he determined that the violation was S&S, the operator's negligence was moderate, and that one person would be affected. Section 56.12004 of the Secretary's regulations requires that "[e]lectrical conductors exposed to mechanical damage shall be protected." 30 C.F.R. § 56.12004. The Secretary proposed a penalty of \$8,209.00 for this citation.

1. Summary of Evidence

Inspector Henry Soderlind testified that he issued Citation No. 6556570 on February 23, 2011, at Respondent's plant (the "Mine"). (Tr.I 10-11).¹ The inspector issued the citation as a violation of 30 C.F.R. 56.12004 because an ungrounded heat lamp violated the safety standard. (Tr.I 13-14). The lamp was mounted on an electrical box and functioned 24 hours a day. (Tr.I 13-14). It swayed when the door to the electrical box opened or closed, causing the inner conductors to move across the sharp, metal edge of the box. *Id.* Grease, a greasy rag, and straws were in the box that operated the lubrication controls. The electrical box was inside the lubrication control box. (Tr.I 16; Ex. G-HH). Inspector Soderlind testified that the room was covered in grease. (Tr.I 16-17).

Inspector Soderlind testified that Citation No. 6556570 was S&S. The cited conditions presented shock and burn hazards. (Tr.I 19). The shock hazard posed the risk of fatality to miners through electrocution. (Tr.I 22). The inspector testified that the cited condition was reasonably likely to cause an injury because the area was greasy and a lube technician opened the box and moved the inner conductors without locking or tagging out the system. (Tr.I 18). The movement of the door and the lamp was likely to expose the inner conductors. (Tr.I 19). Conditions in the area were wet. (Tr.I 21). If the cabinet was not grounded, it could become energized. *Id.*

Inspector Soderlind designated Citation No. 6556570 as the result of Respondent's moderate negligence because the condition was obvious. (Tr.I 23). The inspector testified that a lube technician stated that he had found the hazard in the morning, but had not addressed it. (Tr.I 25).

Tim Aijala, who was Northshore's safety inspector at the time the citation was issued, testified that the room was dry and neither the floor nor walls had any grease upon them during the inspection. (Tr.I 80). Aijala testified that the lube technician was in the process of writing a work order for the underlying condition when Aijala and the inspector discovered the condition. (Tr.I 82).

Mark Steven Saari, who was the lube technician referenced by the inspector, testified that he returned to the office to submit a work order immediately after noticing the cited condition, which occurred shortly before the inspector issued a citation. (Tr.I 118). He did not submit the

¹ Each day of this two-day hearing has a separate transcript and each transcript begins at page 1. Therefore, I refer to the transcript from the first day of the hearing as "Tr.I" and the transcript from the second day as "Tr.II."

order until after the inspection, however, because Aijala asked him to return to the area of the cited condition. (Tr.I 127). He did not post hazard tape because he did not have any and did not believe that anyone else would enter the area. (Tr.I 117). Saari entered the area containing the cited condition once each week; only lube technicians had reason to enter the area and Saari was the only lube technician responsible for this area. (Tr.I 115,124).

2. Discussion and Analysis

Respondent argues that the Secretary did not satisfy his burden of proving a violation of section 56.12004 because the wires were covered with insulation that protected them from mechanical damage. The potential for damage to the insulated conductors arose when the door was opened and closed, but only lube technicians entered the room.

Respondent also asserts that the citation was not S&S because the cited condition was not likely to cause an injury. No bare copper wires were exposed and only the red wire posed a danger. The red wire, moreover, would trip the breaker if it contacted the panel. The control panel was also properly grounded.

The fatal designation is also inappropriate, according to Respondent, because 110 volts is unlikely to cause a fatality, especially considering the use of AC power, the steel grounding system, and the electrical rated boots of the lube technician.

The Secretary argues that the citation was a violation of section 56.12004 that was reasonably likely to contribute to a serious injury. The inner conductors of a heat lamp were exposed to mechanical damage from the sharp edge of a door that opened and closed against the conductor, which could lead to a fatal electrocution. The room that housed the cited condition was covered in grease, ice, and snowmelt. The heat lamp was not grounded and could electrify the entire panel. The box was continually opened and closed.

The Secretary contends that the citation was the result of high negligence because the condition was obvious, the operator knew or should have known of the condition, and there were no mitigating circumstances.

I find that Citation No. 6556570 represented a violation of section 56.12004 because the inner conductor of the heat lamp was exposed to mechanical damage. Although the actual copper wires were not exposed due to their insulation, the outer jacket was missing. The purpose of the outer jacket is to protect the inner conductor from damage, especially mechanical damage. Despite the presence of insulation, a conductor violates section 56.12004 if it lacks an outer protective jacket or structure of some sort.

I find that Citation No. 6556570 was not S&S because the cited condition was not reasonably likely to cause an injury. Respondent violated section 56.12004, which posed the hazard of a lethal shock to a miner because 110 volts is likely to cause a fatality. The Secretary failed to show, however, that the cited condition was reasonably likely to cause an injury assuming continued mining operations. The conductors remained insulated. That insulation would only be worn off to expose the copper wires if the door to the box was opened numerous

times. Traffic in the area was low and the box was not frequently opened. The inspector did not note any wear or damage to the insulation at the time that he viewed the conductor. I credit the testimony of Northshore's witnesses that the lube technician had noticed the condition and was in the process of writing it up so that it would be corrected. Therefore the insulation was unlikely to be damaged. Without the insulation being damaged, a miner would be unlikely to be injured by the cited condition even when touching the insulated wires inside the box.

I find that Respondent's negligence was low because Saari credibly testified that he was in the process of getting the condition repaired before the inspector examined the electrical box. The lube shack was only entered once or twice a week, so the condition was not an open and obvious condition. The Secretary did not establish that the condition had existed for any length of time.

Citation No. 6556570 is hereby **MODIFIED** to a non-S&S, low negligence violation of section 56.12004. A penalty of \$200.00 is appropriate for this violation given the low likelihood that anyone would have been injured by the violation.

B. Citation Nos. 6556571 and 6556572; LAKE 2011-664

On February 23, 2011, Inspector Soderlind issued Citation No. 6556571 under section 104(a) of the Mine Act, alleging a violation of section 56.12017 of the Secretary's safety standards. The citation states, in part:

A Lube Technician opened an electrical box and started moving inner conductors around. The power to the electrical box was verified as having been de-energized, but it was not locked out and tagged out. No other measures were taken to prevent someone from inadvertently energizing the electrical box in the Lube House.

(Ex. G-W). Inspector Soderlind determined that an injury was unlikely to occur but that such an injury could reasonably be expected to be fatal. Further, he determined that the operator's negligence was moderate and that one person would be affected. Section 56.12017 of the Secretary's regulations requires:

[p]ower circuits shall be deenergized before work is done on such circuits unless hot-line tools are used. Suitable warning signs shall be posted by the individuals who are to do the work. Switches shall be locked out or other measures taken which shall prevent the power circuits from being energized without the knowledge of the individuals working on them.

30 C.F.R. § 56.12017. The Secretary proposed a penalty of \$585.00 for this citation.

On February 23, 2011, minutes after issuing Citation No. 6556572 in the same location, Inspector Soderlind issued Citation No. 6556572 under section 104(a) of the Mine Act, alleging a violation of section 56.12017 of the Secretary's safety standards. The citation states, in part:

Two electricians were working on remounting a heat lamp on the electrical box in the Lube House. This circuit had not been locked and tagged out, and no other measures were taken to ensure the circuit would not be energized inadvertently while repairs were taking place.

(Ex. G-X). Inspector Soderlind determined that an injury was unlikely to occur but that such an injury could reasonably be expected to be fatal. Further, he determined that the operator's negligence was moderate, and that two persons would be affected. The Secretary proposed a penalty of \$634.00 for this citation.

1. Summary of Evidence

Inspector Soderlind testified that he issued Citation Nos. 6556571 and 6556572 shortly after he issued Citation No. 6556570. (Tr.I 29). The conductors were inside the electrical box, which was the same box that the lamp referenced in Citation No. 6556570 was attached to. Both Citation Nos. 6556571 and 6556572 resulted from Northshore employees addressing the condition cited in Citation No. 6556570.

The inspector issued Citation No. 6556571 as a result of the lube technician opening the electrical box and touching the conductors without locking or tagging it out and he issued Citation No. 6556572 as a result of the same actions performed by two electricians. (Tr.I 28). Saari testified that he did not handle any conductors or wires within the electrical box; he inspected the box visually. (Tr.I 129). In both instances, the circuits were deenergized, but there were no locks, guards, or signs to prevent the circuits from being reenergized. (Tr.I 31, 34).

Inspector Soderlind designated Citation Nos. 6556571 and 6556572 as unlikely to lead to an injury and non-S&S because the circuit was de-energized. (Tr.I 41). The inspector designated the likely injury to a miner as a fatality. *Id.*

The inspector designated Citation Nos. 6556571 and 6556572 as the result of Respondent's moderate negligence. The inspector testified that a manager of Northshore witnessed the violation cited in Citation No. 6556571 and did nothing to stop the actions of the lube technician. (Tr.I 42). The Inspector also believed that "everybody knows" that they must lock and tag out circuits. (Tr.I 43).

Tim Aijala accompanied Inspector Soderlind during his inspection. Aijala testified that the lube room was small and two people could fit inside it, but uncomfortably. (Tr.I 79). While the inspector viewed the lube technician touching the conductors, Aijala was outside of the lube room because three people could not fit in the room. (Tr.I 85-86). Aijala testified that he stayed within view of the motor control center ("MCC") the entire time the electricians and the lube technician contacted the electrical box. (Tr.I 86-89). The MCC was adjacent to the lube shack. No one could enter the MCC room to reenergize the electrical box without Aijala seeing them; the area had little traffic and even less pedestrian traffic. (Tr.I 109).

Mike Ketola, the process manager at Northshore, is an electrical engineer. He testified that it was highly unlikely that the cabinet could become electrified because the circuit breaker would trip and the entire electrical system was grounded appropriately. (Tr.I 138-39, 144). Ketola did not believe that a fatality was likely to result from the underlying conditions. (Tr.I 141).

2. Discussion and Analysis

Respondent contends that it did not violate section 56.12017 as alleged in Citation Nos. 6556571 and 6556572. Relating to Citation No. 6556571, Saari did not contact the conductors and therefore did not perform “work.” With regard to both citations, Aijala acted as a sentry, complying with section 56.12017 by supplying “other measures” to prevent the power circuits from becoming reenergized.

Respondent asserts that Citation Nos. 6556571 and 6556572 are not the result of moderate negligence. Aijala did not witness Saari contact the conductors inside the panel and Respondent trains employees to perform lock out and tag out procedures when doing electrical work. Respondent’s management was not aware of the cited condition and any negligence concerning either citation is attributable to hourly workers only. Citation Nos. 6556571 and 6556572, therefore, are not the result of Respondent’s moderate negligence.

The Secretary argues that Citation Nos. 6556571 and 6556572 both violated section 56.12017 because Northshore employees worked on an electrical box without locking or tagging out the power circuit. The inspector issued Citation No. 6556571 when he witnessed a lube technician touching inner conductors with his bare hands. The inspector issued Citation No. 6556572 when he saw electricians contact the inner conductors without locking or tagging out the circuit. With regard to both Citation Nos. 6556571 and 6556572, Respondent did not lock out, tag out, or use any alternative methods to prevent a circuit from being reenergized while miners worked upon it, which is a violation of section 56.12017.

The Secretary also argues that Citation Nos. 6556571 and 6556572 were the result of high negligence because the condition was obvious, the operator knew or should have known of the violations, and there were no mitigating circumstances.

I find that Citation Nos. 6556571 and 6556572 were violations of section 56.12017. Respondent did not lock or tag out the circuit while two electricians worked upon it. I also credit Inspector Soderlind’s testimony that Saari contacted and worked upon the same conductor without locking or tagging out that conductor. Although Aijala testified that he remained within sight of the MCC room, I find that his presence did not constitute “other measures” under the standard. I find that Aijala stood outside of the lube shack because the room was too small to fit him, not with the specified intent of stopping the power circuit from being reenergized. If Aijala stood in his position with the actual intent of preventing reenergization, he would have positioned himself directly in front of the door to the MCC. He could also have locked the door to the MCC room, which is what Inspector Soderlind made the electricians do when he noticed them working without following lock out and tag out procedures.

Three employees, two of which were electricians, worked on electrical conductors without locking and tagging out the circuit, suggesting that Respondent has not been vigilant in following its lock out and tag out procedures. Although Aijala's presence contributed to the unlikely designations of these citations, I find that it did not qualify as the "other measures" that "shall prevent the power circuits from being energized." Respondent violated section 56.12017 twice; once when its lube technician worked on a conductor that was not locked out or tagged out and once when two of its electricians did so.

I find that an injury was highly unlikely in this instance. The violations occurred in a remote area so it was extremely improbable that anyone would have entered the MCC to close the circuit, especially since Mr. Aijala was in the area. The violations were not S&S.

I find that Citation Nos. 6556571 and 6556572 were the result of Respondent's moderate negligence. Respondent should have known of these violations, as its safety inspector was present at the time. Three employees, two of which were electricians, did not lock or tag out the circuit while they performed work upon it, suggesting that Respondent has been negligent in training or enforcing its lock-out procedures.

Citation Nos. 6556571 and 6556572 are hereby **AFFIRMED**. A penalty of \$500.00 for each violation is appropriate because of the low likelihood that the violations would have resulted in any type of injury.

C. Citation No. 6556582; LAKE 2011-664

On March 3, 2011, Inspector Soderlind issued Citation No. 6556582 under section 104(a) of the Mine Act, alleging a violation of section 56.14112(b) of the Secretary's safety standards. The citation states, in part:

One miner was operating a hand-held electric grinder without the provided guard in place during operation. No fire extinguisher was present at this location at the time. This condition exposes miners to coming in contact with moving machine parts resulting in lacerations, burns and/or other injuries.

(Ex. G-V). Inspector Soderlind determined that an injury was reasonably likely to occur and that such an injury could reasonably be expected to result in lost workdays or restricted duty. Further, he determined that the violation was S&S, the operator's negligence was moderate, and that one person would be affected. Section 56.14112(b) of the Secretary's regulations requires that "[g]uards shall be securely in place while machinery is being operated, except when testing or making adjustments which cannot be performed without removal of the guard." 30 C.F.R. § 56.14112(b). The Secretary proposed a penalty of \$1,530.00 for this citation.

1. Summary of Evidence

Inspector Soderlind issued Citation No. 6556582 as a violation of section 56.14112(b) caused by the operator's moderate negligence because he observed two miners working to thaw a

frozen pipe and one was using a grinder without its guard. (Tr.I 155). That miner admitted to removing the guard and then using the grinder, even though he knew that doing so violated the Mine Act. (Tr.I 158, 161). The inspector testified that the grinder was used in a visible, high traffic area of the Mine. (Tr.I 157). The inspector initially thought that this citation resulted from Respondent's high negligence, but he could not establish that management had any knowledge of the condition. *Id.*

Tim Aijala testified that the area where the miners were working was easy to see, but that it was difficult to discern that the miner was using a grinder without a guard. (Tr.I 173-74). The miners were given a grinder with a guard, but they removed the guard to accommodate a larger cutting wheel. If the miners wanted to use a larger grinder with a guard, they could have walked 50 feet to a maintenance silo to obtain one, which is the action the miners took to terminate the citation. (Tr.I 171). Aijala testified that Respondent has a "self-directed" workforce; it depends upon thoroughly training its employees and having the employees rely upon that training instead of providing constant supervision. (Tr.I 176, Tr.II 30).

Scott Blood, the senior safety representative at Northshore, testified that the miners who removed the guard from the grinder were disciplined. The training at Northshore makes miners aware that they should not tamper with safety equipment and the miners who removed the guard from the grinder should have known not to do so. (Tr.I 183-84). The disciplined miners were experienced and Blood did not believe that Respondent's management could have done anything further to prevent their actions. (Tr.I 184).

2. Discussion and Analysis

Respondent does not dispute the violation of section 56.14112(b) and the S&S designation of Citation No. 6556582, but disputes the moderate negligence determination and the amount of the penalty. The negligence of rank-and-file, hourly miners cannot be attributed to management. The miners involved knowingly acted against their training and were in an area where a passerby could not see their tools. The Secretary's moderate negligence designation is unfounded because Respondent should not have known of the cited conditions.

The Secretary argues that the violation was the result of Respondent's moderate negligence because the condition was obvious and Respondent should have known of the condition when it assigned the miner to work on the frozen pipe.

I find that Respondent's violation of section 56.14112(b) was the result of Respondent's low negligence. The negligence of rank-and-file miners is not attributable to an operator for the purposes of negligence designations and penalty amounts. *Southern Ohio Coal Co.*, 4 FMSHRC 1459, 1462 (Aug. 1982). When, however, "a rank-and-file employee has violated the Act, *the operator's* supervision, training and disciplining of its employees must be examined to determine if *the operator* has taken reasonable steps to prevent the rank-and-file miner's violative conduct." *Id.* (emphasis in original). Northshore trains its workforce but then, once trained, the workforce is largely self-supervised. In this instance, management would not have known that the two miners used a grinder without a guard unless it had a supervisor standing right in the immediate vicinity. Under the facts of this case, I find that the negligence of the two miners should not be

attributed to management. This finding is, by necessity, very factually specific and situations could arise in which the failure to more closely supervise employees could lead to a higher level of negligence.

Citation No. 6556582 is hereby **MODIFIED** to reduce the negligence to “low.” A penalty of \$800.00 is appropriate for this violation.

D. Citation No. 6556545; LAKE 2011-482

On January 12, 2011, Inspector Soderlind issued Citation No. 6556545 under section 104(a) of the Mine Act, alleging a violation of section 56.12004 of the Secretary’s safety standards. The citation states, in part “[t]here was a broken piece of conduit running along the outside of the Pellet Plant behind furnace number 6 exposing miners to electrical shock/burn hazards resulting in serious injury.” (Ex. G-R). Inspector Soderlind determined that an injury was unlikely to occur but that such an injury could reasonably be expected to be fatal. Further, he determined that the operator’s negligence was moderate and that one person would be affected. The Secretary proposed a penalty of \$2,901.00 for this citation.

1. Summary of Evidence

Inspector Soderlind testified that the citation was a violation of section 56.12004 due to exposed conductors. (Tr.I 185; Ex. G-R). Two sections of the metal conduit were detached approximately 6 to 7 feet above the ground on the exterior of a building. (Tr.I 189-90; Ex. R-T). An electrician certified that the conductors were exposed and that the circuit was live. (Tr.I 190). In the inspector’s opinion, this condition was unlikely to cause injury. (Tr.I 195). The conduit carried 480 volts, which could cause a fatality. (Tr.I 192-93).

The conductors were not damaged, but the Inspector was concerned that weather or the act of opening and closing a nearby door would cause mechanical damage to the conductors. (Tr.I 198, 205). He was primarily concerned that an exterior door located about 90 to 100 feet away was banging against the metal conduit. (Tr.I 218). Inspector Soderlind acknowledged that the circuit may or may not be grounded. (Tr.I 207).

Inspector Soderlind believed that this condition was obvious. (Tr.I 196, 217). He also testified that Respondent was put on notice that greater efforts to comply with section 56.14112 were necessary because over the two prior years, Respondent was cited 51 times under the section. (Tr.I 196, 212). The inspector did not know how long the condition existed. (Tr.I 210).

Brian Gene Hill, who works at Northshore in pelletizer operations, escorted Inspector Soderlind on his January 12, 2011, inspection. (Tr.I 221). Hill testified that the area where the cited conductor was exposed is not well-traveled, seldom passed by pedestrians, and vehicles passed 20 to 30 feet away. (Tr.I 222, 229). Hill did admit that pedestrians will sometimes walk through this area due to spillage in the building, which is what he and the inspector did. (Tr.I 232-33). Miners sometimes park vehicles in the area to perform mechanical work. *Id.*

Hill testified that the conductor was still protected and that there were no hazards that could damage the remaining protection. (Tr.I 225-26). He also testified that he would not

perform the simple task of fixing the conduit covering because he is not an electrician. (Tr.I 228). Hill stated that no one examined this area and that he did not believe that examinations were required. (Tr.I 227).

2. Discussion and Analysis

Respondent argues that it did not violate section 56.12004 because the conductor was neither exposed to mechanical damage nor unprotected. The Secretary did not show that the conductor was exposed to mechanical damage because the inspector's testimony was unreliable. The conductor was not bare copper wire; it was protected by a black outer jacket.

Any injury or illness could not reasonably be expected to be fatal according to Respondent. The electrical systems at the Mine are grounded to prevent electricity from traveling through human bodies.

The Secretary argues that the cited condition was unlikely to cause an injury, but that the resulting injury was reasonably likely to be fatal because although the conductor was distant from the ground, it carried 480 volts of electricity.

The Secretary also argues that the citation was the result of Respondent's moderate negligence because the condition was obvious; Respondent was on notice that greater efforts were necessary to comply with section 56.12004, and Respondent should have known about the condition.

I find that Respondent violated section 56.12004. I credit Inspector Soderlind's testimony that the cited condition exposed a conductor to mechanical damage. Although the copper wire was not visible, the conductor was not adequately protected from mechanical damage. The opening and closing door was cited as the cause of the damage to the conduit, but it was 100 feet away. The precise cause is unknown. An injury was unlikely because the outer jacket around the conductors was intact. The violation was not S&S. A fatal accident could not occur unless the outer jacket was damaged, the copper wires were exposed, and the grounding system failed to function. The chance of a fatal accident was remote at best.

I also find that Northshore's negligence was low to moderate. On one hand, it was on notice to fully protect conductors from mechanical damage. On the other hand, the violation was in a remote location that was not a working place or near a working place. *See* 30 C.F.R. § 56.2.

Citation No. 6556570 is hereby **MODIFIED** to reduce the negligence slightly. A penalty of \$500.00 is appropriate for this violation.

E. Citation No. 6556888; LAKE 2011-664

On February 15, 2011, Inspector Robert A. Marincel issued Citation No. 6556888 under section 104(a) of the Mine Act, alleging a violation of section 56.14132(b)(1)(i) of the Secretary's safety standards. The citation states, in part:

A GMC 3500 flatbed high rail truck, company number CAR-20, was not provided with an automatic reverse activated back up alarm, exposing miners to a back into/over hazard. The truck had a restricted view to the rear from a Sullair compressor mounted on the bed of the truck. The truck was observed backing at the north side of the tails load out building, without a spotter present, or any audible alarm.

(Ex. G-L). Inspector Marincel determined that an injury was reasonably likely to occur and that such an injury could reasonably be expected to be fatal. Further, he determined that the violation was S&S, the operator's negligence was low, and that one person would be affected. Section 56.14132(b)(1)(i) of the Secretary's regulations requires that "[w]hen the operator has an obstructed view to the rear, self-propelled mobile equipment shall have...an automatic reverse-activated signal alarm[.]" 30 C.F.R. § 56.14132(b)(1)(i). The Secretary proposed a penalty of \$1,304.00 for this citation.

1. Summary of Evidence

Inspector Robert Marincel testified that he issued the citation because he observed a vehicle with a restricted rear-view travel in a reverse direction and did not hear an automatic back-up alarm function, which is a violation of section 56.14132(b)(1). (Tr.II 40, 50). Inspector Marincel testified that the cited vehicle travels throughout the plant and into areas with foot traffic. (Tr.II 43-44). The foot traffic in the area where the inspector cited the vehicle was the inspector himself and Aijala, but he believed contractors used the area as well. (Tr.II 43).

The cited condition caused the hazard of a miner being struck or run over by the vehicle. (Tr.II 46). The inspector believed that the cited condition was reasonably likely to cause an injury because the vehicle was used throughout the plant in areas foot traffic would be present and also during times of darkness. (Tr.II 47). Inspector Marincel designated the citation as fatal because the vehicle could crush a miner and cause a fatality. (Tr.II 50).

Inspector Marincel designated Citation No. 6556888 as the result of Respondent's low negligence. He believed that the cited condition existed for about a month and that Respondent should have known of the condition. (Tr.II 38, 48).

Aijala testified that there was no foot traffic in the cited area except for miners who were actually using the vehicle. (Tr.I 242). The vehicle in question is a GMC pick-up truck, not a piece of heavy equipment, according to Aijala. (Tr.I 253). The vehicle moved an average of three times during each 12 hour shift for a total of 400 yards each time. (Tr.I 252). The vehicle only traveled in reverse once per 12 hour shift, at the beginning of each shift, when the examiner of the vehicle served as a spotter. (Tr.I 247, 252). There were no pedestrians in the parking lot

when the vehicle reversed. (Tr.I 252). At all other times, the vehicle turned around in a loop because there wasn't space to turn around in another manner. (Tr.I 242). There were no other vehicles that operated in this low-traffic area. *Id.*

Aijala claims that he and the inspector did not witness the vehicle reverse. (Tr.I 255). The vehicle travels to other sections of the mine 10 percent of the time. (Tr.I 259, 263-64). The obstruction that blocked the driver's sight on the vehicle existed for a month before the inspector issued the citation. (Tr.I 261). There was also a crane and a contractor's trailer in the area where the inspector cited this condition. (Tr.I 262-63).

2. Discussion and Analysis

Respondent argues that it did not violate section 56.14132(b)(1)(i) and was not negligent for doing so because the cited vehicle never reversed without the use of a spotter. The inspector did not witness the truck reverse until he requested the truck to do so and the inspector acted as the spotter at that time. Aijala's testimony and Respondent's standard practices contradict the inspector's claim that he viewed the truck reverse without a spotter.

If the cited condition did violate section 56.14132(b)(1)(i), however, Respondent contends that the citation was not S&S. The truck is used sparingly in an area with little traffic and does not typically reverse. When the truck reversed, a spotter was used. The rear view of the truck was only partially obstructed and dual side mirrors provided a rear view.

The Secretary argues that Citation No. 6556888 is an S&S violation of section 56.14132(b)(1)(i). Inspector Marincel witnessed the cited vehicle, which had a restricted rear view, travel in reverse with no back-up alarm or spotter. This created the hazard that a pedestrian could be struck by the vehicle, which is reasonably likely to be fatal. An injury was reasonably likely to occur because the cited vehicle operates at various locations throughout the mine that have foot traffic and it operates during both day and night. The Secretary contends that the violation was the result of Respondent's high negligence because the cited condition existed for 30 days.

I find that Respondent violated section 56.14132(b)(1)(i). To satisfy his burden, the Secretary must prove that the operator reversed the cited equipment without either a backup alarm or a spotter. *See River Cement Co.*, 10 FMSHRC 1027, 1029-30 (Aug. 1988) (ALJ). I credit Inspector Marincel's testimony that he witnessed the vehicle travel in reverse without either a back-up alarm or spotter. Respondent, therefore, violated section 56.14132(b)(1)(i) because the Secretary provided convincing evidence of a specific time when the cited vehicle reversed without either a spotter or a backup alarm. I do not credit the company's evidence that a spotter is always present when the truck is operated in reverse.

I also find that the violation was S&S. The cited condition presented the hazard that a miner would be struck or run over by the cited vehicle, which could cause a fatal injury. Although Respondent argues that the vehicle was seldom used, not used close to pedestrians, and did not often reverse, I find that an injury was reasonably likely to occur. I credit the uncontroverted testimony of the inspector and Aijala that vehicles of the model cited by the

inspector are used throughout the mine. Even if the vehicle is seldom used and only in one area as Respondent argues, the failure to have a functioning back-up alarm creates a serious risk that a pedestrian would be hit. I credit the inspector's testimony that contractor employees were present at the facility and their presence made the lack of a back-up alarm especially hazardous.

I find that the violation was the result of Respondent's moderate negligence. The inspector designated the negligence as low, but the Secretary argues that it should be raised to high. I find the negligence to be moderate because the compressor that obstructed the view of the driver had recently been installed on the back of the truck. Placing the compressor at the back of the truck should have alerted Northshore that a functioning backup alarm must be present.

Citation No. 6556888 is hereby **MODIFIED** to a moderate negligence designation. A penalty of \$2,000.00 is appropriate for this violation.

F. Citation No. 6556561; LAKE 2011-664

On February 22, 2011, Inspector Soderlind issued Citation No. 6556561 under section 104(a) of the Mine Act, alleging a violation of section 56.11001 of the Secretary's safety standards. The citation states, in part:

The main gas ductwork on the south side of the 502 and 602 precipitators was being used to access the main duct sprayers. No hand rail was provided. Foot tracks were easily observed in the fines material and measured less than 2 ft. away from the edge of the ductwork where a fall of approximately 15 ft. existed. There were also five inch high seams for the ductwork every three feet, approximately, which created a tripping hazard.

(Ex. G-Y). Inspector Soderlind determined that an injury was reasonably likely to occur and that such an injury could reasonably be expected to be fatal. Further, he determined that the violation was S&S, the operator's negligence was moderate, and that one person would be affected. Section 56.11001 of the Secretary's regulations requires that "[s]afe means of access shall be provided and maintained to all working places." 30 C.F.R. § 56.11001. The Secretary proposed a penalty of \$2,901.00 for this citation.

1. Summary of Evidence

Inspector Soderlind issued the citation because he believed, based upon the presence of footprints, that miners had walked across elevated ductwork that exposed them to a 15 foot fall. (Tr.I 272). The duct was 5.5 feet wide and footprints were visible 2 feet from the drop-off. (Tr.I 276). Although chains blocked the path to the ducts, the chains were not fastened during the inspection. (Tr.I 276). Inspector Soderlind testified that manager Lyle Dugas told him that miners might have walked across the duct as a shortcut. (Tr.I 274). The ducts lacked handrails and the inspector observed no evidence that miners who crossed it had used fall protection. (Tr.I 275, 279). Pieces of ductwork project five inches upward, with the result that the surface of the

duct is not a flat surface. (Tr.I 273, 277). There was safe access to the sprayers on the other side of the sprayers, but miners presumably used the cited access as a shortcut to access the sprayers. (Tr.I 296). The inspector did not witness any miners using the cited access point or walking upon the ductwork. (Tr.I 285).

Inspector Soderlind testified that he did not see evidence suggesting the use of fall protection, but he also stated that he expected it to be used in the area and it could have been used. (Tr.I 275-76). He did not view any points where a miner could attach fall protection, but he did not remember specific features of the area either. (Compare Tr.I 279, 293 with Ex. R-NN). He further testified that this citation could be abated by the operator using fall protection to access the work area from every access point. (Tr.I 283).

Inspector Soderlind believed that the 15 foot fall onto hard surfaces and sharp metal framework below the ductwork would likely result in a fatality. (Tr.I 280). The inspector testified that it was reasonably likely that a miner would fall off of the duct. *Id.* Inspector Soderlind testified that dust accumulated in the area quickly, but that there were still several evident tracks. *Id.* The edges that stuck up above the ducts could cause a miner to trip, especially because the area was dark. *Id.* Respondent presented no evidence to the inspector that miners used fall protection in the cited area. (Tr.I 284).

Inspector Soderlind designated the violation as being the result of Respondent's moderate negligence because the condition was obvious. (Tr.I 281). The clasp on the chain barrier that was down was corroded shut, which suggested that this condition existed for an extended period of time. (Tr.I 281).

Hill testified that the cited ducts had thermal couplers and a flop-gate upon them that sometimes required maintenance. (Tr.II 6). Hill testified that the subject footprints likely existed for a period of time. (Tr.II 9). Miners were required to travel upon the ducts to perform maintenance following an occurrence such as a furnace outage. (Tr.II 8; Ex. R-F). Miners performing this maintenance would be wearing fall protection and the area provided places to tie off. (Tr.II 9). Hill believed that Lyle Dugas' statements to the inspector about why the duct was used must be correct. (Tr.II 13). Hill testified that a miner was not likely to fall off of the ductwork in the cited area because any miner working upon the ductwork would be tied off and would have to be well out of the work area to fall. (Tr.II 16).

Blood testified that miners were required and trained to use fall protection in the cited area. (Tr.II 25-26). Blood testified that there were points for miners to secure fall protection in the cited area. (Tr.II 28, 32).

2. Discussion and Analysis

Respondent argues that it did not violate section 56.11001 because it provided safe access to its miners. The Secretary failed to prove that safe access was not provided and maintained in the cited area and the inspector focused on the use of fall protection instead of safe access. Respondent required the use of fall protection to access the cited area. The inspector did not realize that the cited access point was the safest access to maintain thermal couplers and not a

shortcut to the sprayers. The detachable chain used on the cited access point shows that it was not merely a shortcut.

Respondent also argues that the use of fall protection and the safety of a work area are unrelated to the safe access required by section 56.11001. The cited point of access did not present a hazard to miners; the hazard of a 15 foot fall cited by the inspector pertained to the working area, not the access point.

Respondent asserts that Citation No. 6656561 was not S&S because the Secretary failed to establish a reasonable likelihood that the cited condition would contribute to an injury. The fall hazard existed away from the area where miners would be traveling, very few miners traveled in the area, and the tripping hazards were clearly visible.

The Secretary argues that Citation No. 6656561 was S&S because the cited condition was reasonably likely to contribute to a serious injury. A 15foot fall onto hard ground created a safety hazard that could cause a fatal accident. The area was dark, there were flanges to trip on, and miners did not wear fall protection. Based upon the foot traffic in the area and the footprints upon the ductwork, an injury was reasonably likely to occur.

The Secretary also argues that Respondent's moderate negligence caused the condition cited in Citation No. 6656561. The condition was obvious, existed for some time, and management actually knew of the cited condition.

I find that the Secretary did not satisfy his burden to show that Respondent failed to provide a safe means of access to a work area in violation of section 56.11001. Fall protection can constitute a safe means of access for the purposes of section 56.11001 if the operator maintains the requirement to use that fall protection. *See Lopke Quarries, Inc.*, 23 FMSHRC 705, 709 (2001). Although the Inspector did not see evidence that fall protection was used and the operator did not inform him that it was at the time of the inspection, he admitted that fall protection may have been used and did not see any miners access the ductwork without using such protection. In addition, even though the inspector testified that he did not see any places for a miner to secure fall protection, he seemed unsure about the specific features of the area, whereas witnesses for Respondent, who are more familiar with the cited area, confidently described various points where a miner could safely secure fall protection while working on the ductwork. The Secretary failed to satisfy his burden to show that a safe means of access was not provided by Respondent.

Citation No. 6656561 is hereby **VACATED**.

G. Citation No. 6556827; LAKE 2011-482

On January 5, 2011, Inspector Marincel issued Citation No. 6556827 under section 104(a) of the Mine Act, alleging a violation of section 56.11001 of the Secretary's safety standards. The citation states, in part:

A safe means of access was not provided to load the used mantels and bowls onto the flatbed trailer in the east truck bay, exposing miners to a fall hazard. Some miners used a 6 foot ladder to either access the trailer bed to remove the lifting slings from the mantels and then cut off the pad eyes prior to shipping, or just stand on the ladder to remove slings and cut off the pad eyes. The ladder at the site was 30 inches from the north side hand railing....The next floor down beyond the hand railing was 15 feet 10 inches from the top of the railing.

(Ex. G-I). Inspector Marincel determined that an injury was reasonably likely to occur and that such an injury could reasonably be expected to be fatal. Further, he determined that the violation was S&S, the operator's negligence was low, and that one person would be affected. The Secretary proposed a penalty of \$1,944.00 for this citation.

1. Summary of Evidence

Inspector Marincel issued the citation as a violation of section 56.11001 because he saw a 6-foot ladder set up beside a handrail in the fine crusher building. (Tr.II 85). The handrail was 15 feet and 10 inches above a concrete floor. (Tr.II 73). Climbing the ladder placed a miner's entire body above the handrail; the handrail was 37.5 inches high while the highest ladder rung being used was 45.5 inches high. (Tr.II 71-72). The handrail was 30 inches from the ladder. (Tr.II 73). Miners climbed the ladder to remove pad eyes with a torch. (Tr.II 71). The hose for the cutting torch could cause the ladder to tip, throwing the miner over the handrail. *Id.* A sufficient distance for the ladder to be away from a railing would be the sum of the height of the person and the height of the ladder combined. (Tr.II 92). Inspector Marincel testified that miners would not be required to use fall protection while working upon the ladder. (Tr.II 83). The ladder was stable. (Tr.II 85).

Inspector Marincel designated the citation as S&S. Marincel believed that the cited condition was reasonably likely to contribute to an injury because he assumed that the operator continually worked on the crusher components and changed crusher bowls and mantels once each week. (Tr.II 74). The inspector stated that falls of eight feet can be fatal, which is why he believed the hazard of a 15 foot, 10 inch fall was likely to cause a fatality. (Tr.II 78).

Brandon Goutermont, a fine crusher operator, testified that he escorted Inspector Marincel on January 5, 2011. Goutermont testified that he used the ladder to climb onto the trailer to remove the pad eyes. (Tr.II 104). He did not carry the torch on the ladder because he could reach the top of the trailer to place the torch there. (Tr.II 105). A miner would work in the area of the cited condition about once each week. (Tr.II 112). The ladder was typically only used by employees who were too short to reach the pad eyes from the floor. (Tr.II 77, 85-86, 112-13). The ladder has been used for this purpose for at least four years. (Tr.II 107).

2. Discussion and Analysis

Respondent argues that it did not violate section 56.11001 because the ladder in the cited area provided safe access. It is undisputed that a ladder is a safe means of access, that the cited ladder was in good condition, and that it was placed on solid ground 30 inches from the handrail. Miners maintained three points of contact while using the ladder. The use of the ladder did not present a hazard and under the reasonably prudent person test Respondent did not violate section 56.11001.

Respondent also argues that Citation No. 6556827 was not S&S. Inspector Marincel based the S&S designation upon a dissimilar fatalgram and did not see or know how the cited ladder was being used. The ladder was stable, in good condition and seldom used. The Secretary did not present evidence to prove that Citation No. 6556827 was S&S.

The negligence designation for Citation No. 6556827 should be “None” because the cited condition existed during various inspections over the course of seven years and was not cited according to Respondent. Respondent could not have known that the condition constituted a violation of section 56.11001.

The Secretary argues that a miner’s feet would be above the handrail when stepping on to the rung of the ladder closest to the top of the trailer, which could cause the ladder to tip and force the miner to fall over the top of the rail.

The Secretary also argues that the citation was S&S. An injury was reasonably likely to occur due to the frequency with which miners must cut pad eyes off of bowls and mantles. The cited condition posed the hazard of a 15 foot drop onto concrete, which is likely to cause a fatal injury. The inspector’s determination that the violation was the result of Respondent’s low negligence should be affirmed because management was apparently unaware that the ladder was used in the cited manner.

I find that the condition cited in Citation No. 6556827 did not violate section 56.11001. The Secretary failed to satisfy his burden to show that a violation existed.² Although Inspector Marincel testified that a miner could capsize the ladder during a descent and fall over the railing, the inspector also agreed that the cited ladder was stable, secure, and would be safe if it were further from the railing. If the ladder would not present a hazard when moved further from the railing, it would not present a hazard 30 inches from the railing either. Increased distance from a railing does not make a ladder less likely to tip and fall. Although the possible injury a miner could sustain may depend upon the location of a ladder, a violation of section 56.11001 does not

² The Secretary also argues that Respondent indicated that it would not challenge the fact of the violation at the hearing with the result that Respondent’s evidence should therefore be excluded from my analysis. In its amended prehearing statement, Northshore indicated that it would be challenging the S&S designation, the fatal designation, and the amount of the penalty. (P. 5). I reject this argument; the Secretary did present evidence at the hearing to demonstrate that a violation occurred. The parties did not stipulate to the violation. I am vacating the citation based upon the fact that the Secretary’s reasoning is illogical, as described above.

depend upon the distance of a fall from a ladder. It is undisputed that a solidly erected ladder can provide a means of safe access to a working place. There was no showing by the Secretary that Northshore's employees misused the ladder to create a hazard of falling.

Citation No. 6556827 is hereby **VACATED**.

H. Citation No. 6492348; LAKE 2010-756

On January 12, 2011, Inspector Thaddeus Sichmeller issued Citation No. 6492348 under section 104(d)(1) of the Mine Act, alleging a violation of section 56.11016 of the Secretary's safety standards. The citation states, in part:

The snow was not being removed sanded or salted where person[s] were accessing the entrance of the guard shack and in the rear of the building where the portable generator was operating....Multiple footprint[s] were observed, created by person[s] accessing the guard shack in the buildup of snow along with the generator area.

(Ex. G-C). Inspector Sichmeller determined that an injury was reasonably likely to occur and that such an injury could reasonably be expected to result in lost workdays or restricted duty. Further, he determined that the violation was S&S, the operator's negligence was high, and that one person would be affected. The citation was the result of Respondent's unwarrantable failure to comply with a section 56.11016. Section 56.11016 of the Secretary's regulations requires that "[r]egularly used walkways and travelways shall be sanded, salted, or cleared of snow and ice as soon as practicable." 30 C.F.R. § 56.11016. The Secretary proposed a penalty of \$8,400.00 for this citation.

1. Summary of Evidence

Inspector Sichmeller issued Citation No. 6492348 as a violation of section 56.11016 because Respondent did not clear 1 to 2 inches of snow at the entrance to the rear of the guard shack where a portable generator was located, which created a slip and fall hazard. (Tr.II 120, 124). The inspector noted that the snow contained many footprints. (Tr.II 121). The compacted snow was slippery. (Tr.II 141). This hazard could affect anyone who entered the mine because mine policy required that all people checking in at the mine must go to the guard shack. (Tr.II 124).

On January 6, 2011, Inspector Sichmeller notified Respondent that he was concerned about their snow and ice removal. (Tr.II 132). The mine had received previous citations alleging the failure to remove snow and miners had previously slipped and fell due to snow. (Tr.II 132, 142). The mine had recorded seven slip and fall injuries, three of which were snow and ice related. (Tr.II 143; Ex. G-DD). The inspector also informed Respondent that future violations would entail elevated negligence designations. (Tr.II 132). On January 7, 2011, Inspector Sichmeller discussed snow and ice conditions with two members of Respondent's management, one of whom argued that injuries at the mine were not snow and ice related. (Tr.II 135).

On January 11, 2011, Inspector Sichmeller notified Respondent during their daily close-out meeting that snow must be removed from the guard shack and the parking lots. (Tr.II 128). When the inspector returned to the mine on January 12, 2011, snow was present at the guard shack entrance. *Id.* Respondent notified Inspector Sichmeller that it had not cleared the snow due to darkness, but miners continued to access the area after dark. (Tr.II 129).

Inspector Sichmeller believed that an injury was reasonably likely to occur due to the number of previous slip and fall accidents at Respondent's mine as well as in the industry in general. (Tr.II 146). Inspector Sichmeller testified that he designated Order No. 6492348 as likely to cause lost work days or restricted duty because sprains, strains and broken bones often result from slips and falls. (Tr.II 145-46).

The cited condition was obvious, existed for about two days, was extensive, and management had knowledge and prior notice of the cited condition because the inspector notified management about the condition the day before he issued the violation. (Tr.II 147-48).

Scott Blood testified concerning Respondent's snow removal policies. After a snowfall, two trucks work to clear the snow from the roads and parking lots and continue working until all areas are cleared. (Tr.II 174-75). A shovel and a mix of sand and salt are located at each entrance and miners are instructed to use the equipment to clear the entrances when they use the entrance. (Tr.II 175). Snow will not be cleared until a miner accesses a particular entrance. (Tr.II 175-76). Blood testified that on January 11, 2011, he asked the inspector if the area that needed to be cleared of snow was in front of the guard shack, where the plows were unable to reach certain "V" shaped patches of snow. (Tr.II 184, 209). When the inspector answered in the affirmative, Blood immediately called and instructed an employee to clear the discussed patches of snow, which that employee did. (Tr.II 185; Ex. R-QQ). Blood rushed to make the call because the heavy equipment operators leave the mine at 3:00 p.m. and it was approaching 3:00. (Tr.II 210). Blood testified that had he known that the area behind the guard shack needed to be cleared, it could have been shoveled. *Id.* Blood testified that he did not know that the area near the generator needed cleared and testified that the inspector did not alert him that it did. (Tr.II 187). Blood believed that Respondent "did exactly what [the inspector] asked" of it on January 11, 2011. (Tr.II 197). There was no ice present, even beneath the snow. (Tr.II 173, 196; Ex. R-QQ)

After January 6, 2011, when Inspector Sichmeller alerted Respondent that its snow removal was insufficient, Blood reminded employees to clear and spread salt at all entrances. (Tr.II 192). Blood testified that he and most other managers do not enter through the guard shack and did not know of the snow between the shack and the generator. (Tr.II 205).

Inspector Sichmeller testified that on January 11, 2011, he informed Respondent's management that snow must be cleared from parking areas in the entire mine and "access to the guard shack[.]" (Tr.II 212). The inspector did not use the words "sidewalk," "travelway," or "walkway up to the steps" during this conversation. (Tr.II 216).

2. Discussion and Analysis

Respondent argues that it did not violate section 56.11016 because the cited area was not a regularly used walkway or travelway. Section 56.11016 does not require that operators remove snow from every surface, only snow that is located on regularly traveled walkways. Respondent cleared all of its regularly used walkways and provided access to the guard shack before the inspector issued Citation No. 6492348. The area between the guard shack and the generator was not regularly traveled and the generator had only been present for one day.

Citation No. 6492348 was not S&S because the cited condition was unlikely to contribute to an injury, asserts Respondent. The snow that was present was too insignificant to be slippery, constitute a hazard, or be a violation of section 56.11016. There was no ice and no injuries have been reported as a result of slipping upon snow without ice.

Citation No. 6492348 was not the result of Respondent's unwarrantable failure because its conduct was not "aggravated," according to Respondent. The cited condition was not obvious, extensive, and the operator made a good faith effort to abate the condition before it was cited by the MSHA inspector.

The Secretary argues that Citation No. 6492348 was S&S because compacted, slippery snow was reasonably likely to contribute to a serious injury. The area behind the guard shack was regularly traveled for as long as the generator remained in place; a failure to promptly sand, salt or clear this area of snow constituted a violation of section 56.11016 and could cause injuries including sprains, strains, or broken bones. The compacted, slippery nature of the snow as well as the history of injuries resulting from slips and falls in similar conditions at the mine and across the industry show that these injuries were reasonably likely to occur.

The Secretary argues that the violation was the result of Respondent's high negligence and unwarrantable failure to comply with the safety standard. The condition was obvious, existed for two days, posed a high degree of danger due to the area's extensive foot traffic, and the operator should have known of the cited condition. Prior to issuing Citation No. 6492348, the inspector issued other citations to Respondent alleging violations of 56.11016 and discussed the need to address snow removal, which gave Respondent notice that greater efforts were necessary to comply with section 56.11016.

I find that Respondent violated section 56.11016 because it failed to clear, sand, or salt a regularly traveled walkway. Although Respondent argues that the area between the generator and the guard shack was not regularly traveled, the copious amount of footprints witnessed by the inspector suggest otherwise. Although the generator was located in the area for only one day at that time, the walkway was still regularly used at the time of the inspection; fuel must be added to the generator. In addition, the miners who created those footprints could have cleared the snow or sanded or salted the walkway, which means compliance with the standard did not occur as soon as practicable.

I find that the violation was not S&S because the cited condition was not reasonably likely to contribute to an injury. A violation existed and the hazard of a serious injury resulting from a slip and fall was also present. Based upon the testimony of the witnesses and the video

evidence provided by Respondent, however, I find that there was no ice in the cited area and the snow was not reasonably likely to cause a slip and fall injury. The snow appears to be insignificant, which coincides with the testimony of Blood and Inspector Sichemeller. The snow also appears to be rather dry. It had snowed about one inch on the night of January 11 and there was no additional snow fall before the citation was issued. (Tr.II 173). It is unlikely that this snow could cause an injury. The plant is located in northern Minnesota where snow is commonplace and there was no showing that miners wear footwear that would be unsuitable for use in the snow. Only miners would be in the cited area; visitors would enter the guard shack along one of the shoveled and salted walkways. The Secretary did not establish that the conditions were reasonably likely to cause someone to slip.

I also find that the violation was the result of Respondent's low negligence, rather than high negligence. The violation was not extensive because every other regularly traveled walkway around the guard shack was cleared and sanded or salted. Only a small area between the generator and guard shack remained uncleared. The inspector, furthermore, based his negligence and unwarrantable failure designations upon the fact that the operator knew of the violation based upon his conversation with management. Based upon the testimony, however, it is clear that management and Inspector Sichmeller had a significant misunderstanding and Respondent was not aware that the condition the inspector wanted addressed was behind the guard shack. As a result of the inspector's conversation with management, furthermore, Blood testified that he took fast and direct efforts to abate what he believed was the condition of concern. These efforts suggest a sincere desire and effort to correct the condition, but the snow remained on the travelway due to a misunderstanding. The main entrances to the guard shack had been cleared of ice and snow as well as a path to the parking area. The condition was not obvious unless someone went behind the guard shack because the snow was not deep.

Citation No. 6556570 is hereby **MODIFIED** to a non-S&S violation resulting from Respondent's low negligence without an unwarrantable failure. A penalty of \$300.00 is appropriate for this violation.

III. SETTLED CITATIONS

The parties settled a number of the citations in these dockets at the hearing. In LAKE 2011-482-M, the parties agreed to settle 17 of the 19 citations in the docket with the following terms:

Citation	Proposed Penalty	Settled Penalty	Terms of Settlement
6556814	\$4,689.00	\$2,106.00	Low Negligence
6556511	\$4,329.00	\$3,000.00	Low Negligence
6556512	\$460.00	\$460.00	
6556513	\$2,106.00	\$946.00	Low Negligence
6556518	\$3,405.00	\$687.00	Non-S&S
6556820	\$3,689.00	\$1,111.00	Lost Workdays/Restricted Duty
6556528	\$745.00	\$530.00	Non-S&S
6556529	\$334.00	\$334.00	
6556532	\$1,412.00	\$1,412.00	
6556533	\$425.00	\$425.00	
6556534	\$263.00	\$263.00	
6556831	\$1,304.00	\$1,000.00	
6556832	\$2,901.00	\$2,200.00	
6556833	\$1,304.00	\$1,304.00	
6556540	\$745.00	\$300.00	Low Negligence
6556546	\$946.00	\$946.00	
6556837	\$1,304.00	\$264.00	Non-S&S

In LAKE 2011-664-M, the parties agreed to settle 17 of the 23 citations in the docket with the following terms:

Citation	Proposed Penalty	Settled Penalty	Terms of Settlement
6556566	\$499.00	\$499.00	
6556897	\$263.00	\$175.00	Lost Workdays/Restricted Duty
6556573	\$1,304.00	\$1,100.00	Non-S&S
6556900	\$263.00	\$175.00	Lost Workdays/Restricted Duty
6556576	\$2,282.00	\$2,282.00	
6556577	\$2,901.00	\$585.00	Non-S&S
6556902	\$263.00	\$175.00	Lost Workdays/Restricted Duty
6556583	\$190.00	\$0.00	Vacate
6556584	\$190.00	\$175.00	
6556585	\$334.00	\$334.00	
6556586	\$1,304.00	\$1,304.00	
6556587	\$585.00	\$0.00	Vacate
6556588	\$1,304.00	\$1,250.00	
6556907	\$585.00	\$585.00	
6556910	\$460.00	\$0.00	Vacate
6556912	\$687.00	\$687.00	
6556913	\$263.00	\$175.00	Lost Workdays/Restricted Duty

The proposed penalty amount for LAKE 2011-482-M is \$17,288.00 and the proposed penalty amount for LAKE 2011-664-M is \$ 9,501.00. I have considered the representations and documentation submitted and I conclude that the proposed partial settlement is appropriate under the criteria set forth in Section 110(i) of the Act. The parties' motion to approve these settlements is **GRANTED**.

IV. APPROPRIATE CIVIL PENALTIES

Section 110(i) of the Mine Act sets forth the criteria to be considered in determining an appropriate civil penalty. I have considered the Assessed Violation History Reports, which were submitted by the Secretary with her brief. At all pertinent times, Northshore was a large mine operator. The violations were abated in good faith. The penalties assessed in this decision will not have an adverse effect upon Northshore's ability to continue in business. The gravity and negligence findings are set forth above.

V. ORDER

Based upon the criteria in section 110(i) of the Mine Act, 30 U.S.C. § 820(i), I assess the following civil penalties:

<u>Citation No.</u>	<u>30 C.F.R. §</u>	<u>Penalty</u>
LAKE 2010-756-M		
6492348	56.11016	\$ 300.00
LAKE 2011-482-M		
6556545	56.12004	300.00
6556827	56.11001	VACATED
LAKE 2011-664-M		
6556561	56.11001	VACATED
6556570	56.12004	200.00
6556571	56.12017	500.00
6556572	56.12017	500.00
6556582	56.14112(b)	800.00
6556888	56.14132(b)(1)(i)	2,000.00
SUBTOTAL		4,600.00
SETTLED CITATIONS		26,789.00
TOTAL PENALTY		\$31,389.00

Northshore Mining Company is **ORDERED TO PAY** the Secretary of Labor the sum of \$31,389.00 within 30 days of the date of this decision.³ Docket No. LAKE 2010-361-RM is hereby **DISMISSED**.

/s/ Richard W. Manning
Richard W. Manning
Administrative Law Judge

³ Payment should be sent to the Mine Safety and Health Administration, U.S. Department of Labor, Payment Office, P.O. Box 790390, St. Louis, MO 63179-0390.

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RWM/bjr

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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June 20, 2013

SECRETARY OF LABOR,	:	TEMPORARY REINSTATEMENT
MINE SAFETY AND HEALTH	:	PROCEEDING
ADMINISTRATION (MSHA),	:	
on behalf of Randall T. Lester,	:	Docket No. VA 2013-387-D
Complainant	:	MSHA Case No.: NORT-CD-2013-03
	:	
	:	
v.	:	
	:	
	:	
KNOX CREEK COAL CORP.,	:	
A subsidiary of ALPHA NATURAL	:	Mine: Tiller No. 1
RESOURCES, INC.,	:	Mine ID: 44-06804
Respondent	:	

DECISION AND ORDER
REINSTATING RANDALL T. LESTER

Appearances: Ann C. Webb, Esq., and Robert Wilson, Esq., U.S. Department of Labor, Office of the Solicitor, Arlington, VA, representing the Secretary of Labor (MSHA)

Alexis Ronickher, Esq., and Abigail Cook-Mack Esq., Katz, Marshall & Banks, LLP, Washington, D.C., representing Randall T. Lester

Stephen M. Hodges, Esq., Penn, Stuart, & Eskridge, Abingdon, VA, representing Knox Creek Coal Corp.

Before: Judge Steele

Pursuant to section 105 (c)(2) of the Federal Mine Safety and Health Act of 1977 (“Act”), 30 U.S.C. §801, *et. seq.*, and 29 C.F.R. §2700.45, the Secretary of Labor (“Secretary”) on June 3, 2013, filed an Application for Temporary Reinstatement of miner Randall T. Lester (“Lester” or “Complainant”) to his former position with Knox Creek Coal Corp., (“Knox Creek” or “Respondent”) at the Tiller No. 1 Mine pending final hearing and disposition of the case.

That application followed a Discrimination Complaint filed by Lester on April 24, 2013, that alleged, in effect, that his termination was motivated by his protected activity. The complaint was amended by Lester’s counsel on May 23, 2013. The Secretary represents that this

Complaint was not frivolously brought and requests an Order directing Respondent to reinstate Lester to his former position as a scoop operator.

Respondent filed a request for hearing on June 6, 2013. A hearing was held in Abingdon, VA on June 13, 2013. The Secretary presented the testimony of the complainant. Respondent had the opportunity to cross-examine the Secretary's witnesses and present testimony and documentary evidence in support of its position. 29 C.F.R. §2700.45(d).

For the reasons set forth below, I grant the application and order the temporary reinstatement of Lester.

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).

Temporary Reinstatement is a preliminary proceeding, and narrow in scope. As such, neither the judge nor the Commission is to resolve conflicts in testimony at this stage of the case. *Sec'y of Labor on behalf of Albu v. Chicopee Coal Co.*, 21 FMSHRC 717, 719 (July 1999). The substantial evidence standard applies.¹ *Sec'y of Labor on behalf of Peters v. Thunder Basin Coal Co.*, 15 FMSHRC 2425, 2426 (Dec. 1993). A temporary reinstatement hearing is held for the purpose of determining "whether the evidence mustered by the miners to date established that their complaints are non-frivolous, not whether there is sufficient evidence of discrimination to justify permanent reinstatement." *Jim Walter Resources*, 920 F.2d 738, 744 (11th Cir. 1990).

In adopting section 105(c), Congress indicated that a complaint is not frivolously brought if it "appears to have merit." S. Rep. No. 181, 95th Cong., 1st Sess. 36-37 (1977), *reprinted in* Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong. 2nd Sess., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 624-25 (1978). In addition to Congress' "appears to have merit" standard, the Commission and the courts have also equated "not frivolously brought" to "reasonable cause to believe" and "not insubstantial." *Sec'y of Labor on behalf of Price v. Jim Walter Res., Inc.*, 9 FMSHRC 1305, 1306 (Aug. 1987), *aff'd*, 920 F.2d 738, 747 & n.9 (11th Cir. 1990). "Courts have recognized that establishing 'reasonable

¹ "Substantial evidence" means "such relevant evidence as a reliable mind might accept as adequate to support [the judge's] conclusion." *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2163 (Nov. 1989) (quoting *Consolidated Edison Co. V. NLRB*, 305 U.S. 197, 229 (1938)).

cause to believe' that a violation of the statute has occurred is a 'relatively insubstantial' burden." *Sec'y of Labor on behalf of Ward v. Argus Energy WV, LLC*, 2012 WL 4026641, *3 (Aug. 2012) citing *Schaub v. West Michigan Plumbing & Heating, Inc.*, 250 F.3d 962, 969 (6th Cir. 2001).

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

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

Stipulations

The parties stipulated to the following legal and factual propositions:

1. Respondent is the owner and operator of Tiller No. 1 Mine.
2. The Tiller No. 1 Mine has products that enter commerce or has operations or products that affect commerce and is a "coal or other mine" as defined by Section 3(h)(1) of the Act.
3. Operations of the Tiller No. 1 Mine are subject to the jurisdiction of the Act.
4. This proceeding is subject to the jurisdiction of the Federal Mine Safety and Health Review Commission and its designated Administrative Law Judges pursuant to Section 105 and 113 of the Act.

5. Respondent is a mine operator as defined by Section 3(d) of the Act.
6. Lester was employed by Respondent at Tiller No. 1 Mine from April 2001 to June 2005, from August 2005 to March 2008, and, most recently, from January 19, 2010 until April 23, 2013.
7. Lester was discharged from his employment at Tiller No. 1 Mine on April 23, 2013.
8. Lester was at all relevant times herein a miner as defined by Section 3(G) of the Act.

(Transcript at 6).²

Contentions of the Parties

On April 24, 2013, Lester executed a Summary of Discriminatory Action. It was filed with his Discrimination Complaint. In this statement he alleged the following:

I was fired from Knox Creek Coal Corp., Tiller No. 1 Mine on April 23, 20013(sic).

I took a person leave day on 4/22/13. I called in according to procedures.

I went back to work on my regular shift on 4/23/13. I worked the full shift with no problems. At the end of the shift, I was told to go outside. I was told I was needed in the office across the road.

When I got to the office, Ron Patrick, someone from Human Resources and a security guard were there. I was told I was discharged for making threats against personnel, which did not happen.

I believe I was fired because I talked to Lannie Gilbert from MSHA about a discrimination case a former employee filed.

I want a job back, preferably at another mine, with backpay and all benefits restored. I want temporary reinstatement.

Application at Exhibit B, p. 2. Furthermore, Lester submitted, through counsel, a Second Amended Charge of Discrimination that explained his factual contentions and request for relief in this matter. *Id.* at p. 3-19.

² Hereinafter references to the transcript will be cited "Tr." with the page number.

Submitted with the application was the May 29, 2013 Declaration of David Earl Smith, a Special Investigator employed by the Mine Safety and Health Administration. Smith stated that he investigated Lester's discrimination claim against Respondent. Smith laid out the facts that he had determined based on his investigation. *Application at Exhibit A*, p. 2-6. He determined:

3. There is reasonable cause to believe that Lester was discharged because he had engaged in protected activities. Lester engaged in protected activity when he met with MSHA on at least three occasions and provided information concerning conditions and practices at the Tiller No. 1 mine. Lester suffered an adverse action when he was discharged on April 23, 2013. The alleged threats against personnel reported by foreman Stiltner were pretext to terminate Lester because he had engaged in protected activity.
- b. Based on my investigation to this date, I have concluded there is reasonable cause to believe that Lester was discharged because he engaged in protected activities by complaining about unsafe practices at the mine, and testifying to MSHA in its investigation. I have concluded that the complaint filed by Lester was not frivolous.

Id. at 5-6.

Respondent disputes Lester's claim that he was laid off for voicing safety concerns. Instead it claims that he was laid off for making death threats against upper management. Respondent further contends that its president made the decision to discharge Lester without knowledge of his protected activity. Further, Respondent claims it would have taken the same action even if it knew about the protected activity because of the seriousness of the death threats.

Summary of Testimony³

Direct Testimony of Randall T. Lester

Lester is 51 years old and was last employed on April 23, 2013 by Respondent at Tiller No. 1. (Tr. 28-29). He has between 26 and 27 years of experience, 10 or 11 of those years at Tiller No. 1. (Tr. 28). He last worked as a scoop operator but has held other positions.⁴ (Tr. 29).

³ While only three witnesses testified in this proceeding, there were considerably more people discussed. Furthermore, there is a rather dense web of hearsay in this proceeding. While hearsay is permissible, it is also confusing. As a result, I include this list of people mentioned multiple times to attempt to limit confusion:

1. Randall T. Lester – The complainant.
2. Nick Stiltner – a mine foreman and Lester's immediate supervisor.
3. Lannie Gilbert – an MSHA investigator.
4. Jeremiah Heaton – a former employee of Respondent who had also filed a discrimination complaint.
5. David Smith – an MSHA investigator.
6. Mark Jackson – a member of upper management at the mine. One of Lester's supervisors.
7. Ron Patrick – the President of Knox Creek Coal Corp.
8. Scott Jessee - a member of upper management at the mine. One of Lester's supervisors.
9. Dedra Helbert – Respondent's human resources representative.
10. Lynn Blevins – A security guard at the Mine.

⁴ Lester was a scoop operator when he was fired and is also a fair to pretty good miner operator. (Tr. 42). Continuous miner operators make more money than scoop operators. (Tr. 42). Lester has cut cables while operating the miner, but many people cut cables. (Tr. 46). The one he cut was an electrical cable that ran a large piece of equipment. (Tr. 46). It costs money and time to fix a severed cable. (Tr. 46). It is serious when a miner goes down because it costs money. (Tr. 46-47). They tag and lock out the equipment when it happens so you might call it a hazard. (Tr. 47). Lester was not fired or suspended with intent to discharge after this incident. (Tr. 48). Steve Addison, a supervisor, did not suspend him for three days, Lester quit. (Tr. 48). Addison confronted him about cutting the cable but did not fill out discharge papers. (Tr. 48). Lester was never involved in a collision with his scoop. (Tr. 47). Lester has financial difficulty, including paying to support his ex-wife and his children. (Tr. 43-44). He has wanted a continuous miner job for a long time and asked for it repeatedly. (Tr. 44). He believes that Respondent assigned less qualified people to that task. (Tr. 44).

He worked both day and evening, on the swing shift.⁵ (Tr. 29). Lester's immediate supervisor was Nick Stiltner ("Stiltner"). (Tr. 29-30).

Lester met with MSHA investigators approximately three times. (Tr. 30, 49). The first meeting was at the end of February with Lannie Gilbert ("Gilbert") in Lester's driveway. (Tr. 30, 49). Gilbert asked about the discrimination complaint of Jeremiah Heaton ("Heaton"). (Tr. 30-31). Lester told MSHA that he was concerned about Heaton's safety with the track duster. (Tr. 40). Heaton had not been in the mines long and Lester felt that he had not been given a chance at the mine. (Tr. 40). Lester may have told Gilbert that Heaton got "railroaded" at the mine. (Tr. 49-50). Lester had trained Heaton for three days to a week on the duster, but he is not positive on the time. (Tr. 50). Respondent's attorneys also interviewed Lester regarding Heaton and training of the duster. (Tr. 31, 51). Lester was not sure if that interview was before or after his meeting with Gilbert. (Tr. 31).

After meeting with the MSHA manager, Lester told Stiltner he was talking to MSHA about Heaton. (Tr. 31-32). Lester believed that Stiltner already knew of the meeting because he was ordered to talk to Respondent's lawyers a short time before he was fired. (Tr. 32).

Lester's second meeting with MSHA occurred with Gilbert and David Smith ("Smith") around April 17, 2013 at the V&V Restaurant. (Tr. 32-33, 40, 68, 76). Gilbert called Lester and said he wanted him to meet with Smith about advance notice.⁶ (Tr. 67). Lester had already spoken to Investigator Gilbert about the issue. (Tr. 67-68). At this meeting, they discussed advance notice. (Tr. 33). He may have talked about advance notice in February also. (Tr. 53, 55). The last instance of advance notice occurred before the Heaton case, two or three months earlier. (Tr. 53, 76). Mark Jackson ("Jackson") would give the advance notice. (Tr. 57, 68, 76). He would sit in the office and when he saw inspectors he would run to the intake phone. (Tr. 57). He would call to both sections, but Lester could not make out what Jackson was saying. (Tr. 57). He did not know what he was saying but believed he was calling to tell about inspectors. (Tr. 57). Lester also told the MSHA investigators that safety conditions at the mine improved when Alpha took over from Massey, but that improvements took time. (Tr. 55-56, 76). When Alpha came in, Ron Patrick ("Patrick") was made president. (Tr. 56). However, while Patrick and Dave Cramer were new, the rest of the supervisors remained the same. (Tr. 94).

That night, Lester told Stiltner he had met with Gilbert and Smith. (Tr. 34, 40). He also complained about the way Jackson and Scott Jessee ("Jessee") had treated him. (Tr. 40-41). This meant that he did not like the way they handled their jobs. (Tr. 45). Jessee and Jackson had the power to decide who would get that job and Lester was a little upset that he did not get it. (Tr. 45). He did not like that he was kept on one piece of equipment when Jessee knew he was good

⁵ Swing shift means working two weeks on day then two weeks on evening and then going back to day shift. (Tr. 29).

⁶ Advance notice is the illegal practice of providing warning that an inspector has arrived at a mine. (Tr. 57).

on all of the equipment. (Tr. 45). He does not think they have anything against him because they let him get lots of hours. (Tr. 46). He could not figure out why they would not give him the job. (Tr. 46). Lester also told Stiltner about other meetings he had with MSHA. (Tr. 41). This conversation occurred before Lester was discharged. (Tr. 34, 41).

Lester's third meeting with MSHA (this time only Smith) occurred around April 19, 2013 at the V&V Restaurant. (Tr. 34, 77). There, Lester signed a statement regarding advance notice. (Tr. 34, 77). He does not have a copy, although his lawyer got one. (Tr. 77-78). Lester also told Smith about another person at the mine who had asked him about a safety issue. (Tr. 35). Lester told the miner that he agreed with the safety concern and said he had to talk to the boss about it. (Tr. 35). Smith gave Lester books on miners' rights. (Tr. 35). Lester took them to work that evening and gave one to the other miner and kept one. (Tr. 35).

Lester was next scheduled to work the following Monday, but took a personal day and returned on the April 23, 2013, day shift. (Tr. 35-36). That day, a miner named Johnson asked him if he had talked to MSHA. (Tr. 36-37). Lester said he might have talked about the Heaton case. (Tr. 37). Bobby Jackson also asked and Lester told him the same thing. (Tr. 37). Further, while Lester was working on the scoop, Stiltner ran over and asked if Lester really talked to MSHA. (Tr. 37). Lester said he had. (Tr. 37).

On April 23, Lester worked approximately 9 and a half hours. (Tr. 37). At the end of the shift, Terry Belcher told him that Jessee wanted to speak to him in the main office but did not know why. (Tr. 37). Lester took a shower and went to the office. (Tr. 37-38). When he arrived Patrick was present with papers in his hand, as was Dedra Helbert ("Helbert"). (Tr. 38). There was another man in the office who Lester thought might be the security guard. (Tr. 38). Patrick then told him that someone said he was threatening personnel, but Lester denied the accusation. (Tr. 38-39, 89). Patrick then said Lester was fired. (Tr. 39). Lester reiterated that he had not threatened anyone and said that the decision to fire him was instead related to the Heaton discrimination proceeding. (Tr. 39). Patrick just rolled his shoulders. (Tr. 39). Patrick did not say he was being fired for going to MSHA. (Tr. 89). The security guard led him out.⁷ (Tr. 39). No one ever talked to Lester about threats before he was terminated. (Tr. 95).

On cross examination, Lester discussed an interview he gave with a reporter from the *Washington Post* on June 2, 2010. (Tr. 62-63). This was shortly after the disaster at Massey's Upper Big Branch and he was interviewed because Knox Creek was owned by Massey. (Tr. 63). Lester told the reporter that safety had improved since he started in 1980 because he did not

⁷ Lester spoke to Heaton on the phone after Lester was fired. (Tr. 78-79). He did not communicate with Heaton after Heaton was fired but before Lester was fired. (Tr. 79). They only spoke on the phone the day after Lester's discharge. (Tr. 84). Heaton called Lester to apologize and thank him for testifying for him. (Tr. 84-85). Heaton had learned Lester was fired from another former miner. (Tr. 84-85). Heaton never told him the amount of his discrimination settlement. (Tr. 85). Lester never heard the amount before he was fired, but heard it was six figures. (Tr. 85-87).

want the mine shut down. (Tr. 63-64). He said positive things about the company. (Tr. 64). However, he also spoke about advance notice. (Tr. 94). Those comments made it into the article. (Tr. 94). Lester believes that tension regarding his safety concerns built up over the years leading to his firing and that the *Washington Post* story was part of it. (Tr. 64-65). He believes management, (Jessee, Jackson, Dave Roughner, and others) kept their eye on him to see if he would report to MSHA. (Tr. 65).

Lester had told Respondent that management was getting better with respect to safety. (Tr. 51). Lester admitted that he never told Respondent's counsel or anyone else present about advanced notice, cutting corners, or violating safety laws. (Tr. 51). Lester stated that Respondent's counsel never asked about advance notice. (Tr. 52). Advance notice is serious. (Tr. 52). Lester is also familiar with the Running Right program instituted by Alpha. (Tr. 65). At meetings he was told to report safety violations whether anonymously or through management's open door policy. (Tr. 66, 88). He did not complain to the company about advance notice. (Tr. 66). Lester had submitted very few anonymous safety concerns. (Tr. 88). He also participated in one EIG meeting where he was encouraged to talk about safety but he did not talk about advance notice.⁸ (Tr. 66). He only told Gilbert and Smith about it and those conversations were after Respondent would not give him the miner job. (Tr. 66-67).

Lester never told Stiltner that he was upset at Jackson and Jessee and that he would walk into their office and harm them without remorse.⁹ (Tr. 39). He made no other statement that could be interpreted as a threat of violence. (Tr. 39). Lester agreed that if he made a death threat he should be fired. (Tr. 59). He received a handbook during training saying there was zero tolerance for violence and threats. (Tr. 59-60). Lester has a bit of a temper and occasionally raises his voice when talking to people. (Tr. 60). However, he does not get so angry that he begins to shake. (Tr. 60). Stiltner never saw him begin to shake. (Tr. 60).

About a month before he was fired, Lester had an argument with Jackson because Jackson gave him an unexcused absence. (Tr. 60-61). Lester went from the mine to the office, about a quarter of a mile away and across four lanes of traffic. (Tr. 61). Helbert and Christy Myers were in the office. (Tr. 61). Lester did not lose his temper but started to cry because he did not know what anyone had against him. (Tr. 61-62). Lester did not think Jessee had anything against him because he gave him overtime but felt that Jackson did (Tr. 62). He asked Jackson about it, but Lester does not know what the problem is. (Tr. 62).

⁸ The meaning of "EIG" was never developed at hearing. They are apparently meetings wherein employees are encouraged to voice safety concerns to management.

⁹ Lester knows where Stiltner lives. (Tr. 89). Lester has been to Stiltner's house and knows his wife. (Tr. 90). He lives off a country road in the hollow, about a half mile from the main road. (Tr. 90-91). He did not go by Stiltner's house within ten days of his discharge. (Tr. 91). Lester does not own a gun. (Tr. 62). He used to have a .22 mag rifle, but six to eight months before the hearing it was stolen. (Tr. 62).

Since April 23, 2013 Lester has tried to find another job without success. (Tr. 41). He wants to be reinstated with Respondent. (Tr. 41).

Testimony of David Earl Smith

Smith is currently employed by MSHA as a special investigator and has held that position for approximately three years. (Tr. 100-101). In that capacity he investigates 105(c) termination complaints, 110 investigations, and other preliminary investigations. (Tr. 101). To conduct a 105(c) investigation, Smith first determines whether a temporary reinstatement was requested, which creates a shortened time-frame for gathering facts, about 15 days. (Tr. 101-102). He then determines whether the case was frivolously brought, whether the complainant is a miner, if he engaged in protected activity, and whether there was an adverse action. (Tr. 102). In this case, Smith decided that the complaint was not frivolously brought. (Tr. 102, 115). He made this determination after interviewing management personnel. (Tr. 102). It was significant that Lester was terminated three days after Smith met with him. (Tr. 102-103).

Smith met Lester the first time at the V&V Restaurant in Richlands a week before he was terminated, to discuss advance warning. (Tr. 105).¹⁰ They met two days later on April 19, 2013 at the same location and Lester signed a statement. (Tr. 105). Lester also stated that another miner had talked to him about an order from a foreman that he believed was unsafe. (Tr. 105-106). Lester asked Smith the proper way to refuse to take an unsafe action so Smith gave him two copies of the miners' rights book and two business cards with contact information. (Tr. 106). Smith believes these meetings were protected activity. (Tr. 106).

On April 24, Lester was scheduled to meet with Smith but said that he had been discharged. (Tr. 107). Lester believed he was fired because he met with MSHA and told his supervisor about the meeting. (Tr. 107). Smith believed this was an adverse action. (Tr. 107).

Smith was certain that protected activity occurred because he was the one who interviewed Lester. (Tr. 107-108). The fact that Lester told Stiltner about the substance of those meetings convinced Smith there was a nexus. (Tr. 107-108). Smith interviewed Stiltner. (Tr. 108). He learned that Lester had spoken to Stiltner on a couple of occasions in the week prior to the discharge. (Tr. 108-109). Stiltner said that Lester had talked to him about meeting MSHA and about the Heaton case. (Tr. 108). Lester also told Stiltner that Jackson was the person he observed giving advance notice. (Tr. 108). At first Stiltner thought Lester was joking, but the second time he knew Lester was serious. (Tr. 108-109). It was at this time that Stiltner said that

¹⁰ At their first meeting, Gilbert came as well because he knew Lester and had a rapport with him. (Tr. 103). Gilbert met Lester during the Heaton 105(c) investigation on February 12, 2013. (Tr. 103-104). At that earlier meeting, there may have been some talk of advance notice, but Smith does not remember what Gilbert told him; the purpose was the 105(c) investigation. (Tr. 104).

Lester threatened people. (Tr. 108). Stiltner told Smith he reported the alleged threats on Monday evening. (Tr. 109). Smith conceded that Stiltner said that Lester told him he was going to bring a gun and leave the people lying on the floor and not care. (Tr. 124).

Smith interviewed Helbert and she said that Patrick e-mailed her on Monday evening at approximately 5:00 p.m. and asked her to investigate the threats. (Tr. 109-110). Helbert said she went to work at 6:00 a.m. on the 23rd, and talked to Stiltner before he went underground. (Tr. 110). She also said she spoke with Jessee and Jackson and, later in the day, to a rank-and-file miner, Reynolds. (Tr. 110). Reynolds told Helbert that Lester talked about the Heaton case but had not threatened him and that he had not heard him threaten anyone else. (Tr. 110-111). Reynolds told Helbert that Lester was talking about Heaton's large settlement. (Tr. 111). Reynolds also told Heaton that Lester had talked to MSHA. (Tr. 111). Neither Jessee nor Jackson told Helbert that they received any direct threats; just that Stiltner told them that Lester had threatened them. (Tr. 111-112). Helbert said Stiltner was the only person who heard the threats, there were no other witnesses. (Tr. 112). Helbert said she did not speak to Lester about the threats. (Tr. 112).

Smith interviewed Patrick who said he had first learned about the threats when Jackson called him on Monday evening. (Tr. 113). According to Patrick, Stiltner had told Jackson of the alleged death threat on Monday and that Jackson had called Jessee, who then called Patrick. (Tr. 113-114). Patrick said he then called Helbert and told her to conduct an investigation. (Tr. 114). Patrick never spoke to Stiltner or Lester directly. (Tr. 114). Later on Tuesday, Helbert and Patrick met and she told him of her findings. (Tr. 115). Patrick said he fired the Lester because he thought the charge was very serious in nature. (Tr. 124). Patrick said the firing was for the death threat, not the MSHA investigation. (Tr. 124). He specifically denied firing for going to MSHA. (Tr. 125). Smith does not know Patrick to be a liar and has only met him three times. (Tr. 125).

Smith took notes during his interviews of Patrick, Stiltner, Helbert, and others. (Tr. 115). Those notes are currently in the possession of Smith's supervisor, Mr. Clay. (Tr. 115).

Smith looked at his signed affidavit. (Tr. 120). The words are his, but he did not physically prepare the document. (Tr. 121). The document was prepared with information Smith provided, but the Solicitor's office completed the document it. (Tr. 121). Smith's role is simply to gather facts without regard to whether they are favorable to the government or the Respondent. (Tr. 122-123). He provided those facts to the Secretary and the Secretary produced the affidavit. (Tr. 123). Page 5, paragraph 3 of the affidavit says that the death threats were a pretext, which Smith thinks means Respondent covered up the fact that they fired Lester for protected activity. (Tr. 126-127). It appears Respondent used a pretext. (Tr. 127). Patrick alone made the decision to fire Lester, but coming up with the pretext was collaborative. (Tr. 127-128). The evidence for that collaboration comes from the investigation he conducted, including interviews. (Tr. 128).

On cross examination, Smith admitted that it is possible for a person to file a complaint with MSHA that is unjustified. (Tr. 128). Smith did not see anything to substantiate that Lester made a threat. (Tr. 129). Stiltner made a statement, but there was no other witness. (Tr. 129-130). Sometimes there are no witnesses to a conversation, but Smith does not know if Stiltner made the threats up out of whole cloth. (Tr. 130).

Lester told Smith that he had been passed over for a miner job for which he was qualified. (Tr. 132). He did not say anyone in particular had passed him over; just management had done so several times. (Tr. 132-133). Lester said he told Stiltner he was tired of the way the company treated him and that they were passing him over because he cooperated with MSHA. (Tr. 133).

Testimony of Ron Patrick

Ron Patrick lives in Abingdon and works as President of Knox Creek, a position he has held since January 2013. (Tr. 134-135). Before that he was a manager of operations, but the change in position was mostly just a title change. (Tr. 135). Patrick has been a superintendent or supervisor in the coal industry for over thirty years. (Tr. 135). He worked for Pittston Coal and then Alpha. (Tr. 135). They are both large, publicly-traded companies. (Tr. 135). Patrick is aware that miners have the right to make safety complaints to the government without repercussions. (Tr. 136). He has never been accused before of violating that right. (Tr. 136).

The day before the discharge, Jessee and Patrick were at a regional safety meeting. (Tr. 138). That night, Jessee called Patrick and told him about the threats. (Tr. 139). So he took the information to Helbert, the HR person, and asked her to investigate. (Tr. 139-140). Helbert investigated for Patrick. (Tr. 140). Stiltner told Helbert that Lester said that if he came to the mine and shot Jessee or Jackson it would not bother him. (Tr. 140). Helbert passed this information along to Patrick. (Tr. 140).

On April 23, 2013 Patrick decided to fire Lester. (Tr. 136). He had the final authority. (Tr. 136). He spoke with the legal department and his boss. (Tr. 136). This was not to get permission, but to let them know what was happening. (Tr. 136). Lester was fired for making threats against upper management. (Tr. 136). He had no reason to doubt the report or to believe Stiltner made up the threats. (Tr. 137). But he had not spoken directly to Stiltner or Lester. (Tr. 144-145). All of his information came from Jessee and Helbert's interview with Stiltner. (Tr. 145). Helbert did not interview Lester as part of her investigation. (Tr. 145-146). He did not expect someone who had threatened to kill two people to admit it to the company president and saw no reason for an interview. (Tr. 148).

Patrick did not know that Lester was meeting with MSHA. (Tr. 137). Helbert says she told him on the day of the discharge that Lester was meeting with MSHA but he did not know until that morning. (Tr. 137, 140). He does not recall getting that information, but Helbert says she told him. (Tr. 137, 140). Whether he knew it or not, Lester's interaction with MSHA was not considered in the decision to discharge. (Tr. 138, 140). Even if he knew, he would have

fired him anyway because of the death threats. (Tr. 138). Respondent has a policy in the manual issued to every employee that states there is a zero tolerance policy for threats in the workplace. (Tr. 138). Patrick heard the testimony that Lester said he was fired in connection to the Heaton case and that Patrick shrugged his shoulders, but Patrick said this was not true. (Tr. 142). Lester asked if it was related to the Heaton matter and Patrick said absolutely not. (Tr. 142).

When Lester was fired, Patrick decided to have a security guard, Lynn Blevins, present because Lester had threatened to kill two members of upper management. (Tr. 141). Blevins is an employee of the company and there for personal physical security. (Tr. 142). Patrick did not report the threats to the police, Blevins did. (Tr. 149-150). Patrick does not know if the police took a statement from Stiltner and Stiltner never handed in any written documents to Patrick or Helbert. (Tr. 150). Patrick learned of the threat on Monday night and then went to work a full shift on Tuesday, however not at the mine. (Tr. 147-148).

Patrick is not aware of any advance notice at the mine since he took over. (Tr. 141). He is personally committed to safety and does not approve of advance notice. (Tr. 141). He has told all of his subordinates about his positions. (Tr. 141). Patrick has safety meetings with miners called EIG meetings once a month. (Tr. 142). Hourly employees are encouraged to come to the meetings. (Tr. 142-143). At those meetings they review observation cards and safety concerns. (Tr. 143). Patrick has attended many at Tiller. (Tr. 143). There are also Running Right cards available to make anonymous complaints, which are reviewed monthly. (Tr. 143). Lester attended one of these meetings, but Patrick was not present and does not know if he spoke. (Tr. 143). Patrick has an open door policy so that miners can talk to him about safety issues. (Tr. 143-144). Lester has never taken advantage of that policy. (Tr. 144).

Patrick was not aware of the *Washington Post* article until this case. (Tr. 144).

Findings and conclusions

Protected Activity and Adverse Employment Action

The Mine Act contains safeguards for miners engaged in protected activity. Specifically, §105(c)(1) states, in relevant part:

No person shall discharge or in any manner discriminate against...or otherwise interfere with the exercise of the statutory rights of any miner...in any coal or other mine subject to this chapter because such miner...has filed or made a complaint under or related to this chapter, including a complaint notifying the operator or the operator's agent...of an alleged danger or safety or health violation in a coal or other mine.

30 USC § 815(c)(1). As shown previously, to support a temporary reinstatement there must be protected activity with a connection, or nexus, to an adverse employment action. The initial issue is whether Lester engaged in activity that triggered those protections.

Under the Act, protected activity includes filing or making a complaint of an alleged danger, or safety or health violation, instituting any proceeding under the Act, testifying in any such proceeding, or exercising any statutory right afforded by the Act. *See Sec’y of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786 (Oct. 1980), *rev’d on other grounds sub nom. Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3rd Cir. 1981). In this matter it is uncontested that Lester met with MSHA employees Gilbert and Smith on at least three occasions. (Tr. 30-35, 40, 49, 53-55, 68, 76-77, 105, 137, 140). During those meetings Lester discussed his testimony in an MSHA proceeding (the discrimination claim of Heaton) and also made a complaint about alleged dangers (advance notice and the other miner’s desire to refuse unsafe work). (Tr. 30-35, 40, 49-50, 57, 67-68, 76-77, 105-106). It cannot be seriously argued that meeting with MSHA to discuss safety concerns and MSHA proceedings is unprotected. Such a discussion would be exactly the kind of dialogue that §105(c) seeks to protect. Therefore, Lester’s claim that he was engaged in protected activity is not frivolous.

The next issue is whether Lester suffered an adverse action. According to the Act and well-settled Commission precedent, suffering a discharge is an adverse employment action. 30 USC § 815(c)(1); *see also Moses v. Whitley Dev. Corp.* 4 FMSHRC 1475, 1478 (Aug. 1982). Again, it is uncontested that Lester was discharged from his position as a scoop operator. (Tr. 39, 107, 136). Therefore, Lester’s claim that he suffered an adverse employment action is not frivolous.

Nexus between the protected activity and the alleged discrimination

Having concluded that Lester engaged in protected activity, the examination now turns to whether that activity has a connection, or nexus, to the subsequent adverse action, namely the April 23, 2013 termination. The Commission recognizes that the nexus between protected activity and the alleged discrimination must often be drawn by inference from circumstantial evidence rather than from direct evidence. *Phelps Dodge Corp.*, 3 FMSHRC at 2510. The Commission has identified several circumstantial indicia of discriminatory intent, including: (1) hostility or animus toward the protected activity; (2) knowledge of the protected activity; (3) coincidence in time between the protected activity and the adverse action; and (4) disparate treatment of the complainant. *See, e.g., CAM Mining, LLC*, 31 FMSHRC at 1089; *see also, Phelps Dodge Corp.*, 3 FMSHRC at 2510.

Knowledge of the protected activity

According the Commission, “the Secretary need not prove that the operator has knowledge of the complainant’s activity in a temporary reinstatement proceeding, only that there is a non-frivolous issue as to knowledge.” *CAM Mining, LLC*, 31 FMSHRC at 1090 *citing Chicopee Coal Co.*, 21 FMSHRC at 719. Lester testified that he told his foreman, Stiltner, that he met with representatives of MSHA to discuss the Heaton discrimination proceeding and the issue of advance notice. (Tr. 31-32, 34-35, 40, 107-108). The conversations with Stiltner occurred during the week before Lester was fired, with one conversation occurring on April 17, 2013. (Tr. 34, 40, 107-108). Lester also handed out a brochure in the mine with an MSHA

employee's name and contact information on April 19, 2013. (Tr. 35). All of these events occurred before the ultimate decision to fire Lester was made. Furthermore, Patrick testified that Helbert said she had told him that Lester was meeting with MSHA on the morning of April 23. (Tr. 137, 140). This occurred at approximately the same time he had decided fire Lester. (Tr. 137, 140). Thus, I find that Complainant and the Secretary have raised a non-frivolous issue as to whether Respondent had knowledge of the protected activity when the decision was made to fire Lester.

Coincidence in time between the protected activity and the adverse action

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

In the present matter, the time between the Lester's final protected activity and the termination was approximately three to four days. Lester testified that he met with Gilbert and Smith on April 17, 2013 and discussed safety and then signed a statement regarding those safety discussions on April 19, 2013. (Tr. 30-35, 40, 49, 53-55, 68, 76-77, 105, 137, 140). He was then fired on April 23, 2013. (Tr. 39, 107, 136). This easily meets the Commission's requirements. Thus, I find that the time span between the protected activities and the adverse action is sufficient to establish a nexus.

Hostility or animus towards the protected activity

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

As noted above, the time between Lester's protected activity and his discharged was between three and four days. In that time, Lester worked only two shifts. Furthermore, as noted above, the Secretary has raised a non-frivolous issue as to whether Respondent had knowledge of the protected activity. There was little time for Respondent to manifest additional animus towards that protected activity. The possibility of animus is shown by the close proximity of the

termination. I find that this close connection between the possibly known protected activity and the adverse employment is circumstantial evidence of animus.

There may also be a non-frivolous issue as to whether Respondent showed animus toward earlier protected activity conducted by Lester. Specifically, Lester testified that he spoke to the *Washington Post* about advance notice in the mine. (Tr. 62-65, 94). Lester's pleadings noted that a couple of weeks after that article ran, MSHA contacted Lester regarding that claim and initiated a proceeding against Respondent. (*Second Amended Charge of Discrimination* at p. 5). Lester refused to testify, after allegedly being pressured by Respondent. *Id.* After the article ran, Lester testified that he felt that Respondent kept a close eye on him and that members of management, in particular Jackson, prevented him from getting promotions. (Tr. 44-46, 65). The definition of protected activity includes situations where a miner has "caused to be instituted any proceeding under or related to this chapter." 30 USC § 815(c)(1). While Lester may not have intended to initiate a proceeding when he spoke to the reporter, a proceeding was instituted and the Commission has consistently found that Congress intended section 105(c) to be broadly construed to afford maximum protection for miners exercising their rights under the Act. *See Sec'y of Labor o/b/o Charles H. Dixon et. al. v. Pontiki Coal Corp.*, 19 FMSHRC 1009, 1017 (June 1997) (citing *Swift v. Consolidation Coal Co.*, 16 FMSHRC 201, 212 (Feb. 1994) ("the anti-discrimination section should be construed 'expansively to assure that miners will not be inhibited in any way in exercising any rights afforded by the legislation.'")(quoting S. Rep. No. 181, at 36 (1977), reprinted in Senate Subcomm. on Labor, Comm. on Human Res., *Legislative History of the Federal Mine Safety and Health Act of 1977*, 94th Cong., 2d Sess., at 624 (1978)). The Secretary has raised a non-frivolous point as to whether Respondent's increased scrutiny of Lester and refusal to promote him following those proceedings show animus toward Lester's earlier protected activity. This could support an inference that the discharge at issue here was the result of similar animus.

Disparate Treatment

"Typical forms of disparate treatment are encountered where employees guilty of the same, or more serious, offenses than the alleged discriminatee escape the disciplinary fate which befalls the latter." *Secretary of Labor on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2512 (Nov. 1981). In this case, Lester was fired for allegedly threatening to kill members of upper management. There is no evidence on record of any other employees punished less severely for the same or similar alleged misconduct. Therefore there is no evidence of disparate treatment. However, the Commission has previously held that evidence of disparate treatment is not necessary to prove a *prima facie* claim of discrimination when the other indicia of discriminatory intent are present. *Id.* at 2510-2513.

As has already been shown, there is sufficient evidence to conclude that this discrimination claim was not frivolously brought as it relates to animus, knowledge, and coincidence in time. Therefore, I find that the Secretary has established a nexus between Lester's protected activity and the Respondent's subsequent adverse action.

Conclusion

In concluding that Lester's complaint herein was not frivolously brought, I give weight to the evidence of record that he met with MSHA representatives. I also conclude that there were non-frivolous issues as to whether Respondent was aware of Lester's actions, that Respondent showed animus toward Lester's alleged protected activities, and that there was a close connection in time between his alleged protected activity and his April 23, 2013 discharge.

Respondent asserts that its discharge of Respondent was based on his unprotected activities, specifically threatening to kill members of upper management. I find that Respondent's evidence on this record is not sufficient to demonstrate that Lester's complaint of discrimination was frivolously brought. To the contrary, since the allegations of discrimination have not been shown to be lacking in merit, I find they are not frivolous.¹¹

¹¹ At this point I would like to briefly note that there are several issues that were raised at the hearing that were not addressed in my "findings and conclusions." Similar to Judge Gill's decision in *Sec'y of Labor on behalf of Kenneth R. Wilder v. Private Investigation and Counter Intelligence Services, Inc. and Bledsoe Coal Corp.*, 33 FMSHRC 1667, n. 5 (ALJ) (July 2011), and Judge Andrew's decision *Sec'y of Labor on behalf of Brad Houston v. Highland Mining Company, LLC*, 2013 WL 2286139, n. 8 (ALJ) (April 29, 2013), I find the following is a list of ancillary facts broached at the hearing which may be relevant for a trial on the merits, but are not relevant to the limited temporary reinstatement hearing:

1. Conflicting testimony regarding Lester's alleged threat to murder members of upper management;
2. The claim that Lester was "shaking" in anger or, in general, had a temper;
3. Whether Lester has a gun;
4. Lester's knowledge about Stiltner's home;
5. Lester's acquaintance with Stiltner's wife;
6. Lester's personal financial situation;
7. Lester's alleged conversation with Heaton about settlement amounts;
8. Lester's relative skill as a scoop operator or a miner operator;
9. The location of Lester's statement;
10. Whether things got better at the mine after Alpha took over;
11. The specific contents of Lester's conversations with Gilbert and Smith;
12. The content and location of Smith's notes;
13. Anything specifically related to the Heaton case or the amount of the settlement in that case;
14. Whether, in the words of Respondent's counsel, Patrick is a "liar," and his general credibility.

None of these pieces of evidence speak to whether this complaint was frivolously brought or deal with the nexus between protected activity and adverse action. The Commission has been
(continued...)

ORDER

Based on the above findings, the Secretary's Application for Temporary Reinstatement is granted. Accordingly, Respondent is **ORDERED** to provide immediate reinstatement to Lester, at the scoop operator's rate of pay for the same number of hours worked, and with the same benefits, as at the time of his discharge. If Respondent is concerned about the safety of miners or members of upper management, I would be willing to consider an agreement for economic reinstatement of Lester.

/s/ William S. Steele

William S. Steele

Administrative Law Judge

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/tjb

¹¹(...continued)

clear that this review is limited to review of these issues. Therefore these issues are beyond the scope of this decision.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
1331 Pennsylvania Ave., N.W., Suite 520-N
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June 28, 2013

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA), ¹	:	
Petitioner,	:	Docket No. KENT 2011-1223
	:	A.C. No. 15-17360-248538 Q080
	:	
v.	:	
	:	
TRIVETTE TRUCKING,	:	Mine: PE Southern Pike County
Respondent.	:	

DECISION

Appearances: Jennifer Booth Thomas, Esq., U.S. Department of Labor, Office of the Solicitor, Nashville, TN
For the Petitioner

Billy R. Shelton, Esq., Jones, Walters, Turner & Shelton, Lexington, KY
For the Respondent

Before: Judge Tureck

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 Trivette Trucking (“Respondent”), 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”). The Secretary assessed penalties against Respondent totaling \$140,000 for two alleged violations of mandatory safety standards at Premier Elkhorn Coal Company’s (“PE”) PE Southern Pike County Mine (“Mine”). The Secretary contends that each of these violations was significant and substantial, involved high negligence, and was an unwarrantable failure to comply with mandatory safety standards. Respondent challenges both the occurrence of the violations and its alleged negligence.

On January 22, 2013, I issued a decision in *Premier Elkhorn Coal Co.*, KENT 2011-827. Trivette was a trucking contractor for PE, hauling coal from the coal pit to the processing plant. KENT 2011-827 (“PE case”) concerned a fatal accident to Steve Johnson, one of Trivette’s employees, who was hauling coal at the Mine. MSHA issued two citations against PE, alleging

¹ Hilda L. Solis resigned as Secretary of Labor on January 22, 2013. Deputy Secretary Seth D. Harris is the Acting Secretary of Labor.

in one that the truck was overloaded, and in the other that its brakes were defective. At the same time the citations against PE were issued, MSHA issued substantively identical citations to Trivette.

My decision in the PE case, which followed a two day hearing in Pikeville, Kentucky on December 14 and 15, 2011, and the submission of post-hearing briefs by the parties, vacated the citations against PE and dismissed the case. The Secretary filed a petition for review which was accepted by the Commission on February 17, 2013. KENT 2011-1223 initially was assigned to Judge Bullock, who scheduled a hearing for February 26-27, 2013. Since I had just issued a decision regarding the same accident, it was decided to reassign this case to me. Accordingly, Judge Bullock canceled the hearing, and the case was transferred to me on February 13th.

Following a conference with counsel, it was agreed that this case would be decided on cross-motions for summary decision, with reliance on the record in the PE case. The parties filed joint stipulations and cross-motions for summary decision.² But in reality, this is not a summary proceeding. It actually is a litigated case on a stipulated record. That record consists primarily of the transcript and exhibits from the PE case, copies of which I have included in the record in this case. In addition, the parties submitted a list of 19 stipulations, which I have marked as Joint Exhibit 2 and admit into evidence.³ Finally, the Secretary enclosed many documents with the motion for summary decision. Most of these are in the record of the PE case, and there is no reason to have duplicate exhibits in this record. Those that are not, and which should be a part of this record, are the orders issued against Trivette, which were marked as GTX 4 (Order 8230314) and GTX 5 (Order 8230315). Also, the Secretary submitted a copy of his Petition for Discretionary Review in the PE case (GTX 3), and a copy of his brief to me in the PE case (GTX 13). Since briefs are not evidence, they will not be admitted into evidence in this case. However, they will be retained in the file as any brief would to illustrate the

² The *Memorandum of Law in Support of Secretary's Motion for Summary Decision* contains an embarrassing number of factual errors. On page 2 alone, the Secretary incorrectly states that Johnson's truck was the sixth truck loaded on the morning of December 12, 2009; that the truck "veered left onto the berm";

³ that Transcript pages 150, 205-06, 217 and 228 contain testimony that Johnson's truck was traveling down "a 'very steep' 17 percent grade"; and that Transcript pages 149 and 179 contain testimony that Johnson drove along a state highway before turning onto a private haul road on Premier property. Most troubling is the statement that Johnson's truck veered left onto the berm. The direction the truck traveled before it crashed into the berm is a key factor in both this case and the PE case, and the record in the PE case repeatedly and incontrovertibly contains testimony and other evidence that Johnson's truck drove perfectly straight into the berm.

Citations to the record will be abbreviated as follows: JX – Joint Exhibit; GX – Government's Exhibit from KENT 2011-827; RX – Respondent's Exhibit from KENT 2011-827; TR – Hearing Transcript from KENT 2011-827; GTX – Government's Exhibit filed with KENT 2011-1223.

Secretary's position in these matters. Finally, the Secretary submitted several exhibits which I had excluded from evidence in the PE case. They will be discussed *infra*.

Findings of Fact and Conclusions of Law

The parties have stipulated the following :

1. On December 12, 2009, a fatal accident occurred at the PE Southern Pike County Mine, Mine ID No. 15-17360.
2. Just prior to the accident, the deceased, Steve Johnson, was operating Truck No. P419. Truck No. P419 is a 2006 International, VIN No. 1HTXHAPTX63J233337.
3. At the time of the accident, Steve Johnson was an employee of Trivette Trucking. Mr. Johnson worked as the chief mechanic at Trivette Trucking. Mr. Johnson had approximately thirty (30) years experience as a truck driver and truck mechanic. Trivette Trucking is a contractor for Premier Elkhorn Coal Company.
4. On the morning of December 12, 2009, Mr. Johnson's truck was the fifth truck loaded.
5. After being loaded, on the morning of December 12, 2009, Mr. Johnson exited the coal pit and drove to a location on the haul road where another truck driver, Carl Collier, was located. Mr. Johnson parked the truck in the haul road and Mr. Collier helped him look at the steering system. Neither Mr. Johnson nor Mr. Collier detected any leaks in the steering system. Mr. Collier got into the operator's cab and turned the steering. No leaks were detected and the pump reservoir was full of fluid. Mr. Johnson then proceeded to drive the truck on the haul road.
6. The sixth truck to be loaded on the morning of December 12, 2009 was driven by Tim Bentley. While descending a section of the haul road, Mr. Bentley observed the truck driven by Mr. Johnson overturned in the roadway. Mr. Bentley stopped and parked his truck on the haul road above the accident site and walked down to the scene of the accident. There were no eyewitnesses to the accident.
7. The cab of the truck involved in the accident was not significantly damaged. The doors functioned properly and all the cab glass was intact. A seat belt was provided and was operative when tested.
8. Just prior to the accident, Mr. Johnson attempted to jump from the cab of the truck while it was in motion. He was struck by the left rear tandems, resulting in fatal injuries.
9. MSHA interviewed drivers from Trivette Trucking after the accident. The drivers stated during the interviews that pre-operative examinations were conducted daily and that deficiencies were corrected prior to using the trucks.

10. The service brakes on Mr. Johnson's truck were defective.
11. The broken worm gear in the steering gear box was caused by the accident, rather than having caused the accident.
12. On the morning of the accident, MSHA received a hazardous condition complaint about the general condition of Trivette Trucking fleet of trucks.
13. Trivette Trucking is a contractor for Premier Elkhorn Coal Company.
14. Trivette Trucking's operations affect interstate commerce.
15. Premier Elkhorn Coal Company contracted Trivette Trucking to haul coal at PE Southern Pike County [Mine]. PE Southern Pike County Mine is a "mine" as that term is defined in Section 3(h) of the Mine Act, 30 U.S.C. § 802(h).
16. Copies of the violations at issue in this proceeding were served on Trivette Trucking by an authorized representative of the Secretary.
17. Trivette Trucking timely contested the violations.
18. Trivette Trucking is subject to the jurisdiction of the Federal Mine Safety and Health Review Commission and the presiding Administrative Law Judge has the authority to hear this case and issue a decision regarding this case.
19. The proposed penalties will not affect Trivette Trucking's ability to remain in business.

Trivette Trucking is located in Virgie, Kentucky. It is an independent contractor providing coal hauling services to PE and other coal companies. The PE Southern Pike County Mine is located in Myra, Kentucky, and is a surface coal mine. TR 24. Coal from the coal pit was hauled by contractors, including Respondent, to the preparation plant for processing, but only on Saturdays. TR 24-26. The preparation plant was located about six to seven miles from the coal pit. TR 27. Steve Johnson was the Chief Mechanic for Respondent (TR 90), and as part of his duties for Respondent he also drove a coal truck.

Early on the morning of Saturday, December 12, 2009, Johnson drove a red 2006 International Paystar coal truck, number P419, from Respondent's garage to the Mine. TR 90-91. The truck had three axles, with tandem wheels on the two rear axles. Johnson was the only one of the coal truck drivers that morning who drove an International coal truck at the Mine (TR 123-24); the others drove Mack trucks. TR 75-76. At the Mine, Johnson's truck was loaded with coal by Bobby Warf, who at the time was a front-end loader operator for PE (TR 124). After his truck was loaded with coal, Johnson, over the CB radio, stated that he was having trouble with his truck's power steering. TR 110-12; 139-40. Johnson pulled his truck over, and he and

another coal truck driver, Carl Collier, then checked out the truck and did not find any leaks in the steering system. JX 2, at ¶5; TR 105; GX 4, at 2-3. In his conversation over the CB radio, Johnson did not report a problem with the truck's brakes. TR 140. Johnson then proceeded to drive down the Mine's haul road on the way to the preparation plant. It was still dark at the time. TR 34.

The haul road was a gravel road with berms on both sides. TR 28. On the right, there was a hill behind the berm; on the left, the road dropped off. The road had a steep downward grade of 15 to 18 percent for about 1300 feet. About 30 to 40 yards after the site of the crash the haul road crosses an intersection, at which point it becomes level or very slightly upgrade for about two miles. TR 318, 378, 419. According to PE's Manager of Safety and Environmental Affairs, David Lee Wilder, coal trucks generally traveled very slowly – not more than 10 miles per hour - on the haul road. TR 150. At some point Johnson's truck left the normal travelway and started heading directly toward the left berm. Johnson jumped from the truck and unfortunately "he rolled underneath the back tandems on the left side and was dragged all the way down . . . the hillside. . . . At some point the truck flipped over" onto the driver's side. TR 44. Johnson was killed.

MSHA mine inspector and accident investigator Debra Howell was the lead investigator of the accident that killed Johnson on December 12, 2009, and she testified at the PE hearing. She was notified of the accident at home by the MSHA District Manager at 8:30 that morning, and arrived at the Mine sometime between 11:00 and 11:30 a.m. Also at the mine were Hank Bellamy, the head of accident investigations for MSHA for the District; Greg Hall, an engineer; State mine inspectors; David Wilder; and several miners TR 30, 33, 35. Apparently, no representative from Respondent was present. Howell talked to some of the miners, including the driver of the truck which followed Johnson's and who discovered the accident, and found out that there were no witnesses to the accident. TR 33. She then went to the scene of the accident. She saw that there were no skid marks, which led her to conclude that "there were no brakes in operation." TR 45; *see also* TR 33. She also concluded that the truck was overloaded.

MSHA issued two orders against Respondent following its investigation of the accident. Order No. 8230314 alleges that:

[T]he driver of the . . . truck . . . failed to maintain control of the loaded truck as it was descending the mine haul road. Overloading of the truck was a factor in the driver losing control. The estimated weight of the loaded truck was 37,600 pounds over the maximum GVWR [gross vehicle weight rating] recommended by the manufacturer. Management was aware that the trucks were routinely overloaded and did nothing to stop this practice.

The order states that the safety standard violated was 30 C.F.R. §77.1607(b), which states: "Mobile equipment operators shall have full control of the equipment while it is in motion." It adds that the violation resulted in a fatality, was significant and substantial ("S&S"),

and was high negligence. Finally, the violation was alleged to have been an unwarrantable failure to comply with a mandatory safety standard. A \$70,000 penalty was assessed for the violation.

Respondent contends that the Secretary failed to prove that the truck was overloaded. Further, Respondent contends that even if the Secretary proved that the truck was carrying a load in excess of the GVWR, the Secretary has not proven that the weight of the truck's load was hazardous or contributed to the accident.

Order No. 8230315 alleges that:

The 2006 International Paystar . . . haul truck . . . was not equipped with adequate brakes. [Specifically],

1. Both the left and right side brake drums on the steering axle had deposits of dried grease on the drum lining friction surface. These conditions compromise the braking capacity.
2. The brake on the right rear tandem axle did not function when tested.
3. Wear on the brake drums in excess of maximum allowable diameter was found on the right front tandem and the [*sic*] both the left and right side of the rear tandems.
4. Bluing was found on the right side drum on the front tandem and the left side drum on the rear axle. Bluing indicates excessive heat. These conditions compromise the braking capacity.

This order states that the safety standard violated is 30 C.F.R. §77.1605(b), which requires mobile equipment to be equipped with "adequate brakes". Again, the citation notes that a fatality had already occurred, that the violation was S&S, and that it resulted from high negligence. Finally, it was alleged to have been an unwarrantable failure. MSHA also assessed a \$70,000 penalty for this violation.

Respondent contends that the Secretary has failed to prove that the truck's brakes, though defective, were inadequate to stop the truck. In addition, Respondent alleges that it was not negligent even if the brakes were inadequate.

Order 8230314

Inspector Howell based her conclusion that Johnson's truck was overloaded on her assumptions that the loaded truck weighed more than its gross vehicle weight rating and that a truck is overloaded if it carries a load in excess of the GVWR. TR 47-48. In fact, Order 8230314 is premised on MSHA's contention that Johnson lost control of his truck because it was overloaded, *i.e.*, hauling more weight than it could carry safely, and the Secretary's expert witness, Ronald Medina, concluded that Johnson's truck was overloaded solely because its load exceeded the manufacturer's GVWR. GX 25, at 8; *see also* TR 224-26.

But the Secretary has failed to prove that Johnson's truck was overloaded, *i.e.*, that it was carrying a load that was too heavy for the safe operation of the truck. There are several independent grounds, any one of which would be sufficient by itself, to find that the Secretary has failed to prove this key element of the case.

First, the Secretary has failed to prove how much the loaded truck weighed prior to the crash. It is undisputed that Johnson's coal truck was not weighed after it was loaded with coal, for at the Mine the loaded coal trucks are weighed at the preparation plant. Nor was the coal weighed while it was being loaded into the truck, or after the crash. TR 128, 135-36, 331. At the hearing in the PE case, the Secretary attempted to introduce evidence regarding the weight of the four trucks loaded before Johnson's on the morning of December 12, 2009, but I excluded this evidence. TR 70-71. The Secretary has also submitted this evidence here, as Proposed Exhibit GTX 6 to its motion for summary decision. I see no reason to change my ruling. For as I stated in the PE decision, the other four trucks were Mack trucks, not International trucks as Johnson's was. There is no evidence that these trucks had the same GVWR as Johnson's International truck or the same size bed as Johnson's (*e.g.*, TR 76-77). Nor was any evidence presented regarding whether these Mack trucks had been modified to carry heavier loads. Even if the Mack trucks loaded before Johnson's International truck carried loads of about 120,000 pounds, it would not prove that Johnson's truck had a similar load. For these reasons, even if I had admitted this document into evidence, I would not have given it any weight.

At the PE hearing I also excluded evidence of the weight of loads Truck P419 hauled on prior dates, and the Secretary has re-submitted this evidence in this proceeding as Proposed Exhibits GTX 7-10 to his motion. I reiterate my ruling in the PE case that the Secretary failed to establish an adequate foundation for these exhibits, and accordingly they will not be considered here as evidence of the weight that truck was hauling on December 12, 2009.⁴ Again, had I

⁴ These documents show loads hauled by Truck P419 on November 21, November 25, December 5 and December 11, 2009. Counsel for the Secretary could not state whether these were the complete records of the loads the truck hauled during the three-week period covered by these documents. *See* TR 61-68. Had these been the complete records for this truck, these exhibits would have been probative, and I would have admitted them into evidence. But absent such a foundation, it cannot be determined whether the truck's records which were produced at the PE hearing reflect the usual loads Truck P419 hauled or were atypically heavy loads. Further, it appears that only two of the 17 loads reflected in these documents were hauled at the PE Southern Pike County Mine, which could be significant. (The mine is listed as Seam 112 on Proposed Exhibit GTX 6. Only Proposed Exhibit GTX 8 reflects haulage at Seam 112.)

It is interesting that despite having had these deficiencies in its evidence pointed out through my rulings in the PE case, the Secretary made no effort in this case to lay appropriate foundations for this evidence. If in fact the evidence I excluded could actually prove the facts the Secretary contends it does, that would not have been difficult. For example, if the Secretary
(continued...)

admitted these documents into evidence, I would not have given them any weight. Without credible evidence of the truck's weight at the time of the crash, it is impossible for the Secretary to prove that the truck was overloaded.

A second independent reason to find that the Secretary failed to prove that Johnson's truck was overloaded is that, even assuming the Secretary had proven that Johnson's truck carried a load which exceeded the manufacturer's GVWR, there is no proof that exceeding the manufacturer's GVWR is *per se* hazardous. The Secretary has not pointed to a definition of "overloaded" in the Mine Act, the safety standards promulgated under the Mine Act, or any other Federal or State statute or regulation; nor has the Secretary shown that the GVWR has been adopted as the weight limit for a truck's safe operation under any such statute or regulation. Yet it is clear from the citation and the evidence presented by the Secretary that in the context of this case she is defining "overloaded" as a load in excess of the manufacturer's GVWR. There is no basis in this record to support the Secretary's reliance on the GVWR as a maximum safe load for a truck to carry. Since MSHA has not formally adopted the GVWR as a standard for determining a truck's safe hauling capacity, nor even promulgated any regulations governing truck load weights (*e.g.*, TR 83-84), the Secretary's bald-faced assertion that a truck carrying a load in excess of the GVWR is overloaded and therefore hazardous clearly is insufficient to establish that Johnson's truck was overloaded.

In fact, the record contradicts such a conclusion. For one thing, the evidence establishes that Kentucky permits trucks to operate in excess of the manufacturer's GVWR if a fee is paid (TR 87), which indicates that Kentucky does not believe the GVWR is the limit of the weight trucks can haul safely. Rather, the weight limits imposed on trucks by Kentucky relate to the wear trucks cause to the roads, not to how much weight trucks can carry safely. *See, e.g.*, Ky. Rev. Stat. 189.222(1)(2009). Moreover, if the GVWR is intended to be a *per se* limit by the manufacturer on the load a truck may carry safely, and is a reliable measure of that limit, it is reasonable to assume that MSHA would have promulgated a safety standard prohibiting the operation of mining trucks hauling loads in excess of the GVWR. That it has not done so, but has promulgated hundreds of pages of regulations governing mine safety to the *nth* degree including numerous standards governing vehicular safety, speaks volumes regarding the use of the GVWR as a safety standard. In addition, modifications to a truck subsequent to its manufacture can substantially increase the loads it is capable of hauling. Things that can cause a truck's capacity to increase include relatively routine items as changing a truck's tires and springs, and major modifications such as replacing an axle. TR 490-91, 496.

⁴(...continued)

believes the records proffered for Truck P419 are the complete records for that truck during the period they cover, an appropriate Trivette employee could have been deposed on that point, or a request to admit the completeness of the records could have been served on Respondent. That the Secretary appears to be resting on his hope that the Commission will reverse my evidentiary rulings rather than correcting the deficiencies in the evidence, leads me to believe that my conclusions regarding the probative value of the excluded exhibits are justified.

Accordingly, there is no basis to find that it is inherently unsafe for a truck to haul a load in excess of the manufacturer's GVWR.

There is a third independent factor mandating a finding that the Secretary failed to prove that Johnson's truck was overloaded. Even accepting the Secretary's contention that Johnson's truck was hauling a load of around 120,000 pounds at the time of the crash, the evidence establishes that the weight of the load was not hazardous. Both parties' expert witnesses in the PE case testified that 120,000 pounds was not an unsafe load for Johnson's coal truck to haul. Ronald Medina is a mechanical engineer employed by MSHA. TR 247. He testified as an expert witness for the Secretary regarding braking and steering systems.⁵ Medina testified that Johnson's truck was capable of hauling a load of 120,000 pounds since he had hauled loads of that weight in that truck previously. TR 313. PE's expert, Steve Rasnick, a highly experienced mechanic, also testified that the truck would have been capable of hauling that heavy a load. TR 522. As Rasnick put it, "It's a coal truck. It was built to haul. . . . [T]hat truck was well capable of handling it [a 120,000 pound load]." *Id.*⁶ Further, Respondent and PE had excellent records regarding safety in 2009, reporting no accidents of any kind resulting in lost work days due to injury that year prior to the one that killed Johnson. TR 102-05. Finally, there does not appear to have been any incentive for PE to load Respondent's trucks with more coal than they could haul safely. PE paid Respondent by the amount of coal hauled. TR 187. Therefore, it does not appear that PE would profit by overloading Respondent's trucks. It would have cost PE the same whether trucks hauled 82,600 or 120,000 pound loads to get the coal from the Mine to the preparation plant. I find that the evidence fails to prove that Johnson's truck was carrying a load that was too heavy for it to haul safely.

Accordingly, the Secretary has failed to prove that the truck which Johnson was driving on the morning of December 12, 2009, was overloaded, *i.e.*, hauling a load that was heavier than it could safely handle.

In my decision in the PE case, I held that since the crux of the Secretary's case regarding this violation was that Johnson lost control of his truck because it was overloaded, and the evidence did not support this contention, the citation had to be dismissed. I cited Judge Gill's decision in *Clintwood Elkhorn Mining Co. v. Secretary of Labor*, 32 FMSHRC 1880 (ALJ 2010), in which Judge Gill similarly concluded that the GVWR cannot be used to determine that a truck is overloaded. Accordingly, he dismissed an order alleging a violation of §77.1607(b)

⁵ Medina's expertise regarding these subjects – particularly steering systems – was unimpressive. It is unclear why the Secretary chose him to be its expert witness in this case. Respondent's expert, a truck mechanic with only a high school diploma, knew much more about both of these systems than Medina despite Medina's degree in mechanical engineering.

⁶ Had I admitted into evidence the weight records for coal haul trucks that the Secretary proffered in the PE case, and here as Proposed Exhibits GTX 6-10, they would have shown that the trucks routinely carried loads of about 120,000 pounds without incident.

because “it is clear that the gravamen of the investigation and subsequent actions is the alleged overloading of trucks.” *Id.* at 1890 n.8. The Secretary petitioned for review of Judge Gill’s decision, and the Commission granted the petition. Significantly, the Secretary did not appeal Judge Gill’s holding that the Secretary failed to prove that the truck was overloaded. In regard to the alleged violation of §77.1607(b), the Secretary’s appeal was limited to whether, despite failing to prove overloading, a violation of that standard nevertheless was established. In a decision issued on February 25, 2013, subsequent to my decision in the PE case, the Commission reversed Judge Gill’s holding,⁷ stating:

We conclude that the judge erred in his interpretation of 30 C.F.R. § 77.1607(b). In order to establish a violation of section 77.1607(b), the Secretary must only demonstrate, by a preponderance of the evidence, that the operator failed to maintain full control of a piece of equipment while it was in motion. Nothing in the language of the standard requires the Secretary to prove a causal or contributing factor for the loss of control, as suggested by the judge.

Clintwood Elkhorn Mining Co., KENT 2011-40-R et al., slip op. at 6 (Feb. 25, 2013).⁸ It was not controverted in Judge Gill’s case that the driver had failed to maintain control of his truck, nor was it controverted here that Johnson failed to maintain control of his truck. Accordingly, I hold that the Secretary has proven a violation of §77.1607(b).

Since a violation has been proven, I must address the gravity of the violation and Respondent’s degree of negligence, and assess an appropriate penalty. The first two parts of the determination of gravity are simple, since the injury occurred and it was a fatality. Also, there does not seem to be a dispute over the number of persons affected, which is one – the driver.

That leads to consideration of whether the violation was significant and substantial (“S&S”), as is alleged by the Secretary. Respondent contends that the violation was not S&S.

⁷ Unlike the Secretary’s motion for summary decision, Respondent’s motion, written over three months after the Commission’s decision in *Clintwood Elkhorn*, fails to point out that Judge Gill’s decision was reversed.

⁸ The Commission has granted the Secretary’s petition for discretionary review in the PE case, and it is likely that my holding that the Secretary failed to prove a violation of §77.1607(b) will be reversed. See *Direction for Review, Premier Elkhorn Coal Co., KENT 2011-827* (Feb. 27, 2013).

Thirty U.S.C. § 814(d)(1) provides:

If, upon any inspection of a coal or other mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard, and if he also finds that, while the conditions created by such violation do not cause imminent danger, such violation is of a nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard, and if he finds such violation to be caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standards, he shall include such finding in any citation given to the operator under this [Act].

The Commission and several courts of appeals have agreed that four conditions must be met to find that a violation is “significant and substantial”:

[T]he underlying violation of 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.

Secretary of Labor v. Mathies Coal Co., 6 FMSHRC 1, 3-4 (1984); *see also Austin Power, Inc. v. Secretary of Labor*, 861 F.2d 99, 103 (5th Cir.1988); *Consolidation Coal Co. v. Federal Mine Safety and Health Review Comm'n*, 824 F.2d 1071, 1075 (D.C.Cir.1987).

It would seem that any violation of §77.1607(b) would be S&S. For if a mobile equipment operator loses control of the equipment, it would create a danger to safety with a reasonable likelihood of a reasonably serious injury. This case is a prime example. Johnson lost control of his truck, which ultimately caused it to crash into a berm and turn over onto its side. Although Respondent argues that Johnson probably would not have been killed, and speculates that he might not have suffered an injury at all, had he stayed in the cab, it cannot seriously be argued that there was no reasonable likelihood of a reasonably serious injury to the driver when a loaded, out of control coal truck turns over. Therefore, I hold that the violation was S&S.

The next issue is negligence. The Secretary contends that Respondent was highly negligent, and engaged in aggravated conduct constituting an unwarrantable failure to comply with a safety standard, because “management was aware that the trucks were routinely overloaded and did nothing to stop this practice.” GTX 4. Respondent argues that

it was not negligent because “[t]here was no proof of any causal factor that could or should be attributed to Trivette Trucking as to why the driver of the truck lost control.” Respondent’s Motion at 10. Since I found that the Secretary failed to prove that the truck was overloaded, the Secretary’s contentions regarding Respondent’s negligence and aggravated conduct must be rejected. Therefore, I conclude that Respondent was not negligent, and did not engage in an unwarrantable failure to comply with a safety standard, in regard to its violation of §77.1607(b).

Finally, the assessment of a penalty must be considered. The Secretary assessed a penalty of \$70,000 for this violation. The assessed penalty was premised on proof of high negligence and an unwarrantable failure due to overloading of Johnson’s truck. Overloading was the crux of this case regarding the violation of §77.1607(b). The Secretary has not addressed the amount of a reasonable penalty in the absence of the truck being overloaded.

Section 110(i) of the Mine Act lists the factors to be considered in assessing a penalty. These factors are:

the operator’s history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator’s ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

First, there is no evidence that Respondent has ever been cited for a violation of §77.1607(b), let alone that a violation of that standard has ever been proven. Second, since the parties stipulated that the proposed penalties would not affect Respondent’s ability to remain in business, I find that any penalty assessed for this violation which does not exceed \$70,000 would not be inappropriate in relation to Respondent’s size. Next, I have found that Respondent was not negligent, but the violation resulted in a fatality and was S&S. The final factor appears inapplicable to the facts of this case.

The key point regarding this order is that although the Secretary has proven a violation of §77.1607(b), the Secretary has not shown that there was anything the Respondent should have done that would have prevented the accident. As was pointed out above, the Secretary’s case was premised on the allegation that Johnson lost control of his truck because it was overloaded, and the \$70,000 penalty was based on the allegation that Respondent was aware that its trucks were routinely overloaded and did nothing about it. In failing to prove these contentions, the basis for the Secretary’s special assessment no longer applies. However, since a fatality occurred and the violation was S&S, I will assess a penalty of \$1,000 for the violation of §77.1607(b).

Order 8230315

The parties have stipulated that the service brakes on Johnson's truck were defective. Nevertheless, Respondent contends that the truck's brakes were adequate, and therefore it was not in violation of §77.1605(b). Also at issue is the Secretary's contention that these defective brakes contributed to the accident which resulted in Johnson's death.

Medina testified that the braking system on Johnson's truck was thoroughly inspected as part of the accident investigation. Medina testified that the brake drum on the right of the rear axle did not function, and was in that condition at the time of the accident. TR 285-86. In addition, in his report he stated that he found some dried grease on only the right front brake drum, but the left front brake drum was dry. GX 25, at 7. However, he testified at the hearing that he found grease on the front linings, which would have "greatly reduce[d] the braking capability . . ." TR 287. This discrepancy is not explained. He also found that the three rear brake drums they were able to inspect (one wheel could not be removed from the truck) were all worn past the point where they should have been replaced. TR 288-89; GX 25, at 9. Finally, he found bluing in some of the brake drums, which he stated is symptomatic of the brake drums having gotten very hot at some point. TR 291-92. However, he admitted that once brake drums return to their normal temperature, bluing is insignificant. TR 295. He stated that all of these defects existed at the time of the accident. TR 295-96.

Medina believes that even if the truck was not overloaded, the condition of the brakes would have created an unsafe situation. TR 322-23. He concluded that the accident occurred because the brake defects caused the driver to lose control of the truck. TR 323-24.

However, Medina admitted that the accident could have been caused by other factors. For one thing, it is possible that the driver missed a gear and accidentally shifted into neutral, which Medina testified is easy to do (TR 321, 336-37). He stated that "I don't have conclusive evidence of that. Just suggest – the circumstances suggest it." TR 342. If the truck was in neutral, the truck would pick up speed on the downgrade and the Jake brake (*see infra*) would not operate. TR 319, 321. Medina also posited that Johnson may have been driving too fast (TR 335-37, 403); and it is his opinion that the truck was traveling too fast for the defective brakes to stop it. TR 336-37. He bases this on how far Johnson's truck slid after it hit the berm. TR 330, 335-36. But even if he is right that the distance the truck slid after it hit the berm shows that it was traveling at excessive speed when it crashed, Medina fails to take into account the obvious point that if the truck's brakes were defective, leading to the accident, Johnson's truck doubtless would have been traveling overly fast at the time it impacted the berm. That does not mean that the truck was going overly fast when Johnson lost control of it. Further, I find it significant that neither the report prepared by the accident inspector, Debra Howell (GX 4), nor Medina's report, mention that the truck was being driven at an excessive rate of speed at the time of the accident or that the speed at which the truck was being driven caused the accident. There is no indication in the record of when or why Medina changed his mind to conclude that speed had an impact on the accident. Accordingly, I give no weight to Medina's testimony that excessive speed played a role in causing the accident.

Medina also had a change of heart regarding the condition of the parking brake. His report does not note any problems with the parking brake (*see* GX 25, at 8-9), a finding which was echoed by Howell in her accident report. GX 4, at 5. Yet Medina testified at the hearing that 25% of the parking brake system was not functional. Again, there is no explanation for this inconsistency.

PE's expert, Rasnick, disagreed with Medina on several points. For one thing, he believes that the amount of grease Medina found on the brake drum would not have rendered the brake unsafe. He testified that brake drums have to be saturated with oil or grease before they become unsafe. TR 468-69. He also testified that the bluing found on the brake drums was of no significance. He said that what matters is whether there are heat stress cracks inside the drums. Medina admitted there were none. TR 289. Rasnick also stated that the bluing could have occurred months ago. TR 470-71. Next, Rasnick disputed Medina's allegation that excessive truck speed contributed to the accident. He stated that Medina's report (GX 25) indicates that the truck was in fourth gear, and in that gear the truck could not have been going more than 14 miles per hour. TR 472; *see also* GX 25, at 2. But he is incorrect in saying that Medina's report shows that the truck was in fourth gear, as the transmission was found to be in neutral after the crash. GX 25, at 2. However, since Medina pointed out that the gear may have been pushed into neutral as a result of the accident, it could have been in fourth gear before the crash; and Medina concedes as much. TR 340. Regardless, the truck was found to be in "low range and low split." TR 340.

That Johnson's truck was not traveling at an excessive rate of speed at the time it crashed is also the opinion of PE's safety manager, David Wilder. Contrary to Medina's testimony, Wilder stated that Johnson's truck did not go very far once it struck the berm and turned over. TR 428-29. Further, Wilder pointed out that the cab of the truck was undamaged, that even the glass and mirrors were intact. TR 426. Based on these factors, he believes the truck was traveling no more than 10 miles per hour when it crashed. TR 432.

Wilder believes that the accident was caused by a problem with the truck's steering, not the brakes. TR 430-31. He stated that he knew Johnson personally, and he "was one of the best drivers on the property." TR 432. He testified that Johnson should have been able to keep his truck in the road even without any brakes if he could have turned the steering wheel the slightest amount. TR 430-31.

I find that the Secretary's assertion that the accident resulted from defective brakes is questionable at best. First, there are three different braking systems that Johnson could have employed to stop or slow down the truck. The truck had six drum brakes, two on each axle. TR 267. These brakes are activated when the driver steps on the brake pedal, which sends air pressure to the brake system. These are the service brakes. Then there are spring brakes on the two rear axles, which do not rely on air pressure and function as the parking brake. TR 268-69. Finally, the truck has an engine brake – the Jake brake – which has the ability to slow the truck as long as the truck is in gear. TR 319. Although the Secretary contends that the truck's service brakes were defective, the evidence shows that only one of the six drum brakes was too worn to have functioned. Rasnick testified that if only one of the drum brakes was not functioning, the brakes on the other five wheels would have stopped the truck. TR 522-23, 527-29. Further, no deficiencies were found in either the parking brake or the

Jake brake. GX 25, at 5, 8; GX 4, at 5. Significantly, the only brake drivers generally used on the haul road was the Jake brake. TR 319, 344.

In addition, assuming that Johnson could not stop the truck because his brakes failed, why would he not have attempted to turn the truck so it stayed on the road? He was familiar with the haul road, and had to know that it would very shortly level out, permitting him to eventually stop even with seriously defective brakes. TR 419, 421. Yet the truck did not turn at all – it headed off the normal travelway straight into the berm from 283 feet away. TR 424. There is no credible evidence that the truck was traveling more than the usual rate of speed of not more than 10 miles per hour at which the coal trucks generally went down the haul road prior to the time Johnson lost control of the truck. But even if the truck was going more than 10 miles per hour – even if it was going much more than 10 miles per hour – Johnson should have been able to at least start turning the truck to try to keep it on the road. TR 430. Yet the truck did not deviate from the path it took directly into the left berm. Also significant is that Johnson drove the truck from Trivette’s location to the Mine on the morning of the accident. If his brakes were as defective as the Secretary alleges, it is hard to believe that a mechanic of his experience would not have noticed that something was wrong with them. But he stopped to check the steering after his truck was loaded, not the brakes.⁹

Further, it was discovered that several seals in the truck’s steering mechanism had been installed backwards, which resulted in power steering fluid leakage. GX 25, at 3. The power steering fluid was below the “add” line on the power steering dipstick. *Id.* Low power steering fluid could have caused a reduction in the steering performance or “hard” steering, although by itself it would not have caused the steering to fail. *Id.* at 4; GX 26, at 3. Nevertheless, that the seals were installed backwards indicates that maintenance of the steering system was being performed incorrectly, which could have caused the steering system to fail on December 12, 2009.

In her report of the accident investigation, Inspector Howell concedes that deficiencies in the steering could have contributed to the accident. GX 4, at 7. The Secretary has not contended that the alleged overloading affected the truck’s steering, only the truck’s capacity to stop. Yet under the circumstances of this case, the most logical assumption is that the truck crashed due to a steering problem. It is highly significant that just prior to the accident, Johnson was so concerned about his truck’s steering that after the truck was loaded with coal he stopped the truck and, with another driver, inspected the steering system as best they could under the circumstances. He did not report any problems with the truck’s brakes. Within a very short time after Johnson resumed driving, the truck crashed by going straight into the left side berm without deviating from its course. In regard to the brakes, although problems were found, the brakes apparently had functioned properly earlier that morning when Johnson drove the truck to the mine and immediately after it was loaded with coal. Further, there is no evidence that the Jake brake, which Johnson most likely would have been relying on to slow the truck at the time he lost control of it, was defective. Attributing the accident

⁹ In my decision in the PE case, I discussed the possibility that the broken worm gear inside the steering box, which was discovered after the accident, may have caused the crash. See KENT 2011-827, slip op. at 11. However, the parties in this case have stipulated that the broken worm gear was caused by the accident.

to brake failure considering the low rate of speed at which the truck was likely traveling probably would have required three separate braking systems to have failed simultaneously.

To state the salient facts in this case in their simplest, a highly experienced coal truck driver, who is also the trucking company's chief mechanic, complains about a problem with his truck's steering, and minutes later is killed in an accident where the truck travels perfectly straight out of the normal travelway for 283 feet and crashes into a berm. Yet MSHA determined that the accident was caused by deficient brakes in an overloaded truck, dismissing a problem with the steering as a possible cause.

To give the Secretary his due, the cause of the accident in this case is far from straightforward, and since the truck's brakes were deficient it is possible that they played a role in the accident. But even if the brakes were not working at all, that would not explain why Johnson could not steer the truck away from the berm. Absent proof that the brakes would have been incapable of slowing down the truck enough to permit Johnson to steer it, it is hard to ignore the obvious – that Johnson could not steer the truck. Under these circumstances, attributing the accident to defective brakes in an overloaded truck appears illogical.

Adding to the uncertainty, if only the brakes were not functioning, Johnson should have been able to steer the truck so that it would not have crashed into the berm. But the truck did not turn at all; it drove straight into the berm. On the other hand, if only the steering was not working, Johnson should have been able to stop the truck before it reached the berm. The way this accident makes the most sense is if both the steering and the brakes were not applied or stopped functioning simultaneously. In regard to the former, something physically could have happened to Johnson just prior to the crash which caused him to lose control of the vehicle. But there is no medical evidence which addresses Johnson's condition at the time of the crash,¹⁰ and that he jumped from the truck shows that he was conscious just before the truck struck the berm. In regard to the brakes and steering failing simultaneously, Rasnick proposed a scenario in which both the brakes and the steering would have been rendered ineffective. He believes that Johnson's truck went into what is called limp mode or idle mode. TR 454.

[I]f it's [the truck] in idle mode, you're not going to have the Jake brake, you're going to lose air pressure, or it's not going to run like it should because it's going to be running anywhere from eight [hundred] to 1,000 RPMs a minute [instead of 1400 to 1600]. And if he's used his air pressure up and he's trying to get it into a ditch, you couldn't steer it and try to get into the ditch to stop the truck, probably. TR 482.

Rasnick's testimony on this point is not air-tight. It depends to a significant extent on a printout by a Cummins dealer from the truck's electronic control module, which is somewhat similar to an airliner's black box (TR 382). RX 1. Cummins is the company which

¹⁰ It does not appear that a post-mortem examination was conducted, and the condition of Johnson's remains after the crash may have made such an examination impossible.

manufactured the truck's engine. The significance of this report is disputed by Medina (TR 385-91), and I find Rasnick's testimony regarding this document confusing. Accordingly, I cannot find that the accident resulted from the truck going into idle mode even though it is consistent with the evidence of the accident. Yet it is another possible cause of the accident to consider.

Based on the foregoing, I conclude that the Secretary has failed to prove that Johnson's truck crashed due to defective brakes.

However, the Secretary has shown that there were defects in the service brakes on Johnson's truck. For one of the drum brakes was worn to the point that it was ineffective, and three others were worn below recommended levels. But the regulation in question, 30 C.F.R. §77.1605(b), requires brakes to be "adequate", not perfect. If a truck's brakes are worn, but are still capable of stopping it, are those brakes adequate?

Judge Feldman faced a similar issue in *Nally & Hamilton Enterprises, Inc.*, 31 FMSHRC 689 (June 23, 2009) (ALJ), *rev'd on other grounds* 33 FMSHRC 1759 (Aug. 11, 2011) (hereinafter "N&H"). As in this case, N&H concerned an alleged violation of §77.1605(b). The truck involved, although not a coal truck, also was a three axle tandem vehicle. The inspector had found that one of the six brake assemblies was not adjusted properly, which allegedly would have a negative impact on the five other brakes. Nevertheless, it appeared that overall, the brakes were working.

In order to determine whether §77.1605(b) had been violated, Judge Feldman turned to the dictionary for guidance:

The applicable meaning of the term adequate is ". . . fully sufficient for a specified or implied requirement. *Webster's Third New Int'l Dictionary, Unabridged* 25 (2002). An entity is "sufficient" when it is "marked by quantity, scope, power, or quality to meet with the demands, wants, or needs of a situation or of a proposed use or end." *Id* at 2284.

The plain use of the terms "adequate" and "sufficient" reflects that section 77.1605(b) is a functional standard. In other words, service brakes can be deemed adequate as contemplated by section 77.1605(b) even if a component part is in need of adjustment. Thus, the dispositive question is whether the braking system on the . . . truck was functioning adequately.

N&H at 694-95.

Since there is no further guidance in 30 C.F.R. Part 77 regarding when brakes in trucks are deemed adequate, Judge Feldman referred to the regulations governing trucks used in surface metal and non-metal mines. Thirty C.F.R. §56.14101(a)(1) states that "self-propelled mobile equipment shall be equipped with a service brake system capable of stopping and holding the

equipment with its typical load on the maximum grade it travels.” He applied this standard in concluding that the Secretary had failed to prove that the truck’s brakes were inadequate in violation of §77.1605(b), since the evidence indicated that despite the problem with one of the brakes, the truck’s driver believed the brakes were functioning normally. N&H at 695.

Judge Feldman’s discussion of this issue is very well reasoned, and I will apply his analysis to this case. Accordingly, it is not enough for the Secretary to prove that there were problems with the truck’s brakes. Instead, the Secretary must prove that the brakes on Johnson’s truck were not capable of stopping and holding the truck with its typical load on the maximum grade it travels. Specifically, did the Secretary prove that the brakes on Johnson’s truck were incapable of stopping it on the haul road?

There were two ways in which the Secretary could have met this burden. First, she could have proven that the accident was caused by the defects in the brakes. But based on the record before me, the cause of Johnson’s fatal accident is at best inconclusive. In fact, it is more likely that the accident was caused by a failure of the steering system, or by other problems which caused both the brakes and the steering to fail simultaneously, rather than defective brakes. Second, the Secretary could have proven that the defects with the truck’s brakes were significant enough to cause the brakes to fail in typical usage regardless of whether they caused the accident. In this regard, it is doubtful that Johnson believed the truck’s brakes were not functioning adequately. Johnson frequently, if not routinely, drove this particular truck, and had driven it on at least some occasions in the weeks before the accident. TR 123-24, 432. Further, he had driven the truck that morning from Trivette’s garage to the Mine without pointing out any problems with the brakes. In addition, Rasnick’s testimony that the brakes, in the condition they were in, were adequate and would still have been able to stop Johnson’s truck going down the haul road, is well explained.

In regard to both factors, I give little weight to Medina’s opinion due to his demonstrated lack of expertise, inconsistency between his report and testimony and in his testimony itself, and generally poor reasoning.

Therefore, I find that the Secretary has failed to prove that the brakes on Johnson’s truck were not adequate. Accordingly, Order No. 8230315 must be vacated.¹¹

¹¹ At the conclusion of the discussion in his brief regarding this citation, the Secretary referenced six citations and orders (Proposed Exhibits GTX 14-19) issued to Trivette for operations at the PE Southern Pike County Mine on the same date as the orders in this case, and a Decision Approving Settlement issued by Judge Gill on October 24, 2012 which encompasses them and four other citations (Proposed Exhibit GTX 20). Two of those citations allege unwarrantable failures concerning a single truck during the same inspection, for failing to conduct an adequate pre-shift examination (GTX 14), and failing to maintain the truck in a safe manner (GTX 15). The Secretary has proffered

(continued...)

ORDER

IT IS ORDERED that Order No. 8230315 is **VACATED**.

IT IS FURTHER ORDERED that Order No. 8230314 is modified from high negligence to no negligence, and Respondent shall pay a penalty of \$1,000 within 30 days of this decision.

/s/ Jeffrey Tureck
Jeffrey Tureck
Administrative Law Judge

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¹¹(...continued)

these exhibits in the apparent belief that they provide probative evidence that “Trivette Trucking engaged in a practice of wanton disregard of the safety of its employees.” Secretary’s Motion at 12. Exhibits GTX 14-19 were culled from GX 18 in the PE case, an exhibit containing a multitude of unproven citations and orders against Trivette which I excluded as having no probative value. TR 239-43. That these citations and orders in GTX 14-19 were the subjects of a settlement agreement does not make them more probative, for entering into a settlement is not an admission of the truth of the allegations contained in a citation or order and the agreement contains no findings of fact or conclusions of law. Further, none of these exhibits concern a violation of the same standards which are alleged to have been violated by Trivette in Orders 8230314 and 8230315. Accordingly, Proposed Exhibits GTX 14-20 will be excluded.

ADMINISTRATIVE LAW JUDGE ORDERS

SECRETARY OF LABOR	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 2012-661
Petitioner,	:	A.C. No. 15-19374-000280614
	:	Mine: River View
	:	
v.	:	
	:	
RIVER VIEW COAL LLC,	:	
Respondent.	:	

AMENDED ORDER GRANTING RESPONDENT’S MOTION FOR SUMMARY DECISION AND DENYING SECRETARY’S MOTION FOR SUMMARY DECISION

The Order Granting Respondent’s Motion for Summary Decision and Denying Secretary’s Motion for Summary Decision issued May 28, 2013, is hereby amended pursuant to Commission Rules 31 (g) and 69(c), 29 C.F.R. 2700.31(g) and 2700.69(c), to read as set forth below. This Order is reissued to correct clerical errors.

Procedural History and Summary of Facts

These dockets are before me on petitions for penalties filed by the Secretary pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815 et seq. (2000) (the “Act”). On March 7, 2013 upon request by counsel, I consolidated these dockets for submission of motions for partial summary decision in accordance with Section 2700.67 of the Federal Mine Safety and Health Review Commission’s Procedural Rules, 30 C.F.R. § 27.00.67. Each of these operators is a subsidiary of Alliance Coal, LLC (“Respondent”) and is located in the Commonwealth of Kentucky.

Each of these dockets contains violations issued against the operators during regular inspections conducted by a Mine Safety and Health Administration (MSHA) inspector for violations of three mandatory standards involving oil and gas wells located within the coal mine. The predicate standard cited is 30 C.F.R. § 75.1700 which states:

Each operator of a coal mine shall take reasonable measures to locate oil and gas wells penetrating coalbeds or any underground area of a coal mine. When located, such operator shall establish and maintain barriers around such oil and gas wells in accordance with State laws and regulations, except that such barriers shall not be less than 300 feet in diameter, unless the Secretary or his authorized representative permits a lesser barrier consistent with applicable State laws and regulations against hazards for such wells to the miners in such mine, or unless the Secretary or his authorized representative requires a greater barrier where the depth of the mine, other geological conditions, or other factors warrant such a greater barrier.

The Secretary alleges that in each of these cited mines, the operator mined within the 300 foot barrier without seeking MSHA approval. There are a total of five cited violations of this mandatory standard among these five dockets related to 117 permits issued by the Commonwealth of Kentucky.

Believing that the bore holes were not either gas or oil wells under Kentucky law, the Respondent did not so label them on the mine maps. This resulted in the issuance of five violations under Section 75.1200 and four violations of Section 75.372. These two closely related mandatory standards require, in relevant part, that the certified mine maps show either producing or abandoned oil and gas wells located within 500 feet of such mine; and, the ventilation maps contain the location of all known oil and gas wells and other drill holes that penetrate the coalbed, respectively. 30 C.F.R. § 75.1200(k) and § 75.372(b)(5).

The parties have stipulated that the MSHA inspectors relied upon information gathered from the Commonwealth of Kentucky Department for Natural Resources Office of Mine Safety and Licensing to determine that the holes were oil and/or gas wells. They have further stipulated that no advisory statements were provided to these mines that these holes were considered oil or gas wells prior to the issuance of these citations and orders. Based upon information obtained from MSHA's data retrieval system, each of these mines has been inspected by MSHA since 2006 between 1,127 and 4,358 inspection days after the holes were drilled.¹ If these holes are not considered oil and gas wells, the Secretary agrees that the Respondent's maps are correct. (Joint Exhibit A.)

The Joint Stipulations submitted by counsel also provide a chart of each of the wells at issue here listed by mine name, record and permit number. Beside each permit number is the date drilling of the hole commenced, date completed and date plugged, the geological survey designation and whether any production of oil or gas resulted. The earliest one drilled was in 1944 and last one in 1998, the majority of them being drilled between 1960 and 1987. Of the 117 bore holes listed, not one of them produced any oil or gas. All of them were listed as "dry and abandoned" and were plugged the same day drilling was completed or very shortly thereafter. (Joint Exhibit A.)²

¹ Data prior to 2006 is no longer available. The number of inspection days is as follows: Dotiki Mine, 4,358 days; Cardinal Mine, 3,014 days; Elk Creek Mine, 2,737 days; River View Mine, 1,127 days.

² There was one permit, number 11087, issued to Elk Creek Mine in 1964 not at issue in these proceedings, which produced oil for some period of time. By letter dated April 11, 2006, MSHA approved the operator's request to mine within 70 feet of the coal barrier.

Summary Decision Standards

Commission Rule 67 sets forth the guidelines for granting summary decision:

(b) A motion for summary decision shall be granted only if the entire record, including the pleadings, depositions, answers to interrogatories, admissions, and affidavits shows:

- (1) That there is no genuine issue as to any material fact; and
- (2) That the moving party is entitled to summary decision as a matter of law.

29 C.F.R. §2700.67(b).

The Commission “has long recognized that [] ‘summary decision is an extraordinary procedure,’ and has analogized it to Rule 56 of the Federal Rules of Civil Procedure, under which the Supreme Court has indicated that summary judgment is authorized only ‘upon proper showings of the lack of a genuine, triable issue of material fact.’” *Hanson Aggregates New York, Inc.*, 29 FMSHRC 4, 9 (Jan. 2007)(quoting *Energy West Mining Co.*, 16 FMSHRC 1414, 1419 (July 1994)). In reviewing the record on summary judgment, the court must evaluate the evidence in “the light most favorable to...the party opposing the motion.” *Hanson Aggregates* at 9 (quoting *Poller v. Columbia Broad. Sys.*, 368 U.S. 464, 473 (1962)). Any inferences “drawn from the underlying facts contained in [the] materials [supporting the motion] must be viewed in the light most favorable to the party opposing the motions.” *Hanson Aggregates* at 9 (quoting *Unites States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962)).

The issues presented in this penalty proceeding are whether the bore holes identified by their corresponding permit numbers are oil and gas wells as contemplated within mandatory standard 75.1700, and if so, was Respondent provided fair notice of MSHA’s interpretation of the terms to assess penalties against it.

The parties have not provided any conflicting material facts which would prevent issuance of summary decision on the issue of fair notice. However, as set forth in more detail below, the issue of whether the bore holes come within the definition of oil and gas wells contemplated by the MSHA regulation is not appropriately decided here by summary decision.³

³ Had the Secretary of Labor taken this case to hearing and presented expert witness testimony to address the issues discussed below and proposed an interpretation of the mandatory standard on behalf of MSHA, this issue could well have been resolved at hearing. However, I would not have changed my decision on the issue of fair notice as discussed in this decision. The citations and orders herein would still have been vacated.

ADDITIONAL FINDINGS OF FACT AND CONCLUSIONS

Definition of Oil and Gas Wells

Both parties agree that the definition of oil and gas wells is not defined within the MSHA regulations. They have asked that the terms be defined by me herein. I decline to do so. The Secretary has not provided a proposed definition for the terms while the Respondent suggests MSHA should follow State law. The issue, however, is not simply a question of choice of law between State and Federal statutes or defining an ambiguous term found in a Federal regulation as counsel proposes.

The Commonwealth of Kentucky defines a “well” as any “bore hole drilled or proposed to be drilled for the purpose of producing natural gas or petroleum or one through which natural gas or petroleum is being produced.” KY. REV. STAT. ANN. § 353.010(19) (West 2012). It then goes on to define a “gas well” as any well that produces natural gas not blended with oil or producing more than 10,000 cubic feet of gas to every barrel of oil. KY. REV. STAT. ANN. § 353.010(10)(West 2012). An “oil well” is defined as any well that produces at least one barrel of oil in conjunction with producing natural gas. KY. REV. STAT. ANN. § 353.010(14) (West 2012). The “Dictionary of Mining, Minerals, and Related Terms,” Second Edition, U.S. Dept. of the Interior, 1996 defines a “well” as a borehole sunk in the ground for the purpose of obtaining oil, gas, water etc. There is no separate definition of a gas or oil well in this source. 17 C.F.R. § 229.1205 (“Drilling and other exploratory and development activities”) separates the definitions of wells into categories depending upon their production. A “dry well” is one that cannot provide sufficient quantities to make completion as an oil or gas well economically justifiable. Similarly, Pennsylvania, West Virginia, Texas, Tennessee and Alaska, to name a few states, define oil and gas wells based upon productivity in terms of cubic feet of gas produced to the number of barrels of oil. (*See generally*, 58 PA. CONS. STAT. § 502 (2011); W. VA. CODE § 35-4-2 (2013); TEX. NAT. RES. CODE ANN. § 86.002 (West 1977); TENN. COMP. R. & REGS. 1040-02-09-.04 (2013); and, ALASKA ADMIN. CODE tit. 20, § 25.990 (2013).

Reading the various statutes and regulations as well as general discussions on dry wells and their reclamation, it becomes abundantly clear that wells in the general sense transition into oil or gas wells when a sufficient quantity of the mineral is found to make it economically worth the cost of completion of the well by installing ejection equipment and factoring in associated costs of production compared to market value. A well may have been categorized as “dry” even when a reservoir of oil or gas is present if the cost of completion outweighed the expected profit (or loss) at the time it was drilled. A dry well may be re-entered and re-completed many years after it has been labeled as “dry” when the market factors change – the price of the product goes up or the costs of production goes down due to better surveying techniques or lower equipment costs. Thus, relying on any one State’s terminology is misdirected. It could produce wildly differing definitions across the country causing more ambiguity and confusion. More significantly, however, it would impose upon MSHA, whose purpose under the Act is to protect the health and safety of miners, definitions based upon commercial considerations. The legislative purpose of Section 75.1700 is to prevent inundations of gas and oil in the mines which could lead to potential

fatalities. *Leg. Hist., Federal Coal Mine Health and Safety Act of 1969 (Comm. Print, 1970)*, pp. 83-84. Taking note of the fact that coal mines produce methane, some in great quantities, it is conceivable that a well labeled as “dry” could still produce a sufficient amount of methane to cause an inundation or other safety hazards and still be less than an amount commercially viable for production.

I would surmise that there are other important considerations involved in crafting a definition of oil and gas wells to address the health and safety issues of concern to MSHA besides those I have mentioned herein. It appears to me that the matter should be addressed through either rule making proceedings or at the least through meaningful discussion between technical experts and regulatory authorities leading to promulgation of agency-wide informational bulletins or other directives providing the mine operators with a clear meaning of the terms used in this mandatory standard. Summary decision is not the appropriate vehicle by which to do so particularly with the paucity of facts and absent a well-reasoned and clearly stated proposed definition provided by the Secretary.

Fair Notice

The Respondent’s position with respect to lack of fair notice is well taken. It has been stipulated that the wells were drilled between 1944 and 1998. Since 2006, there have been between 1,127 and 4,358 inspection days spent at these mines with no previous citations issued under this standard. By regulation, the mine and ventilation maps have been submitted and approved by MSHA’s district office every year with the same designations as they appear currently. It has also been stipulated by the Secretary that no advisory statements were provided to these mines advising them that the drill holes were considered oil or gas wells. The Respondent, in the absence of MSHA guidance, relied upon Kentucky’s statutes and the letter from the Commonwealth’s Commissioner of the Department of Natural Resources as the basis of their belief that the dry wells are not contemplated within the meaning of oil and gas wells. I find their reliance is understandable and reasonable and that the Secretary has not met her burden of proving fair notice was provided to Respondent that a different definition should apply. By the Secretary’s own admission, there is no definition of the terms. It would be patently unfair to hold the Respondent accountable 15 years later without warning for violation of a standard, the meaning of which the Secretary cannot articulate.

The citations and orders issued for violations of mandatory standard 30 C.F.R. § 75.1700 in these five dockets must be vacated. The citations and orders issued under mandatory standards 30 C.F.R. § 75.1200 and § 75.372 must also be vacated for the reasons set forth herein.

ORDER

The Secretary's motion for partial summary decision is **DENIED**. The Respondent's motion for partial summary decision is **GRANTED**. I further **ORDER**

1. Citation Nos. 8502461, 8502462 and 8502463 in Docket No. KENT 2011-1580 are **VACATED**.
2. Citations Nos. 8502423, 8502424 and 8502425 in Docket No. KENT 2012-27 are **VACATED**.
3. Citation Nos. 8502319 and 8502320 in Docket No. KENT 2012-446 are **VACATED**.
4. Order Nos. 8502375, 8502376 and 8502377 in Docket No. KENT 2012-861 are **VACATED** and this case is **DISMISSED**.
5. Citation No. 8502378 and Order Nos. 8502379 and 8502380 in Docket No. KENT 2012-661 are **VACATED** and this case is **DISMISSED**.

The parties are further **ORDERED** to confer for the purposes of settlement negotiations. Should settlement not be reached within 30 days, they are directed to contact the court for the purpose of setting a hearing date.

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

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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June 5, 2013

SECRETARY OF LABOR	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 2013-614
Petitioner	:	A.C. No. 46-09154-314388-01
	:	
v.	:	
	:	
WHITE BUCK COAL COMPANY,	:	Mine: Pocahontas Mine
Respondent	:	

ORDER DENYING STAY

Before: Judge Lesnick

This case is before me upon a petition for assessment of a civil penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d).

The Secretary of Labor's Conference and Litigation Representative ("CLR") has filed a motion requesting that the assignment of the captioned docket be stayed for 180 days due to a "high rate of contests coupled with MSHA's limited staff." In the past, I have granted stay requests with similar justifications. Recently, however, the Acting Secretary of Labor assured Congress that MSHA is able to keep caseloads at a manageable level, despite a significant reduction in the staffing of the MSHA Litigation Backlog Project (MLBP).¹

While I certainly understand the CLR's justification, as the Commission is also contending with the current backlog, I believe the CLR's suggested remedy is misguided. Given that the Acting Secretary of Labor has assured Congress that the Department of Labor has the resources to manage the backlog, the CLR must look within his own Agency for a remedy to his "high rate of contest" and "limited staff[ing]."

¹ On March 15, 2013, Senators Rockefeller, Miller, Manchin and Rahall sent a letter to Acting Secretary Harris expressing their concerns regarding the Department of Labor's decision to disproportionately reduce MSHA's staffing as a result of sequestration. The MLBP is being reduced from 74 FTEs to 44 FTEs. On May 13, 2013, Acting Secretary Harris responded to the Senators, stating that the reduction was justified due to the Secretary's ability to maintain a manageable caseload following the success of MLBP's efforts to reduce the backlog since 2010, as well as MSHA's new strategy to reduce the number of citations contested.

WHEREFORE, the motion to stay assignment is **DENIED**; and it is **ORDERED** that this docket be **ASSIGNED** in due course.

/s/ Robert J. Lesnick
Robert J. Lesnick
Chief Administrative Law Judge

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June 21, 2013

SECRETARY OF LABOR, MSHA, on behalf of TIMOTHY ORR , Complainant,	:	TEMPORARY REINSTATEMENT
	:	PROCEEDING
	:	
	:	Docket No. WEST 2013-831-DM
	:	RM-MD 13-06
v.	:	
	:	
CML METALS CORP., Respondent.	:	Mine: GDC Crusher #1
	:	Mine ID: 42-01927

ORDER DENYING RESPONDENT’S MOTION FOR SUMMARY DECISION

This case is before me on an application for temporary reinstatement under section 105(c) of the Federal Mine Safety and Health Act of 1977 filed by the Secretary of Labor on behalf of Timothy Orr. On May 30, 2013 Respondent filed a response and requested a hearing on the issue. Shortly thereafter, on June 7, 2013 Respondent filed a Motion for Summary Decision for Lack of Jurisdiction and Memorandum in Support (the “Motion”). On June 20, 2013 the Secretary filed an Opposition to Respondent’s Motion and Memorandum in Support (the “Opposition”), in which he alleges that jurisdiction is proper.

I. DISCUSSION

Commission Procedural Rule 67 sets forth the following grounds for granting summary decision:

A motion for summary decision shall be granted only if the entire record, including the pleadings, depositions, answers to interrogatories, admissions, and affidavits, shows:

- (1) That there is no genuine issue as to any material fact; and
- (2) That the moving party is entitled to summary decision as a matter of law.

29 C.F.R. § 2700.67. Based upon the facts set forth in the -filings of the parties, I find that there is no genuine issue as to any material fact and that the question of jurisdiction may properly be decided based on the record before me. For the reasons that follow, Respondent’s motion is **DENIED**.

Respondent set forth the following relevant facts. The GDC Crusher #1 Mine (the “mine”) is an iron ore mine. CML Mot. Ex. A ¶ 4. CML Metals is a contractor that processes the iron ore in a mill adjacent to the excavation site. CML Mot. Ex. A ¶ 6. Once the ore has been processed, it is loaded onto railroad cars on railroad tracks located adjacent to the mill and excavation site. CML Mot. Ex. A ¶ 7. The rail line consists of 18 miles of railroad track (the

“spur”) that extends from a Union Pacific railroad line to the mine and beyond. CML Mot. Ex. A ¶ 8. The spur and real property upon which it sits are owned by Union Pacific. CML Mot. Ex. A ¶ 9. CML Railroad, a separate entity doing business as PIC Railroad, Inc., leases the spur from Union Pacific. Mot. Ex. A ¶ 10. CML Railroad also leases rail cars used to transport the ore. CML Mot. Ex. A ¶ 12. The spur, rail cars, and locomotives have, in the past, been inspected by the Federal Railroad Administration. CML Mot. Ex. A ¶ 1. Complainant Orr was hired by Respondent, CML Metals, to maintain and repair railroad cars and the spur. CML Mot. Ex. A ¶¶ 21, 23. On or about February 25, 2013, Complainant claims to have received an injury while repairing a rail car. CML Mot. Ex. A ¶ 26. CML reported the injury to the Federal Railroad Administration (the “FRA”). CML Mot. Ex. A ¶ 30. MSHA inspected the spur and rail cars for the first time in May of 2013. CML Mot. Ex. A ¶ 20. Several additional facts were contained in the Respondent’s motion but are disputed by the Secretary.

The Secretary added the following relevant facts. Gilbert Development Corporation (“GDC”), the excavation operator, transports the iron ore from the excavation site, via haul truck, to a crusher, where it is crushed. Sec’y Opp. Tromble Decl. ¶ 5. The crushed material is then stockpiled by a bulldozer, fed into a feeder, and then transported to the mill via conveyor belt. *Id.* CML Metals, the mill operator, processes, dries, and then stockpiles the iron ore outside of the mill. *Id.* ¶ 10. The mill is approximately one mile from the extraction pit. *Id.* ¶ 6. CML Metals then transports the stockpiled material into a feeder, and onto a conveyor belt that delivers the material to the tipple at the loadout, which is approximately 300 feet from the mill. *Id.* ¶¶ 10, 11, 12. At the tipple, CML Metals employees deposit the material into railcars that sit on rail lines that extend past the tipple and come within approximately 60-70 feet of the mill. *Id.* ¶¶ 8, 12; Sec’y Opp. Ex. 4, 5. The spur on which the loadout sits connects to Union Pacific’s main line. CML Mot. Ex. A ,¶¶ 8, 24; Sec’y Opp. Ex. 2. CML Railroad is a wholly owned subsidiary of CML Metals. Sec’y Opp. Ex. 1, ¶ 14. The spur lease agreement between Union Pacific and CML provides CML with “full and exclusive use of the [Railroad spur] for operation of rail freight service, including the right to access and interchange traffic directly with all present and future railroads at Iron Springs UT, provided, however that [CML] may not use the [Railroad Spur] for passenger operations.” Sec’y Opp. 5 (citing Ex. 6, p. 6). The spur consists of two segments; the (1) “Industry Track,” a three to four mile segment which connects the area of the pit, mill, and tipple to the (2) remainder of the spur leading to the main line. Sec’y Opp. Tromble Decl. 17; Sec’y Opp. Ex. 2. Trains travel on the “Industry Track,” down the remainder of the spur, to the main line and “then to ports on the west coast of the United States.” Sec’y Opp. 5 (citing Sec’y Opp. Tromble Decl. 17; Sec’y Opp. Ex. 2). CML Metals President and CEO Dale Gilbert has represented that CML Metals “produces, ships, markets, and sells iron ore, primarily for export to China but also sells ore to domestic buyers.” Sec’y Opp. 2 (citing Ex. 1). Gilbert has stated that “rail shipping is the life blood of CML Metals’ business” and “occurs on a 24 hour bases every day of each year[.]” Sec’y Opp. 4 (citing Ex. 1). As recently as 2010, Dale Gilbert was Vice President of GDC, the entity responsible for extraction of the ore from the pit. Sec’y Opp. 6 (citing *Gilbert Development Corp.*, 32 FMSHRC 185 (Feb. 2012) (ALJ)). Orr received MSHA Part 48 “new miner training” on March 4-5, 2013.

Respondent, CML Metals, asserts that the Secretary, acting under the Mine Act, lacks jurisdiction in this matter because the Complainant does not meet the definition of “miner” under the Act. CML Mot. 2. Specifically, Respondent argues that “[w]ith respect to the safety of

railroad workers, including safety when repairing railcars Congress has . . . granted jurisdiction to” the FRA. CML Mot. 5. Moreover, the Secretary has assigned jurisdiction to OSHA for any “claims of discrimination for reporting [railroad] safety violations.” CML Mot. 5-6.

Respondent argues that, because Orr only worked on the rail cars and the spur, and not in the actual production of iron ore, he is not a miner as defined by the Mine Act. While Respondent asserts that where jurisdictional questions have arisen, the Commission has employed a two part “functional test” which addresses “(1) whether the operation in question performs one of more the activities listed in 30 U.S.C. § 802(h)([1]) [and in Appendix A of the OSHA/MSHA Interagency Agreement]; and (2) a review of the nature of the activities being performed.” CML Mot. 8 (citing *Oliver M. Elam, Jr., Co.*, 4 FMSHRC 5, 7 (1982)). Further, they assert, neither “railroad car” repair nor “railroad operation” are listed in the Act’s definition of “mine” or as part of “mining operations.” and the nature of railroad car repair, is not “mine-related.” CML Mot. 9. Given the Federal Railroad Agency’s past consistent oversight and inspection activities, as well as MSHA never having previously conducted an inspection of the area, proper authority should rest with the Federal Railroad Agency and OSHA. CML Mot. 11-12.

The Secretary argues that Respondent is not entitled to summary decision and that jurisdiction is proper. The Secretary asserts that what is to be considered a “mine” under the Act should be given the broadest possible interpretation. Sec’y Opp. 9-10. Moreover, the Act’s plain language and the Secretary’s reasonable interpretation of any ambiguities in the Act establish that jurisdiction is proper. Sec’y Opp. 10. The Secretary argues that the “loadout,” qualifies as a mine under two theories. First, the “loadout is part of a private way or road appurtenant to the Mine – the Railroad Spur.” Sec’y Opp. 11. Second, the loadout and spur “are lands – which include structures, facilities, equipment, machines, tools or other property - on the surface used in the work of preparing minerals.” *Id.* Given that Orr worked at the loadout and on the spur, he was a “miner” under the Act. *Id.* Moreover, the OSHA/MSHA Interagency Agreement’s lack of inclusion of “railroad car repair” in its list of activities subject to Mine Act jurisdiction is immaterial, as the list is only illustrative and not exhaustive. *Id.* 17. Finally, any lack of prior inspections or other enforcement activity related to the subject area is immaterial when it comes to the question of jurisdiction in this matter. *Id.* 17-18.

Section 4 of the Mine Act, 30 U.S.C. § 803, provides that each “coal or other mine” is subject to the provisions of the Act. “Coal or other mine” is defined under § 3(h)(1) of the Act to mean:

an area of land from which minerals are extracted in nonliquid form or, if in liquid form, are extracted with workers underground, (B) private ways and roads appurtenant to such area, and (C) lands, excavations, underground passageways, shafts, slopes, tunnels and workings, structures, facilities, equipment, machines, tools, or other property including impoundments, retention dams, and tailings ponds, on the surface or underground, used in, or to be used in, or resulting from, the work of extracting such minerals from their natural deposits in nonliquid form, or if in liquid form,

with workers underground, or used in, or to be used in, the milling of such minerals, or the work of preparing coal or other minerals, and includes custom coal preparation facilities.

30 U.S.C. § 802(h)(1).

The legislative history of the Mine Act indicates that Congress intended a broad interpretation of what constitutes a “coal or other mine” under the Act. The Senate Committee stated that “what is considered to be a mine and to be regulated under this Act [shall] be given the broadest possibl[e] interpretation, and . . . doubts [shall] be resolved in favor of . . . coverage of the Act.” S. Rep. No. 95-181, at 14 (1977), *reprinted in* Senate Subcomm. on Labor, Comm. on Human Res., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 602 (1978). *See Marshall v. Stoudt's Ferry Preparation Co.*, 602 F.2d 589, 591-92 (3d Cir. 1979), *cert. denied*, 444 U.S. 1015 (1980) (“[T]he statute makes clear that the concept that was to be conveyed by the word [mine] is much more encompassing than the usual meaning attributed to it [-] the word means what the statute says it means.”).

Shamokin Filler Company, Inc., 34 FMSHRC 1897, 1902 (Aug. 2012). Section 3(g) defines “miner” as “any individual working in a coal or other mine.” 30 U.S.C. § 802(g). Section 3(d) defines “operator” as “any owner, lessee, or other person who operates, controls, or supervises a coal or other mine or any independent contractor performing services or construction at such mine[.]” 30 U.S.C. § 802(d)

In the instant case, I find that both CML Metals and CML Railroad are “operators” of “mines” as those terms are defined by the Act. CML Metals is engaged in the milling of iron ore that is extracted from the adjacent excavation site. The mill can be classified as a “structure,” “facility” and/or “equipment” that is used in, or to be used in, the milling of minerals and, accordingly, is a “mine” as defined by the Act. I further find that the loadout area of the rail line, or spur, that runs to the GDC Crusher #1 Mine, CML Mot. Ex. A ¶ 10, is a “private way . . . appurtenant to” both the excavation site and mill and, accordingly, is a “mine” as defined by the Act.

The terms “private” and “appurtenant,” as used in Act’s definition of “coal or other mine,” have been determined to be “ambiguous” terms. *Sec’y of Labor (MSHA) v. National Cement Co. of California*, 494 F.3d 1066, 1074-77 (D.C. Cir. 2007). When a statute has been found to be ambiguous on an issue, a determination must be made as to whether an agency’s interpretation of that statute is a reasonable one. *Chevron, U.S.A., Inc v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843-44 (1984). When “an agency’s interpretation of the statute it is charged with administering . . . is reasonable[.]” deference must be afforded to such interpretation. *Energy West Mining Co. v. FMSHRC*, 40 F.3d 457, 460 (D.C. Cir. 1994). In *Sec’y of Labor (MSHA) v. National Cement Co. of California*, 573 F.3d 788, 792 (D.C. Cir. 2007) the court found the Secretary’s respective interpretations of “private” and “appurtenant” to

be reasonable, and, accordingly found that those interpretations were due deference. There, the court succinctly articulated the Secretary's interpretation of the two terms.

“[P]rivate” roads are those restricted to a particular group or class of persons (not to a particular person) and . . . “appurtenant to” requires only that the road belong and provide a right of way to some more important thing (not dedicated exclusively to use by some more important thing.)

Id. at. 791 (citing *National Cement Co. of California*, 30 FMSHC 668, 672 (Aug. 2008)). Here, the spur and the loadout area were certainly “private.” The spur, which is leased by CML Railroad from Union Pacific, as well as the loadout area, are used exclusively by, and for the sole benefit of, the various entities engaged in the extraction, milling and processing of ore at this particular site. This restriction on use is a clear indication of the “private” nature. Moreover, the spur and loadout area provide a right of way to both the adjacent mill and excavation operation, thereby making them “appurtenant to” those respective areas. Given the fact that the loadout and rail line would be useless, at least to CML Railroad, without the presence of adjacent excavation and mill sites, it is clear that the rail and the loadout area were a “way” to a “more important thing.” Accordingly, I find that the spur and loadout area come within the Act's definition of “mine”. To find otherwise would ignore that the excavation site, mill, loadout, and spur are essential parts of the mining process at this particular operation and would fly in the face of Congress's intent that what is considered to be a mine be given the broadest possible interpretation.

Commission ALJ Koutras addressed a somewhat similar issue regarding a railroad in *Harman Mining Corp.*, 3FMSHRC 45 (Jan 1981), *aff'd sub nom Harman Mining Corp. v. FMSHRC*, 671 F.2d 794 (4th Cir. 1981). In *Harman*, a fatal railroad haulage accident occurred at the operator's central preparation plant. A railroad employee was killed when struck by a runaway car. The operator argued that MSHA had no jurisdiction because the accident did not occur at a “coal or other mine” and, further, that the Mine Act did not include the transportation of prepared coal in its definition of mine. The railroad cars in *Harman* were loaded at the preparation plant, dropped onto the tracks and moved off by the railroad. The Judge found that the rail cars were part of the process at the preparation plant, that the track was “an integral and indispensable part of . . . [the] mining operations[,]” and that, accordingly, the activities in that area were subject to MSHA jurisdiction. *Id.* at 51. While the Commission declined review, on appeal, the Fourth Circuit agreed with the Judge and held that the car dropping activity and subject section of track fit within the Act's definition of “mine,” which Congress intended to “be given the broadest possible interpretation[, and to which any] . . . doubts be resolved in favor of inclusion of a facility within the coverage of the Act.” *Harman*, 671 F.2d at 796-797 (citing S. Rep. No. 95-181, 95th Cong., at 14 (1977), *reprinted in* Senate Subcomm. on Labor, Comm. on Human Resources, 95th Cong., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 602 (1978) (“Legis. Hist.”). Moreover, the court held that it is “immaterial” who owns the tracks when the evidence shows that the tracks are used by another party as part of its day to day operations. *Harman*, 671 F.2d at 796.

In *TXI Operation, LP.*, 23 FMSHRC 54 (Jan. 2001) (ALJ), Judge Feldman found that MSHA's enforcement authority extended to a Union Pacific railroad crossing that granted exclusive access to the operator, TXI. The judge held that it was clear that the railroad crossing was a "private way or road" that was "appurtenant" to the mine and, accordingly, fit within the Act's definition of "coal or other mine." He noted that evidence that the operator was a licensee and lessee of the railroad crossing was "indicia of the requisite mine operator responsibility and control warranting a finding of Mine Act jurisdiction" and that, but for the mine, no motorists would have traveled over the railroad crossing. *Id.* at 60.

Here, just as in *Harman* and *TXI Operations LP*, the rail line, and/or area where the rail line passes, is an integral part of the mine operation. As lessee, CML Railroad enjoys exclusive use of the spur line and is charged with maintenance of such. CML Railroad uses the loadout area and spur, over which it maintains exclusive control under the lease agreement, for the singular purpose of loading and transporting ore to the Union Pacific mainline and then on to its customers. The only beneficiaries of this exclusive use are CML Railroad, CML Metals and the extraction operator at GDC Crusher #1 Mine. Even though Complainant may have been performing work on a railroad car leased by CML Railroad, and was working on a spur leased from Union Pacific, the railroad car and spur are inextricably tied to the mining process. Moreover, there is Commission precedent for upholding citations and orders related to railcar inspection and repair. See *U.S. Steel Group, Minnesota Ore Operations*, 15 FMSHRC 1720 (Aug. 1993) (ALJ).

Given that Orr was an employee of CML Metals and working in what I have already found to be a mine, I find that, at all times relevant to this proceeding, he was a "miner" as defined by the Act.

Much of CML's Motion was spent arguing that Federal Railroad Administration jurisdiction over the rail spur preempts MSHA's jurisdiction. I find this argument to be without merit. The Commission has previously addressed the question of jurisdictional preemption by other agencies in the context of independent contractors who are found to be "operators" under the Act. In *Williams Natural Gas Co.*, 19 FMSHRC 1863 (Dec. 1997), the Commission found that a company that was delivering natural gas to a mine and transforming the natural gas into quantities and pressures required to start large kilns necessary to produce cement at the mine was an "operator" and therefore subject to the jurisdiction of the Mine Act. The Commission rejected the company's argument -that Department of Transportation regulations covering interstate natural gas pipelines preempted MSHA jurisdiction. -The Commission noted that an express indication of preemption of MSHA jurisdiction did not exist. -The same is true here. Accordingly, I reject CML's argument.

II. ORDER

Given the undisputed facts and the legal reasoning set forth above, I find the Orr was a miner as defined by the Act, that CML metals, who employed Orr, as well as CML Railroad are mine operators and that MSHA has jurisdiction in this matter. The Respondent's Motion for Summary Decision is **DENIED**.

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

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