

**March 2017**

**TABLE OF CONTENTS**

**COMMISSION DECISIONS**

03-28-17	MICHAEL K. McNARY v. ALCOA WORLD ALUMINA, LLC	CENT 2015-279-DM	Page 433
03-29-17	NORANDA ALUMINA, LLC	CENT 2015-71-M	Page 441

**COMMISSION ORDERS**

03-06-17	ZEOTECH CORPORATION	CENT 2016-149-M	Page 447
03-06-17	REDHAWK MINING LLC	KENT 2016-147	Page 450
03-06-17	RISING SUN DEVELOPMENT LLC	KENT 2016-202-M	Page 453
03-06-17	JESSE CREEK MINING, LLC	SE 2016-43	Page 456
03-06-17	A&G COAL CORPORATION	VA 2016-111	Page 461
03-06-17	THE SILVER QUEEN MINE LLC	WEST 2016-56-M	Page 464
03-06-17	MARIGOLD MINING COMPANY	WEST 2016-261-M	Page 467
03-06-17	ESSROC CEMENT CORP.	WEVA 2014-818-RM	Page 470
03-06-17	CARTER ROAG COAL COMPANY	WEVA 2016-86	Page 473

03-28-17	CARROLL COUNTY STONE, INC.	CENT 2015-475-M	Page 476
03-28-17	ARMSTRONG CEMENT & SUPPLY CORPORATION	PENN 2016-270-M	Page 479
03-28-17	LEHIGH SOUTHWEST CEMENT COMPANY	WEST 2015-690-M	Page 482
03-28-17	MUNSEN PAVING, LLC	WEST 2016-215-M	Page 485
03-28-17	LEHIGH SOUTHWEST CEMENT COMPANY	WEST 2016-464-M	Page 488
03-31-17	THE QUIKRETE COMPANIES	CENT 2016-231-M	Page 491
03-31-17	THYSSEN KRUPP INDUSTRIAL SOLUTIONS (USA), INC.	CENT 2016-325-M	Page 494
03-31-17	AMERICAN TALC COMPANY	CENT 2016-338-M	Page 497
03-31-17	METZGER REMOVAL, INC.	SE 2016-207-M	Page 500
03-31-17	USIBELLI COAL MINE, INC.	WEST 2016-300	Page 503
03-31-17	GOOD BENTONITE COMPANY, LLC	WEST 2016-335	Page 506

**ADMINISTRATIVE LAW JUDGE DECISIONS**

03-03-17	WARRIOR COAL, LLC	KENT 2012-706	Page 509
03-06-17	JONES BROTHERS INC.	SE 2016-246	Page 570

03-07-17	CONSOL PENNSYLVANIA COAL CO., LLC	PENN 2016-132	Page 572
03-07-17	ORIGINAL SIXTEEN TO ONE MINE, INC.	WEST 2015-850-M	Page 590
03-07-17	SIGNAL PEAK ENERGY LLC	WEST 2016-0624-R	Page 638
03-08-07	CONSOLIDATION COAL CO.	WEVA 2015-0036	Page 654
03-15-17	NALLY & HAMILTON ENTERPRISES	KENT 2011-434	Page 666
03-20-17	STAR MINE OPERATIONS, LLC	WEST 2014-994-M	Page 675
03-24-17	PEABODY MIDWEST MINING, LLC	LAKE 2016-0232	Page 685
03-30-17	NEWMONT SLATE COMPANY, INC.	YORK 2016-20-M	Page 689
03-31-17	SEC. OF LABOR O/B/O JEFFREY PAPPAS v. CALPORTLAND COMPANY, and RIVERSIDE CEMENT COMPANY	WEST 2016-264-DM	Page 718

#### **ADMINISTRATIVE LAW JUDGE ORDERS**

02-03-17	INTREPID POTASH – NEW MEXICO, LLC	CENT 2016-219-M	Page 771
03-15-17	CYPRESS POINTE INCORPORATED	CENT 2015-480-M	Page 776
03-20-17	DANIEL B. LOWE v. VERIS GOLD USA, INC., and JERRITT CANYON GOLD, LLC	WEST 2014-614-DM	Page 781

03-21-17	WALBRIDGE COMPANY and IMPERIAL CRANE SERVICES, INC.	LAKE 2017-0190	Page 790
03-23-17	PEABODY MIDWEST MINING LLC	LAKE 2016-0305	Page 794
03-27-17	MATTHEW A. VARADY v. VERIS GOLD USA, INC., and JERRITT CANYON GOLD, LLC	WEST 2014-307-DM	Page 798
03-27-17	VERIS GOLD USA, INC., and its Successors	WEST 2015-909-M	Page 801
03-28-17	M-CLASS MINING, INC.	LAKE 2015-686	Page 804
03-30-17	SEC. OF LABOR O/B/O JEFFREY PAPPAS v. CALPORTLAND COMPANY, and RIVERSIDE CEMENT COMPANY	WEST 2016-264-DM	Page 808

**Review was not granted or denied in any case during the month of March 2017.**

**Previously unpublished in FMSHRC Volume 39, No. 2:**

Secretary of Labor, MSHA v. Intrepid Potash – New Mexico, LLC, Docket Nos. CENT 2016-219-M, CENT 2016-220-M (Judge Rae, February 3, 2017)



## **COMMISSION DECISIONS**



**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

March 28, 2017

MICHAEL K. McNARY

v.

ALCOA WORLD ALUMINA, LLC

Docket No. CENT 2015-279-DM

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

**DECISION**

BY THE COMMISSION:

This proceeding, arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) (“Mine Act” or “Act”), involves a complaint filed by Michael McNary alleging that Alcoa World Alumina, LLC had interfered with his statutory rights in violation of section 105(c)(1) of the Act, 30 U.S.C. § 815(c)(1).<sup>1</sup> A Commission Administrative Law Judge granted the motion for summary decision filed by Alcoa and dismissed the proceeding on the grounds that McNary had failed to present evidence of any adverse action supporting his interference claim. 37 FMSHRC 2205, 2212-14 (Sept. 2015) (ALJ).

McNary filed a petition for discretionary review challenging the Judge’s entry of summary decision on the basis that the Judge applied an incorrect standard in evaluating the interference claim and failed to view the record in a light most favorable to McNary, the non-moving party. We granted the petition and heard oral argument. For the reasons discussed below, we hold that the Judge erred in entering summary decision. Accordingly, we vacate the Judge’s decision and remand for further proceedings.

---

<sup>1</sup> Section 105(c)(1) of the Mine Act provides in relevant part:

No person shall discharge or in any manner discriminate against . . . or otherwise interfere with the exercise of statutory rights of any miner . . . because such miner . . . has filed or made a complaint 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).

## I.

### **Factual and Procedural Background**

Alcoa operates the Bayer Alumina Plant in Point Comfort, Texas. Alumina is produced by grinding bauxite and mixing it with sodium hydroxide to form a slurry. The slurry is combined with steam under high heat and pressure to produce sodium aluminate. The sodium aluminate then undergoes clarification, precipitation, and calcination to produce alumina.

In 2013, McNary was a miners' representative<sup>2</sup> and managed pumps in the Digestion Department at the plant. Steve Emig, the Department supervisor, had been one of McNary's managers since March 2013.<sup>3</sup>

On January 8, 2014, McNary was walking through his work route when he observed a valve on the 5L5 pump blowing out hot slurry, which can reach a temperature of 480 degrees Fahrenheit. Emig arrived and helped some of the miners in the area to put on special suits to protect them from the slurry so that they could close the pump. Emig approached McNary, who was standing next to another miners' representative, Delton Luhn, and asked McNary to get tape from the tool room. The tape was to be used to prevent slurry from getting under the miners' gloves. *Id.* at 2206.

McNary was not able to find tape in the tool room. As he was returning to the 5L5 pump, he asked another miner to request that Kelly Grones, the health and safety manager, go to the 5L5 pump. Before he was able to return to the 5L5 pump, another supervisor, Miguel Gonzales, asked McNary to check on another pump to see if it was blowing out. McNary checked the other pump, which was not blowing out, and returned to the 5L5 pump. *Id.*

When he returned to the pump, McNary observed that two miners had attempted to close the pump. McNary gestured for Emig to come to the side. McNary informed Emig that Kelly

---

<sup>2</sup> A miners' representative has various rights and responsibilities under the Mine Act. These include the right to accompany an inspector from the Department of Labor's Mine Safety and Health Administration ("MSHA") during inspections of a mine, to be involved in pre- or post- inspection conferences (30 U.S.C. § 813(f)), and to request an immediate inspection of a mine (30 U.S.C. § 813(g)).

<sup>3</sup> Because this proceeding was decided on summary decision, there was no evidentiary hearing. McNary and Emig were deposed on July 8, 2015, and each provided different accounts of the events which are the basis of this proceeding. The Judge relied upon McNary's deposition testimony in his decision. 37 FMSHRC at 2205-06. It was proper for the Judge to rely on McNary's version of the facts in that McNary was the party opposing the motion for summary decision. *KenAmerican Res., Inc.*, 38 FMSHRC 1943, 1946 (Aug. 2016) ("[w]e look at the record on summary judgment in the light most favorable to . . . the party opposing the motion.") (citations omitted).

Grones was on her way. McNary described the following reaction by Emig and the subsequent confrontation:

[W]hen I told him that Kelly was on her way over there and he said, "You shouldn't have . . . called anyone, because this is my department and I direct the workforce," and I asked Steve [Emig], "Well, why did you direct . . . the operators into the hot slurry?" And Steve says, "I didn't direct them in there." I say[], "Well, you watched them go in there and you didn't stop them." And I asked him, "How did they get in there?" And Steve said, "They volunteered."

. . . .

When . . . Steve said they volunteered to go in there . . . I basically told Steve, "You watched them go in there. You didn't stop them."

And Steve . . . said, "You shouldn't be involved in these matters." And I told him, "I'm an MSHA rep and I'm concerned for the safety of these operators. I should be. I should be concerned with these matters."

And that's when Steve told me, "I will remove you as MSHA rep. I will remove you . . . from this department, and I will remove you from the plant."

*Id.* (quoting McNary Dep. at 62-63).

Carlos Delgado, the chief miners' representative at the plant, and MSHA Inspector Brett Barrett then walked up to the area. *Id.* at 2214; McNary Dep. at 63-64. According to McNary, McNary informed them that Emig had just threatened him, and Delgado replied, "Yeah, I heard it." McNary Dep. at 64. McNary described the exchange that followed:

Steve [Emig] started . . . explaining something to . . . Carlos and Brett that actually didn't happen that way. And, yes, I butted in.

. . . .

Well, actually, he was telling Carlos and Brett that he didn't threaten me, which I know he did threaten me. And I said, you know, "it didn't happen that way." And Steve says, "I'm done with you."

. . . .

And I asked Steve . . . , "Are you done with me? Are you done with me for good?" Because the threat was still there. He had threatened me prior. And when I asked him, "Are you done for

good,” I’m asking him, are you carrying out your threat? And he says, “No, I’m not done for good.”

37 FMSHRC at 2214, *quoting* McNary Dep. at 64.

McNary subsequently filed a complaint with MSHA, and was later informed that MSHA would not be pursuing his case. McNary then filed a complaint with the Commission pursuant to section 105(c)(3) of the Act, 30 U.S.C. § 815(c)(3).<sup>4</sup> The operator subsequently filed a motion for summary decision, to which McNary responded *pro se*.

The Judge granted Alcoa’s motion for summary decision, concluding that, making all inferences in favor of the non-moving party, McNary had not presented evidence of any adverse action that would dissuade a reasonable miner from engaging in protected activity. 37 FMSHRC at 2215. McNary subsequently retained counsel and filed a petition for discretionary review challenging the Judge’s determination, which we granted.

## II.

### Disposition

Summary decisions are governed by Commission Procedural Rule 67, which provides that:

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 reviews a Judge’s summary decision *de novo*. See *Lakeview Rock Prods. Inc.*, 33 FMSHRC 2985, 2988 (Dec. 2011). Summary decision is appropriate only if there are no material facts in dispute and the movant’s position is entitled to judgment as a matter of law. *West Ala. Sand & Gravel, Inc.*, 37 FMSHRC 1884, 1886-87 (Sep. 2015). The Commission has recognized that the record and the inferences drawn from the underlying facts on summary decision must be viewed in the light most favorable to the party opposing the motion. *KenAmerican*, 38 FMSHRC at 1946 (citations omitted). When the Commission reviews a summary decision and determines that the record before the Judge contains disputed material

---

<sup>4</sup> Under section 105(c)(2) of the Act, a miner may file a complaint with the Secretary of Labor alleging discrimination or interference in violation of section 105(c)(1), and the Secretary is required to investigate the complaint. If, upon such investigation, the Secretary determines that a violation has occurred, the Secretary is required to file a complaint on behalf of the miner with the Commission. 30 U.S.C. § 815(c)(2). If, however, the Secretary determines that no violation has occurred, “the complainant shall have the right . . . to file an action in his own behalf before the Commission, charging discrimination or interference in violation of [section 105(c)(1)].” 30 U.S.C. § 815(c)(3).

facts, the proper course is to vacate the grant of summary decision and remand the matter for an evidentiary hearing. *See Energy West Mining Co.*, 17 FMSHRC 1313, 1316-17 (Aug. 1995).

Alcoa moved for summary decision on the basis that McNary had failed to establish an adverse action by Alcoa in response to McNary's protected activity.<sup>5</sup> 37 FMSHRC at 2205. In considering whether Alcoa's position is entitled to judgment as a matter of law, we preliminarily examine the standard applied by the Judge to determine whether Alcoa had impermissibly interfered with McNary's statutory rights in violation of section 105(c) of the Mine Act.

Section 105(c)(1) states in relevant part that "[n]o person shall discharge or in any manner discriminate against . . . or otherwise interfere with the exercise of the statutory rights of any miner. . . ." 30 U.S.C. § 815(c)(1) (emphasis added). Section 105(c)(3) permits an individual to file a complaint charging "discrimination or interference" in violation of section 105(c)(1). 30 U.S.C. § 815(c)(3).

The Judge set forth a legal framework that has been applied by the Commission to establish a discrimination violation under section 105(c), which has been commonly referred to as the "*Pasula-Robinette* test."<sup>6</sup> 37 FMSHRC at 2210 (citing *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 (3d Cir. 1981); *Sec'y of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803 (Apr. 1981)). Under that test, a complainant establishes a prima facie violation of discrimination by showing that he engaged in protected activity, and thereafter, suffered an adverse employment action that was motivated at least in part by the protected activity.<sup>7</sup>

The Judge further recognized that the Commission applies the adverse action test articulated in *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53, 68 (2006). 37 FMSHRC at 2212-13 ("[A] plaintiff must show that a reasonable employee would have found the challenged action materially adverse, which . . . means it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination.") (quoting *Burlington*, 548 U.S. at 68) (other citations omitted). Applying this test, the Judge reasoned that "Alcoa's actions will be found to be adverse actions if they would dissuade a reasonable miner from engaging in protected activity." 37 FMSHRC at 2213. Quoting *Moses v. Whitley Development Corp.*, 4 FMSHRC 1475, 1479 (Aug. 1982), *aff'd*, 770 F.2d 168 (6th Cir. 1985), the Judge stated

---

<sup>5</sup> The other basis for Alcoa's motion for summary decision was that McNary did not timely file his complaint with the Commission. A. Mem. Supporting Summ. Dec. at 9. The Judge excused the late filing of McNary's complaint (37 FMSHRC at 2212), and Alcoa did not file a cross-petition for discretionary review challenging that finding.

<sup>6</sup> The Commission has not explicitly held whether the *Pasula-Robinette* framework is the only framework applicable to claims brought under section 105(c). Given the Judge's errors in granting summary decision discussed *supra*, we need not reach that question at this preliminary stage of this proceeding.

<sup>7</sup> The operator conceded only for purposes of summary decision that McNary had engaged in protected activity by calling Grones and expressing concerns about safety. A. Resp. Br. at 11.

that “harassment over the exercise of protected rights is prohibited by section 105(c)(1) of the Mine Act.” 37 FMSHRC at 2213.

The Judge ultimately concluded, however, that “[m]aking all inferences in favor of the nonmoving party, Complainant has not presented evidence of any adverse action properly before the Court that would dissuade a reasonable miner from engaging in protected activity.” *Id.* at 2215.

We conclude that while the Judge correctly set forth the standard for summary decision, he erred in its application. We therefore vacate the Judge’s grant of summary decision and remand for an evidentiary hearing.

First, the Judge erred in entering summary decision in favor of Alcoa because he viewed some of the underlying facts in a light favorable to Alcoa, rather than to the opposing party, McNary. The Judge characterized Emig’s threats to McNary that he would remove McNary as an MSHA representative, remove him from the department, and remove him from the plant as “vague,” “not clearly directed at protected activity,” and having “occurred during an emergency situation.” 37 FMSHRC at 2214.

The Judge clearly viewed Emig’s statement in a light most favorable to Alcoa by focusing on the surrounding circumstances of the emergency rather than by focusing on the language which could be viewed as a threat to terminate McNary’s employment. At least two of the three threats were not vague. It may be said that “removal from the plant” is susceptible to different meanings depending upon the length of time of the removal. However, the threats to remove McNary as a miners’ representative and to remove him “from the department” were quite specific.

Second, the Judge erred in drawing inferences from the underlying facts that favored Alcoa rather than McNary. At least two different meanings may be inferred from Emig’s statement that he “was not done for good”: (1) that Emig was done arguing with McNary and was backing off, and that McNary was in no danger of removal; or (2) that Emig was done talking with McNary now, but would deal with McNary later, and the removal threat was continuing. The first inference is favorable to Alcoa, while the second inference is favorable to McNary. The Judge drew an inference most favorable to Alcoa, the first meaning above, stating that Emig’s statement was an assurance that Emig would not be carrying out his threat of removal. *Id.*<sup>8</sup> Confronted with these competing inferences, the Judge ruled in favor of the moving party, Alcoa, even though he acknowledged in his opinion that McNary had interpreted Emig’s statement as a continuing threat of removal. *Id.*

The Judge also rejected McNary’s interpretation because he found that there were no subsequent events that constituted retaliation or adverse employment actions. *Id.* This was error.

---

<sup>8</sup> Acting Chairman Althen takes the position that, when all material facts are uncontested in a bench trial with a judge as the ultimate trier of fact, the trial judge may draw necessary ultimate inferences of fact. *See KenAmerican Res.*, 38 FMSHRC at 1954-71 (Young and Althen, dissenting).

Even if there was no adverse employment action in the tangible sense of a firing, suspension, transfer or other action which directly impacts a miner's job status, the threats themselves may constitute interference within the meaning of section 105(c)(1) of the Mine Act. In this case, the evidence indicates that the statements which Emig made to McNary threatening to remove him as an MSHA representative, remove him from the department and remove him from the plant were very public. *See* Emig. Dep. at 19. Other miners in the area heard Emig's statements. *See, e.g.,* Delgado Aff. ¶ 3; Luhn Aff. ¶ 3. If miners understood those statements as threats directed at their representative for MSHA matters after the miners' representative raised a very serious safety concern,<sup>9</sup> the threats could broadly chill miners' willingness to raise safety concerns in the future.

Therefore, McNary does not have a burden of demonstrating that a threat of reprisal had actually been carried out in a tangible way. In *Moses*, the Commission concluded that "coercive interrogation and harassment over the exercise of protected rights" was prohibited under section 105(c). 4 FMSHRC at 1478. In so holding, the Commission noted Congress' direct and express concern about the chilling effect of such threats on miners in the legislative history for section 105(c) explaining that "it is clear that section 105(c)(1) was intended to encourage miner participation in enforcement of the Mine Act by protecting them against 'not only the common forms of discrimination, such as discharge, suspension, demotion . . . , but also against the more subtle forms of interference, such as promises of benefit or *threats of reprisal*.'" *Id.* (quoting S. Rep. 95-181 at 36 (1977), *reprinted in* Senate Subcomm. on Labor, Comm. on Human Res., 95th Cong., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 624 (1978) (emphasis added). Thus, under established Commission precedent, section 105(c) does not protect only against tangible *acts* of reprisal. Rather, it also protects miners against "*threats of reprisal*" that chill the exercise of protected rights.

---

<sup>9</sup> McNary's concern about workers being burned by the hot slurry arose in the context of employees suffering serious burns at the Alcoa plant. Four months prior to this incident, on September 9, 2013, an operator was "badly burned" in an accident at the plant. Emig Video Dep. In December 2011, McNary himself suffered second and third-degree burns on his face, torso, back, and buttocks. *See* McNary Add. Resp. to Def's Proposed Findings of Fact and Mot. for Summ. Dec.

In short, the Judge erred in entering summary decision because he failed to view the record and to draw inferences in a light most favorable to McNary, and because Alcoa was not entitled to summary decision as a matter of law. Accordingly, we vacate the Judge's decision and remand for further proceedings, including an evidentiary hearing.

### **III.**

#### **Conclusion**

For the foregoing reasons, we vacate the Judge's decision granting summary decision, and remand for further proceedings consistent with this opinion.

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

/s/ Mary Lu Jordan  
Mary Lu Jordan, Commissioner

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

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

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1331 PENNSYLVANIA AVE., N.W., SUITE 520N  
WASHINGTON, DC 20004-1710

March 29, 2017

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

v.

NORANDA ALUMINA, LLC

Docket No. CENT 2015-71-M

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

## DECISION

BY THE COMMISSION:

This civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) (“Mine Act”) and comes to the Commission on remand from the United States Court of Appeals for the Fifth Circuit. *Noranda Alumina, LLC v. Perez*, 841 F.3d 661 (5th Cir. 2016). The Court directed the Commission to review our denial of a motion filed by Noranda Alumina, LLC (“Noranda”) to reopen a final order assessing a penalty. The Court determined that the Commission must explain and apply the factors it considers when denying a motion to reopen on the ground of inadequate internal procedures. Consistent with the Court’s decision and our re-analysis of the facts, on remand we grant the motion to reopen.

### I.

#### **Factual Background**

Noranda operates an alumina refinery near Gramercy, Louisiana. In March or April 2014, a contractor detected mercury in Noranda’s facility. The Department of Labor’s Mine Safety and Health Administration (“MSHA”) inspected the facility and issued two citations to the operator for failing to test for mercury. The operator participated in a safety and health conference with MSHA on June 12, 2014, but failed to persuade MSHA to change the citations.

MSHA proposed a penalty assessment for the citations, which was delivered to the operator on July 18, 2014. However, Louis DeRose, the Environmental Safety and Health Manager who handled proposed assessments for Noranda, unexpectedly quit on that day. Therefore, the proposed assessment was handled by Environmental Manager Bud Preston and Plant Manager Dave Hamling. Preston, who was not familiar with MSHA procedures and mistakenly believed the proposed assessment was a bill, asked Hamling whether it should be paid. Hamling approved the payment, which was made by check dated July 25, 2014.

Noranda filed a motion to reopen the penalty assessment at issue on October 31, 2014. The operator claimed that it had always intended to contest the citations and that it had inadvertently paid the proposed assessment. The Secretary opposed the request to reopen, arguing that the operator failed to timely contest the assessment because of its inadequate internal procedures.

On December 18, 2015, the Commission issued an order denying Noranda's motion to reopen this matter. *Noranda Alumina LLC*, 37 FMSHRC 2731 (Dec. 2015). The Commission agreed with the Secretary's characterization of Noranda's procedures as inadequate. The Commission stated that, "Here, the failure to timely contest the proposed assessment after the departure of the individual who previously handled such matters represents an inadequate internal processing system and fails to establish good cause for reopening a final order."

On November 8, 2016, the Court of Appeals for the Fifth Circuit vacated and remanded the Commission's decision. The Fifth Circuit found that the Commission had selectively applied its rule that inadequate procedures warrant denial of an operator's motion to reopen. On remand, the Fifth Circuit directed the Commission to explain the factors it considers when it denies a motion to reopen on the basis of inadequate procedures and to apply those factors to this case. 841 F.3d at 669.

## II.

### **Legal Principles Applicable to Motions to Reopen Final Penalty Assessments**

Under section 105(a) of the Mine Act, the Secretary must notify a mine operator of the proposed civil penalty for the issuance of any citation or order. 30 U.S.C. § 815(a). In turn, an operator who wishes to contest a proposed penalty must notify the Secretary no later than 30 days after receiving the proposed penalty assessment. If the operator fails to notify the Secretary of its contest within the 30-day period, the proposed penalty assessment becomes a final order of the Commission by operation of the statute. *Id.*

We have held that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) ("*JWR*"). In evaluating requests to reopen final section 105(a) orders, the Commission finds guidance in Rule 60(b) of the Federal Rules of Civil Procedure under which a party may be relieved from a final order of the Commission upon a showing of mistake, inadvertence, surprise, excusable neglect, or other reason justifying relief. *See* 29 C.F.R. § 2700.1(b) ("the Commission and its Judges shall be guided so far as practicable by the Federal Rules of Civil Procedure"); *JWR*, 15 FMSHRC at 787.

Reopening a penalty that has become final is extraordinary relief. Thus, the operator has the burden of showing that it is entitled to such relief, through a detailed explanation of its failure to timely contest the penalty and any delays in filing for reopening:

At a minimum, the applicant for such relief must provide all known details, including relevant dates and persons involved, and a clear explanation that accounts, to the best of the operator's knowledge, for the failure to submit a timely response and for any delays in seeking relief once the operator became aware of the delinquency or failure

*Higgins Stone Co.*, 32 FMSHRC 33, 34 (Jan. 2010).

In reviewing an operator's explanation, we consider the entire range of factors relevant to determining whether the operator's error was the result of mistake, inadvertence, surprise, excusable neglect, or another good faith reason. No precise formula exists for weighing the factors, and the analysis is conducted on a case-by-case basis. However, key factors are identifiable. The Commission has provided guidance to operators on its website explaining the factors that will generally be considered in determining whether to grant relief:

The Commission has considered a number of factors in determining whether good cause exists: (1) the error does not reflect indifference, inattention, inadequate or unreliable office procedures or general carelessness; (2) the error resulted from mistakes that the operator typically does not make; (3) procedures to prevent, identify and correct such mistakes have been adopted or changed, as appropriate; (4) . . . A proper motion must also provide all relevant documentation and identify the persons who have knowledge of the circumstances. . . . Your motion should also be supported by affidavit(s) of (a) person(s) with direct knowledge of the underlying facts. Motions for relief must identify and explain: (1) why a timely contest was not filed; (2) how and when you first discovered the failure to timely contest the penalty and how you responded once this was discovered. (3) If the motion to reopen was filed more than 30 days after you first learned that the penalty was not timely contested, you must provide a reasonable explanation for the delay or your motion may be DENIED.

FMSHRC, *Requests to Reopen*,

<https://www.fmsihrc.gov/content/requests-reopen> (last visited March 28, 2017).

In addition, it is important to consider the good faith of the operator's actions and whether MSHA opposed the motion to reopen. *Pioneer Inv. Servs. Co. v. Brunswick Associated Ltd. P'ship*, 507 U.S. 380, 395 (1993); *FC Hemisphere Assocs., LLC v. Democratic Republic of Congo*, 447 F.3d 835, 838 (D.C. Cir. 2006); *Oak Grove Res. LLC*, 33 FMSHRC 1130, 1132 (June 2011). To justify reopening, an operator's detailed recounting of the

circumstances should demonstrate that the operator acted at all times in good faith and without any purpose of evasion or delay, taking into account the nature of the violation, the amount of the penalty, and the circumstances of receipt and processing of the proposed assessment. The operator's motion should also address whether errors were within the operator's control, and the reasons for any delay in filing the motion itself, especially after notice of the delinquency.

### III.

#### Disposition

In accordance with the Fifth Circuit's remand, the Commission again considers Noranda's motion to reopen. In this case, the operator had implemented an internal processing system by designating an employee to determine which assessments to contest and which to pay. On the day the proposed assessment was delivered, this employee left the company. In his absence, other employees who were not as familiar with MSHA's assessment process mistakenly decided to pay the proposed assessment.

We have held that the inadvertent payment of a proposed assessment and the Secretary's opposition to a motion to reopen do not necessarily justify denial of an operator's motion to reopen. See *Kaiser Cement Corp.*, 23 FMSHRC 374, 375-76 (Apr. 2001); *Doe Run Co.*, 21 FMSHRC 1183, 1184-85 (Nov. 1999) (assessments reopened after the operator inadvertently paid the assessments); *Pinnacle*, 38 FMSHRC 422, 423 (Mar. 2016) (assessment reopened despite Secretary's opposition). Thus, we must consider whether the totality of circumstances surrounding Noranda's failure to timely contest the assessment justifies denial of its motion to reopen because they demonstrate that the failure resulted from inadequate internal processing procedures. See, e.g., *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).<sup>1</sup>

In determining whether inadequate procedures warrant denial of a motion to reopen, we review an operator's procedures for handling proposed MSHA assessments. We also consider the reason(s) for the failure of the internal processing system and the operator's efforts to correct any such flaws.

As stated on the Commission's website, we consider whether the failure to timely contest an assessment resulted from a unique occurrence, *i.e.*, a mistake that the operator usually does

---

<sup>1</sup> On appeal, the Fifth Circuit constrained its analysis of Noranda's request to the factors the Commission relied upon in denying Noranda's motion. 841 F.3d at 666. On remand, we similarly limit our consideration to those factors. Thus, although Noranda did not seek to re-open the final order at issue for more than two months - including more than 30 days after discovering its default - and did not explain why it did not act sooner, the Secretary did not raise the delay in his opposition to the motion, and the Commission did not identify it as a reason for denying Noranda's motion to reopen. Accordingly, we do not now consider this factor as part of our analysis.

not make. FMSHRC, *Requests to Reopen*. Here, the company had an existing internal processing system prior to receiving this proposed assessment. It had assigned its safety director to manage assessments. We find that this system failed because of a unique occurrence. The operator received the assessment on a day when there was no employee designated to handle assessments because the safety director unexpectedly left the company on the day the proposed assessment was delivered. The subsequent payment of the assessment constituted an inadvertent mistake.

Upon further review of the assertions before us, we determine that Noranda has demonstrated sufficient circumstances to explain the failure of its internal processing system. After the unanticipated departure of its safety director, Noranda paid the assessment inadvertently rather than ignoring it. This fact supports the operator's assertion of good faith. We also note that Noranda's efforts to seek a conference with MSHA support the operator's asserted intent to contest the citations. The motion was factually well-supported and documented the operator's mistake and the attendant circumstances. Finally, this operator does not have a history demonstrating a general carelessness or lack of attention to MSHA assessments.

Upon reconsideration of all the evidence, we determine that the operator had been diligent in seeking to implement an effective internal processing system for handling proposed assessments and that the proposed assessment at issue should be reopened.

#### IV.

#### Conclusion

Having reviewed Noranda's motion to reopen, we reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.

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

/s/ Mary Lu Jordan  
Mary Lu Jordan, Commissioner

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

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

# **COMMISSION ORDERS**



# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1331 PENNSYLVANIA AVE., N.W., SUITE 520N  
WASHINGTON, DC 20004-1710

March 6, 2017

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

v.

ZEOTECH CORPORATION

Docket No. CENT 2016-149-M  
A.C. No. 41-03374-391575

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

## ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) (“Mine Act”). On December 29, 2015, the Commission received from Zeotech Corporation (“Zeotech”) a motion seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

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

Records of the Department of Labor’s Mine Safety and Health Administration (“MSHA”) indicate that the proposed assessment was delivered on September 15, 2015, and became a final order of the Commission on October 15, 2015. Zeotech asserts that it did not timely file a notice of contest in this case because it did not realize that the investigation of the accident involved in this case generated two separate proposed assessments. Zeotech states that

it submitted a timely notice of contest for one of the proposed assessments, but did not become aware that the proposed assessment for this case dealt with separate citations until it received a delinquency notice from MSHA. The Secretary does not oppose the request to reopen but urges the operator to take steps to ensure that future penalty contests are timely filed.

Having reviewed Zeotech's request and the Secretary's response, in the interest of justice, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.

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

/s/ Mary Lu Jordan  
Mary Lu Jordan, Commissioner

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

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

Distribution:

Nik A. Mimari, Esq.  
Brandon E. Strey, Esq.  
Plunkett & Griesenbeck, Inc.  
1635 N. E. Loop 410, Suite 900  
San Antonio, TX 78209

W. Christian Schumann, Esq.  
Office of the Solicitor  
U.S. Department of Labor  
201 12th St. South, Suite 500  
Arlington, VA 22202-5450

Chief Administrative Law Judge Robert J. Lesnick  
Federal Mine Safety & Health Review Commission  
1331 Pennsylvania Ave. N.W., Suite 520N  
Washington, DC 20004-1710

Melanie Garris  
Office of Civil Penalty Compliance  
Mine Safety and Health Administration  
U.S. Department of Labor  
201 12th St. South, Suite 500  
Arlington, VA 22202-5450

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

1331 PENNSYLVANIA AVE., N.W., SUITE 520N  
WASHINGTON, DC 20004-1710

March 6, 2017

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

v.

REDHAWK MINING LLC,

Docket No. KENT 2016-147  
A.C. No. 15-19242-390139

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

**ORDER**

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) (“Mine Act”). On December 24, 2015, the Commission received from Redhawk Mining LLC (“Redhawk”) a motion seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

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

Records of the Department of Labor’s Mine Safety and Health Administration (“MSHA”) indicate that the proposed assessment was delivered on September 5, 2015, and became a final order of the Commission on October 5, 2015. Redhawk asserts, with a supporting affidavit, that the mine’s authorized representative, who is in charge of contesting citations, never received the proposed assessment and did not become aware that the assessment was

delinquent until he received a delinquency notice from MSHA. The Secretary does not oppose the request to reopen, but notes that his records reflect that an individual signed for this assessment and also several other assessments sent to Redhawk, which shows that the assessment was delivered to the operator. The Secretary further states that he decided not to oppose reopening primarily because Redhawk filed its motion to reopen soon after it received the delinquency notice.

Having reviewed Redhawk's request and the Secretary's response, in the interest of justice, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.

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

/s/ Mary Lu Jordan  
Mary Lu Jordan, Commissioner

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

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

Distribution:

Billy R. Shelton, Esq.  
Jones, Walters, Turner & Shelton, PLLC  
2452 Sir Barton Way, Suite 101  
Lexington, KY 40509

W. Christian Schumann, Esq.  
Office of the Solicitor  
U.S. Department of Labor  
201 12th St. South, Suite 500  
Arlington, VA 22202-5450

Chief Administrative Law Judge Robert J. Lesnick  
Federal Mine Safety & Health Review Commission  
1331 Pennsylvania Ave. N.W., Suite 520N  
Washington, DC 20004-1710

Melanie Garris  
Office of Civil Penalty Compliance  
Mine Safety and Health Administration  
U.S. Department of Labor  
201 12th St. South, Suite 500  
Arlington, VA 22202-5450

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

1331 PENNSYLVANIA AVE., N.W., SUITE 520N  
WASHINGTON, DC 20004-1710

March 6, 2017

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

v.

RISING SUN DEVELOPMENT LLC,

Docket No. KENT 2016-202-M  
A.C. No. 15-19656-397603-B2598

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

**ORDER**

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) (“Mine Act”). On February 1, 2016, the Commission received from Rising Sun Development LLC (“RSD”) a motion seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

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

Records of the Department of Labor’s Mine Safety and Health Administration (“MSHA”) indicate that the proposed assessment was delivered on December 3, 2015, and became a final order of the Commission on January 4, 2016. RSD asserts that, because it is not a mining company, it was unfamiliar with the contest procedures. RSD was a contractor for Pine Branch Mining, LLC. RSD states that after receipt of the proposed civil penalty, it gave the

assessment to Pine Branch Mining, which assured RSD that it would be contested and handled in accordance with MSHA procedures. However, nothing was submitted to MSHA to contest the assessment. After discovering that the proposed penalty had become final, RSD contacted counsel, who immediately filed the motion to reopen.

The Secretary does not oppose the request to reopen but urges the operator to take steps to ensure that future penalty contests are timely filed.

Having reviewed RSD's request and the Secretary's response, in the interest of justice, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.

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

/s/ Mary Lu Jordan  
Mary Lu Jordan, Commissioner

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

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

Distribution:

Billy R. Shelton, Esq.  
Jones, Walters, Turner & Shelton, PLLC  
2452 Sir Barton Way, Suite 101  
Lexington, KY 40509

W. Christian Schumann, Esq.  
Office of the Solicitor  
U.S. Department of Labor  
201 12th St. South, Suite 500  
Arlington, VA 22202-5450

Chief Administrative Law Judge Robert J. Lesnick  
Federal Mine Safety & Health Review Commission  
1331 Pennsylvania Ave. N.W., Suite 520N  
Washington, DC 20004-1710

Melanie Garris  
Office of Civil Penalty Compliance  
Mine Safety and Health Administration  
U.S. Department of Labor  
201 12th St. South, Suite 500  
Arlington, VA 22202-5450

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1331 PENNSYLVANIA AVE., N.W., SUITE 520N  
WASHINGTON, DC 20004-1710

March 6, 2017

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

v.

JESSE CREEK MINING, LLC

Docket No. SE 2016-43  
A.C. No. 01-03422-389387

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

## ORDER

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

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) (“Mine Act”). On November 12, 2015, the Commission received from Jesse Creek Mining, LLC (“Jesse Creek”) a motion seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

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

Records of the Department of Labor’s Mine Safety and Health Administration (“MSHA”) indicate that the proposed assessment was delivered on or around August 18, 2015, and became a final order of the Commission on or around September 18, 2015. Jesse Creek asserts that, as a result of its Safety Director’s reassignment, the proposed assessment was delivered to the wrong employee, a partial payment was made in error, and a notice of contest

was not timely filed. Jesse Creek further states that its legal representative investigated the matter in conjunction with the Office of Assessments and determined that the proposed assessment was received but did not locate a record of receipt. Jesse Creek claims that this investigation delayed the filing of the motion to reopen.

The Secretary does not oppose the request to reopen, but notes that MSHA received a partial payment on August 28, 2015. The Secretary further states that the proposed penalty should have received attention when it arrived at the mine. Records submitted by the Secretary show that the delivery date of the proposed assessment could not be confirmed.

Having reviewed Jesse Creek's request and the Secretary's response, in the interest of justice, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.

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

/s/ Mary Lu Jordan  
Mary Lu Jordan, Commissioner

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

Commissioner Cohen, dissenting:

I dissent from my colleagues' decision because I believe that Jesse Creek Mining, LLC ("Jesse Creek"), has not established good cause to reopen this civil penalty proceeding.

In attempting to excuse its failure to timely contest the Secretary's proposed civil penalty assessment, Jesse Creek asserts that its safety director was reassigned to a new position, resulting in "an inadvertent error" in the receipt of the assessment. Mot. to Reopen, at 1. Jesse Creek further avers that the assessment "was apparently delivered to the Mine, but obviously delivered to the improper responsible employee." Mot. to Reopen, at 2. Next, Jesse Creek states that it further inadvertently erred in sending MSHA a check for \$392.00 for payment of one of the citations in the penalty assessment. *Id.*

Jesse Creek's representations do not add up. The operator insists that the penalty assessment never reached an employee with the authority to handle such assessments. Nevertheless, the employee who received MSHA's proposed assessment possessed sufficient authority to decide not to contest one of the seven citations and to authorize a check paying that citation's penalty. This check was dated August 28, 2015, which was within 30 days of Jesse Creek's receipt of the proposed assessment. Thus, someone at the mine was taking responsibility for the handling of MSHA's proposed assessments, and did so, at least partially, in a timely fashion

Unfortunately, we are left to guess who that employee was, as Jesse Creek's motion lacks any sworn affidavit to support its claims. Instead, we are left with the bare assertions of Jesse Creek's lawyer, in conflict with the Commission's stated guidance for petitioners seeking to reopen proposed penalties that have become final orders. The Commission's Guidance for Asking the Commission to Reopen Final Orders so that a Proposed Penalty may be Contested states, "Your motion should also be supported by affidavit(s) of (a) person(s) with direct knowledge of the underlying facts." Fed. Mine Safety and Health Review Comm'n, Requests to Reopen, <http://www.fmsihrc.gov/content/requests-reopen>.

I note that this is not the only incident of Jesse Creek's failure to properly respond to proposed MSHA penalties. In September 2015, the operator defaulted in a Commission proceeding by neglecting to file a response to the Secretary's civil penalty petition and the subsequent Order to Show Cause issued by Chief Administrative Law Judge Robert J. Lesnick. *See Jesse Creek Mining, LLC*, 38 FMSHRC 2538 (Oct. 2016). The penalties proposed in both proceedings are significant, with the present proposed penalties tallying over \$113,000. Thus, Jesse Creek for months operated with a system for handling MSHA citations that was insufficient to flag even major proposed penalties.

I dissented in Jesse Creek's previous petition to the Commission, *see* 38 FMSHRC at 2540, and must dissent again here. The Commission has made clear that where a failure to contest a proposed assessment results from an inadequate or unreliable internal processing system, the operator has not established grounds for reopening the assessment. *Shelter Creek Capital LLC*, 34 FMSHRC 3053, 3054 (Dec. 2012); *Oak Grove Res., LLC*, 33 FMSHRC 103, 104 (Feb. 2011); *Double Bonus Coal Co.*, 32 FMSHRC 1155, 1156 (Sept. 2010); *Highland*

*Mining Co.*, 31 FMSHRC 1313, 1315 (Nov. 2009); *Pinnacle Mining Co.*, 30 FMSHRC 1066, 1067 (Dec. 2008); *Pinnacle Mining Co.*, 30 FMSHRC 1061, 1062 (Dec. 2008). “Relief under Rule 60(b) should generally not be accorded to an operator who creates and condones a system which predictably will result in missed deadlines.” *Pinnacle Mining Co.*, 30 FMSHRC at 1062; *Pinnacle Mining Co.*, 30 FMSHRC at 1067.

Jesse Creek’s submissions in this matter do not suffice to show that the operator’s failures were a matter of mere “inadvertence.” Rather, the operator created an unreliable internal processing system and failed to take responsibility for its proposed citations over a substantial period of time. Accordingly, I would deny Jesse Creek’s motion to reopen.

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

Distribution:

Rebecca J. Oblak, Esq.  
Bowles Rice, LLP  
700 Hampton Center  
Morgantown, WV 26505

W. Christian Schumann, Esq.  
Office of the Solicitor  
U.S. Department of Labor  
201 12th St. South, Suite 500  
Arlington, VA 22202-5450

Chief Administrative Law Judge Robert J. Lesnick  
Federal Mine Safety & Health Review Commission  
1331 Pennsylvania Ave. N.W., Suite 520N  
Washington, DC 20004-1710

Melanie Garris  
Office of Civil Penalty Compliance  
Mine Safety and Health Administration  
U.S. Department of Labor  
201 12th St. South, Suite 500  
Arlington, VA 22202-5450

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1331 PENNSYLVANIA AVE., N.W., SUITE 520N  
WASHINGTON, DC 20004-1710

March 6, 2017

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

v.

A&G COAL CORPORATION

Docket No. VA 2016-111  
A.C. No. 44-07160-399126

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

## ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) (“Mine Act”). On February 22, 2016, the Commission received from A&G Coal Corporation (“A&G”) a motion seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

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

Records of the Department of Labor’s Mine Safety and Health Administration (“MSHA”) indicate that the proposed assessment was delivered on December 21, 2015, and became a final order of the Commission on January 20, 2016. A&G asserts that, due to the holidays and layoffs of over 70 office personnel at the parent company during the time the proposed assessment was delivered, the proposed assessment was not forwarded to the mine’s safety representative, who reviews assessments to determine which ones should be contested.

The Secretary does not oppose the request to reopen but urges the operator to take steps to ensure that future penalty contests are timely filed.

Having reviewed A&G's request and the Secretary's response, in the interest of justice, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.

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

/s/ Mary Lu Jordan  
Mary Lu Jordan, Commissioner

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

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

Distribution:

Billy R. Shelton, Esq.  
Jones, Walters, Turner & Shelton, PLLC  
2452 Sir Barton Way, Suite 101  
Lexington, KY 40509

W. Christian Schumann, Esq.  
Office of the Solicitor  
U.S. Department of Labor  
201 12th St. South, Suite 500  
Arlington, VA 22202-5450

Chief Administrative Law Judge Robert J. Lesnick  
Federal Mine Safety & Health Review Commission  
1331 Pennsylvania Ave. N.W., Suite 520N  
Washington, DC 20004-1710

Melanie Garris  
Office of Civil Penalty Compliance  
Mine Safety and Health Administration  
U.S. Department of Labor  
201 12th St. South, Suite 500  
Arlington, VA 22202-5450

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

1331 PENNSYLVANIA AVE., N.W., SUITE 520N  
WASHINGTON, DC 20004-1710

March 6, 2017

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

v.

THE SILVER QUEEN MINE LLC

Docket No. WEST 2016-56-M  
A.C. No. 02-03312-357676

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

**ORDER**

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) (“Mine Act”). On October 19, 2015, the Commission received from The Silver Queen Mine LLC (“Silver Queen”) a motion seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

We have held, however, that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) (“*JWR*”). In evaluating requests to reopen final orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure under which the Commission may relieve a party from a final order of the Commission on the basis of mistake, inadvertence, excusable neglect, or other reason justifying relief. *See* 29 C.F.R. § 2700.1(b) (“the Commission and its Judges shall be guided so far as practicable by the Federal Rules of Civil Procedure”); *JWR*, 15 FMSHRC at 787.

Further, Rule 60(c) of the Federal Rules of Civil Procedure provides that 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. Fed. R. Civ. P. 60(c).

The Secretary opposes the request to reopen, and argues that the motion to reopen was filed out of time, over a year after the assessment became a final order. Records of the Department of Labor’s Mine Safety and Health Administration (“MSHA”) indicate that the

proposed assessment was delivered on August 9, 2014, and became a final order of the Commission on September 8, 2014.

In its motion to reopen, Silver Queen asserts that it has very little experience with MSHA, and that it is financially prohibitive to hire a lawyer or safety consultant. Silver Queen claims that the delay was due to its lack of understanding of the contest procedure, and also because the operator did not understand that subsequent violations of the same standard would result in substantially increased penalties. Essentially, Silver Queen claims that its failure to contest the proposed assessment was excusable neglect. However, the operator's motion to reopen was filed more than one year after becoming a final order. Therefore, under Rule 60(c), Silver Queen's motion is untimely. *J S Sand & Gravel, Inc.*, 26 FMSHRC 795, 796 (Oct. 2004). Accordingly, we deny Silver Queen's motion.

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

/s/ Mary Lu Jordan  
Mary Lu Jordan, Commissioner

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

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

Distribution:

John Emmett  
Owner  
The Silver Queen Mine LLC  
1477 Menlo Avenue  
Clovis, CA 93611

W. Christian Schumann, Esq.  
Office of the Solicitor  
U.S. Department of Labor  
201 12th St. South, Suite 500  
Arlington, VA 22202-5450

Chief Administrative Law Judge Robert J. Lesnick  
Federal Mine Safety & Health Review Commission  
1331 Pennsylvania Ave. N.W., Suite 520N  
Washington, DC 20004-1710

Melanie Garris  
Office of Civil Penalty Compliance  
Mine Safety and Health Administration  
U.S. Department of Labor  
201 12th St. South, Suite 500  
Arlington, VA 22202-5450

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

1331 PENNSYLVANIA AVE., N.W., SUITE 520N  
WASHINGTON, DC 20004-1710

March 6, 2017

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

v.

MARIGOLD MINING COMPANY,

Docket No. WEST 2016-261-M  
A.C. No. 26-02081-395678

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

**ORDER**

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) (“Mine Act”). On February 9, 2016, the Commission received from Marigold Mining Company (“Marigold”) a motion seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

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

Records of the Department of Labor’s Mine Safety and Health Administration (“MSHA”) indicate that the proposed assessment was delivered on November 9, 2015, and became a final order of the Commission on December 9, 2015. Marigold asserts that its timely notice of contest was lost in the mail. Specifically, it mailed payment for one of the four citations to the MSHA payment office in St. Louis, together with the proposed assessment form

showing that the other three citations were being contested, and also mailed a copy of the assessment form to MSHA's Arlington, Virginia office. Marigold was unable to track the notice of contest because it did not send the contest via certified mail. Marigold further states that it has changed its mailing procedures to prevent this issue from recurring.

The Secretary does not oppose the request to reopen but notes that he did not receive a notice of contest for this proposed assessment. The Secretary's payment office in St. Louis did receive the partial payment check and the assessment form showing the contests. The Secretary urges the operator to take steps to ensure that future penalty contests are timely filed and mailed to the proper address.

Having reviewed Marigold's request and the Secretary's response, in the interest of justice, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.

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

/s/ Mary Lu Jordan  
Mary Lu Jordan, Commissioner

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

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

Distribution:

Steve Chambliss  
People & Safety Manager  
Marigold Mining Company  
P.O. Box 160  
Valmy, NV 89438

W. Christian Schumann, Esq.  
Office of the Solicitor  
U.S. Department of Labor  
201 12th St. South, Suite 500  
Arlington, VA 22202-5450

Chief Administrative Law Judge Robert J. Lesnick  
Federal Mine Safety & Health Review Commission  
1331 Pennsylvania Ave. N.W., Suite 520N  
Washington, DC 20004-1710

Melanie Garris  
Office of Civil Penalty Compliance  
Mine Safety and Health Administration  
U.S. Department of Labor  
201 12th St. South, Suite 500  
Arlington, VA 22202-5450

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

1331 PENNSYLVANIA AVE., N.W., SUITE 520N  
WASHINGTON, DC 20004-1710

March 6, 2017

ESSROC CEMENT CORP.

v.

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

Docket No. WEVA 2014-818-RM  
Order No. 8716832; 02/12/2014

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

**ORDER**

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) (“Mine Act”). On April 17, 2014, the Commission received from Essroc Cement Corp., (“Essroc”) a motion seeking to reopen or accept a late-filed contest for an imminent danger withdrawal order that had been issued pursuant to section 107(a) of the Mine Act, 30 U.S.C. § 817(a).

Under section 107(e)(1) of the Mine Act, an operator who wishes to contest an imminent danger order under section 107(a) may request review by the Commission no later than 30 days after being notified of such order. Commission Procedural Rule 9 allows the Commission to extend the filing time for a document for good cause shown. 29 C.F.R. § 2700.9(a). The rule allows the Commission to grant motions for extensions of time after the designated filing time has expired if the party requesting the extension can show, in writing, the reasons for its failure to make the request before the filing deadline. 29 C.F.R. § 2700.9(b).

The section 107(a) order that Jones seeks to contest was issued on February 12, 2014. Hence, the deadline for contesting it under section 107(e)(1) was March 14, 2014. Essroc asserts that it intended to contest the order, but mistakenly believed that it would be able to do so when it received a proposed assessment from MSHA. Essroc states that its Safety Manager did not understand that this order would not be assessed a penalty, and would have to be contested within 30 days of issuance, until Essroc’s legal counsel advised him of this fact. The Secretary has submitted a letter stating that it will not file an answer in this case until the Commission rules on Essroc’s motion, but does not oppose the operator’s request.

Relying on Rule 60(b) of the Federal Rules of Civil Procedure, we have 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, appropriate proceedings on the merits may be permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995). We find that the same considerations apply to the order here under Commission Procedural Rule 9.

Having reviewed Essroc's request and the Secretary's response, in the interest of justice and judicial economy, we find that Essroc has shown good cause for us to extend the time to contest the order at issue. We further accept Essroc's late-filed application for review of the imminent danger withdrawal order and remand the case for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.

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

/s/ Mary Lu Jordan  
Mary Lu Jordan, Commissioner

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

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

Distribution:

Maxwell K. Multer, Esq.  
Dinsmore & Shohl LLP  
255 East Fifth Street  
Suite 1900  
Cincinnati, OH 45202

Robert Huston Beatty, Jr., Esq.  
Dinsmore & Shohl LLP  
215 Don Knotts Blvd., Suite 310  
Morgantown, WV 26501

W. Christian Schumann, Esq.  
Office of the Solicitor  
U.S. Department of Labor  
201 12th St. South, Suite 500  
Arlington, VA 22202-5450

Chief Administrative Law Judge Robert J. Lesnick  
Federal Mine Safety & Health Review Commission  
1331 Pennsylvania Ave. N.W., Suite 520N  
Washington, DC 20004-1710

Melanie Garris  
Office of Civil Penalty Compliance  
Mine Safety and Health Administration  
U.S. Department of Labor  
201 12th St. South, Suite 500  
Arlington, VA 22202-5450

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

1331 PENNSYLVANIA AVE., N.W., SUITE 520N  
WASHINGTON, DC 20004-1710

March 6, 2017

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

v.

CARTER ROAG COAL COMPANY

Docket No. WEVA 2016-86  
A.C. No. 46-08194-391101

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

**ORDER**

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) (“Mine Act”). On November 2, 2015, the Commission received from Carter Roag Coal Company (“Carter Roag”) a motion seeking to reopen a penalty assessment that had appeared to become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a). In response to this motion, the Secretary of Labor requests that the motion to reopen be denied as moot.

In his response, the Secretary states that the penalty assessment that Carter Roag seeks to reopen is already the subject of an active contest case, Docket No. WEVA 2016-107.<sup>1</sup> The Secretary maintains that he received a timely contest of this assessment, and has since filed a penalty petition with the Commission and assigned the case to an attorney.

Having reviewed Carter Roag’s motion and the Secretary’s response, we conclude that the proposed penalty assessment did not become a final order of the Commission because the operator timely contested the proposed assessment. Section 105(a) states that if an operator “fails to notify the Secretary that he intends to contest the . . . proposed assessment of penalty. . . the citation and the proposed assessment of penalty shall be deemed a final order of the

---

<sup>1</sup> Commission records confirm that Docket No. WEVA 2016-107 deals with the penalty assessment at issue.

Commission.” 30 U.S.C. § 815(a). Here, Carter Roag notified the Secretary of the contest. This obviates any need to reopen the penalty assessment.

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

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

/s/ Mary Lu Jordan  
Mary Lu Jordan, Commissioner

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

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

Distribution:

Jonathan R. Ellis, Esq.  
Katrina N. Bowers, Esq.  
Steptoe & Johnson PLLC  
P.O. Box 1588  
Charleston, WV 25301-1588

W. Christian Schumann, Esq.  
Office of the Solicitor  
U.S. Department of Labor  
201 12th St. South, Suite 500  
Arlington, VA 22202-5450

Chief Administrative Law Judge Robert J. Lesnick  
Federal Mine Safety & Health Review Commission  
1331 Pennsylvania Ave. N.W., Suite 520N  
Washington, DC 20004-1710

Melanie Garris  
Office of Civil Penalty Compliance  
Mine Safety and Health Administration  
U.S. Department of Labor  
201 12th St. South, Suite 500  
Arlington, VA 22202-5450

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

1331 PENNSYLVANIA AVE., N.W., SUITE 520N  
WASHINGTON, DC 20004-1710

March 28, 2017

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

v.

CARROLL COUNTY STONE, INC.

Docket No. CENT 2015-475-M  
A.C. No. 03-01232-379841

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

**ORDER**

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) (“Mine Act”). On October 30, 2015, the Commission received from Carroll County Stone, Inc. (“Carroll County”) a motion seeking to reopen a penalty assessment proceeding and relieve it from the Default Order entered against it.

On August 4, 2015, the Chief Administrative Law Judge issued an Order to Show Cause in response to Carroll County’s perceived failure to answer the Secretary of Labor’s June 29, 2015 Petition for Assessment of Civil Penalty. By its terms, the Order to Show Cause was deemed a Default Order on September 4, 2015, when it appeared that the operator had not filed an answer within 30 days. MSHA mailed a delinquency notice to the operator on October 21, 2015.

Carroll County asserts that it timely filed its answer to the Order to Show Cause in the same envelope as another case involving a sister company, Bailey Quarries, Inc., and that the two cases were mixed up by the Commission. Commission records confirm that it received responses for both cases, CENT 2015-363-M and CENT 2015-475-M on August 28, 2015. The Secretary does not oppose the request to reopen.

Having reviewed Carroll County's request and the Secretary's response, we conclude that the operator was not in default under the terms of the Order to Show Cause because it timely complied with the Order. *See Vulcan Construction Materials*, 33 FMSHRC 2164 (Sept. 2011). This renders the Default Order a nullity. Accordingly, the operator's motion to reopen is moot, and this case is remanded to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.

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

/s/ Mary Lu Jordan  
Mary Lu Jordan, Commissioner

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

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

Distribution:

Michael J. Boardman  
Carroll County Stone, Inc.  
911 U.S. Highway 60  
Republic, MO 65738

W. Christian Schumann, Esq.  
Office of the Solicitor  
U.S. Department of Labor  
201 12th St. South, Suite 500  
Arlington, VA 22202-5450

Chief Administrative Law Judge Robert J. Lesnick  
Federal Mine Safety & Health Review Commission  
1331 Pennsylvania Ave. N.W., Suite 520N  
Washington, DC 20004-1710

Melanie Garris  
Office of Civil Penalty Compliance  
Mine Safety and Health Administration  
U.S. Department of Labor  
201 12th St. South, Suite 500  
Arlington, VA 22202-5450

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

March 28, 2017

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

v.

ARMSTRONG CEMENT & SUPPLY  
CORPORATION

Docket No. PENN 2016-270-M  
A.C. No. 36-00215-404373

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

**ORDER**

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) (“Mine Act”). The Commission has received a motion from the operator seeking to reopen a penalty assessment which had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 813(a). The Secretary states that he does not oppose the motion.

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

The granting of this motion is not precedential for the consideration of any other motion before the Commission.

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

/s/ Mary Lu Jordan  
Mary Lu Jordan, Commissioner

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

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

Distribution:

Daniel Wible, MS, CSP  
Safety Director  
Armstrong Cement & Supply Corp.  
100 Clearfield Rd.  
Cabot, PA 16023-9521

W. Christian Schumann, Esq.  
Office of the Solicitor  
U.S. Department of Labor  
201 12th St. South, Suite 500  
Arlington, VA 22202-5450

Chief Administrative Law Judge Robert J. Lesnick  
Federal Mine Safety & Health Review Commission  
1331 Pennsylvania Ave. N.W., Suite 520N  
Washington, DC 20004-1710

Melanie Garris  
Office of Civil Penalty Compliance  
Mine Safety and Health Administration  
U.S. Department of Labor  
201 12th St. South, Suite 500  
Arlington, VA 22202-5450

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

1331 PENNSYLVANIA AVE., N.W., SUITE 520N  
WASHINGTON, DC 20004-1710

March 28, 2017

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

v.

LEHIGH SOUTHWEST CEMENT  
COMPANY

Docket No. WEST 2015-690-M  
A.C. No. 04-00034-380538

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

**ORDER**

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) (“Mine Act”). On November 6, 2015, the Commission received from Lehigh Southwest Cement Company (“Lehigh”) a motion seeking to reopen a penalty assessment proceeding and relieve it from the Default Order entered against it.

On September 3, 2015, the Chief Administrative Law Judge issued an Order to Show Cause in response to Lehigh’s failure to answer the Secretary of Labor’s July 21, 2015 Petition for Assessment of Civil Penalty. By its terms, the Order to Show Cause was deemed a Default Order on October 5, 2015, when the operator failed to file an answer within 30 days.

MSHA records show that after Lehigh filed a timely contest to a proposed assessment containing the citation herein and other citations, the proposed assessment was split into several dockets. The operator filed an answer to the Order to Show Cause in the other docket (WEST 2015-689-M) but did not file an answer in this docket. Lehigh states that it failed to timely answer the Order to Show Cause here because in answering the Order to Show Cause in the other docket, it overlooked the fact that the proposed assessment had been split up. The Secretary does not oppose the request to reopen. However, he urges Lehigh to timely file an answer to all penalty petitions and to take Orders to Show Cause seriously.

The Judge’s jurisdiction in this matter terminated when the default occurred. 29 C.F.R. § 2700.69(b). Under the Mine Act and the Commission’s procedural rules, relief from a judge’s decision may be sought by filing a petition for discretionary review within 30 days of its issuance. 30 U.S.C. § 823(d)(2)(A)(i); 29 C.F.R. § 2700.70(a). If the Commission does not direct review within 40 days of a decision’s issuance, it becomes a final decision of the Commission. 30 U.S.C. § 823(d)(1). Consequently, the Judge’s order here has become a final decision of the Commission.

Having reviewed Lehigh's request and the Secretary's response, in the interest of justice, we hereby reopen the proceeding and vacate the Default Order. Accordingly, this case is remanded to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.

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

/s/ Mary Lu Jordan  
Mary Lu Jordan, Commissioner

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

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

Distribution:

Ramiro Jimenez  
Area Safety and Health Manager  
Cement Operations  
24001 Stevens Creek Blvd.  
Cupertino, CA 95014

W. Christian Schumann, Esq.  
Office of the Solicitor  
U.S. Department of Labor  
201 12th St. South, Suite 500  
Arlington, VA 22202-5450

Chief Administrative Law Judge Robert J. Lesnick  
Federal Mine Safety & Health Review Commission  
1331 Pennsylvania Ave. N.W., Suite 520N  
Washington, DC 20004-1710

Melanie Garris  
Office of Civil Penalty Compliance  
Mine Safety and Health Administration  
U.S. Department of Labor  
201 12th St. South, Suite 500  
Arlington, VA 22202-5450

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

1331 PENNSYLVANIA AVE., N.W., SUITE 520N  
WASHINGTON, DC 20004-1710

March 28, 2017

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

v.

MUNSEN PAVING, LLC

Docket No. WEST 2016-215-M  
A.C. No. 35-003312-398548

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

**ORDER**

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) (“Mine Act”). On September 7, 2016, the Commission received from Munsen Paving, LLC (“Munsen”) a motion seeking to reopen a penalty assessment proceeding and relieve it from the Default Order entered against it.

On March 8, 2016, the Chief Administrative Law Judge issued an Order to Show Cause in response to Munsen’s failure to answer the Secretary of Labor’s January 14, 2016 Petition for Assessment of Civil Penalty. By its terms, the Order to Show Cause was deemed a Default Order on April 8, 2016, when it appeared that the operator had not filed an answer within 30 days.

Munsen asserts that, on April 7, 2016, it timely filed an answer to the Order to Show Cause via certified mail. It offers a return receipt to prove that the answer was post-marked on April 7, 2016. Munsen further demonstrates that it received the return receipt with April 13, 2016 stamped on the front of the card. The Secretary does not oppose the request to reopen.

Having reviewed Munsen's request and the Secretary's response, we conclude that the operator was not in default under the terms of the Order to Show Cause as it timely complied with the Order. *See Vulcan Construction Materials*, 33 FMSHRC 2164 (Sept. 2011). This renders the Default Order a nullity. Accordingly, the operator's motion to reopen is moot, and this case is remanded to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.

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

/s/ Mary Lu Jordan  
Mary Lu Jordan, Commissioner

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

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

Distribution:

Gwendolyn K. Nightengale, Esq.  
Ogletree, Deakins, Nash, Smoak & Stewart, P.C.  
1909 K Street, N.W., Suite 1000  
Washington, DC 20006

W. Christian Schumann, Esq.  
Office of the Solicitor  
U.S. Department of Labor  
201 12th St. South, Suite 500  
Arlington, VA 22202-5450

Chief Administrative Law Judge Robert J. Lesnick  
Federal Mine Safety & Health Review Commission  
1331 Pennsylvania Ave. N.W., Suite 520N  
Washington, DC 20004-1710

Melanie Garris  
Office of Civil Penalty Compliance  
Mine Safety and Health Administration  
U.S. Department of Labor  
201 12th St. South, Suite 500  
Arlington, VA 22202-5450

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

March 28, 2017

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

v.

LEHIGH SOUTHWEST CEMENT  
COMPANY

Docket No. WEST 2016-464-M  
A.C. No. 04-00034-402554

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

**ORDER**

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) (“Mine Act”). The Commission has received a motion from the operator seeking to reopen a penalty assessment which had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 813(a). The Secretary states that he does not oppose the motion.

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

The granting of this motion is not precedential for the consideration of any other motion before the Commission.

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

/s/ Mary Lu Jordan  
Mary Lu Jordan, Commissioner

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

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

Distribution:

Richard Larch  
Safety Manager  
Lehigh Southwest Cement Company  
15390 Wonderland Blvd.  
Redding, CA 96003

W. Christian Schumann, Esq.  
Office of the Solicitor  
U.S. Department of Labor  
201 12th St. South, Suite 500  
Arlington, VA 22202-5450

Chief Administrative Law Judge Robert J. Lesnick  
Federal Mine Safety & Health Review Commission  
1331 Pennsylvania Ave. N.W., Suite 520N  
Washington, DC 20004-1710

Melanie Garris  
Office of Civil Penalty Compliance  
Mine Safety and Health Administration  
U.S. Department of Labor  
201 12th St. South, Suite 500  
Arlington, VA 22202-5450

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

1331 PENNSYLVANIA AVE., N.W., SUITE 520N  
WASHINGTON, DC 20004-1710

March 31, 2017

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

v.

THE QUIKRETE COMPANIES

Docket No. CENT 2016-232-M  
A.C. No. 41-03760-399975

Docket No. CENT 2016-231-M  
A.C. No. 41-03760-397835

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

**ORDER**

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) (“Mine Act”). On March 3, 2016, the Commission received from The Quikrete Companies (“Quikrete”) a motion seeking to reopen two penalty assessments that had become final orders of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).<sup>1</sup>

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

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

---

<sup>1</sup> For the limited purpose of addressing these motions to reopen, we hereby consolidate docket numbers CENT 2016-232-M and CENT 2016-231-M involving similar procedural issues. 29 C.F.R. § 2700.12.

Records of the Department of Labor's Mine Safety and Health Administration ("MSHA") indicate that the proposed assessment involved in Docket No. CENT 2016-231-M, A.C. No. 41-03760-397835, was delivered on December 8, 2015 and became a final order of the Commission on January 7, 2016. A delinquency notice for this assessment was mailed on February 22, 2016. MSHA's records further reflect that the proposed assessment involved in Docket No. CENT 2016-232-M, A.C. No. 41-03760-399975, was delivered on January 4, 2016, and became a final order of the Commission on February 3, 2016. MSHA received a partial payment for these assessments on February 2, 2016.

Quikrete asserts that it mailed the contest documents, but addressed them to MSHA's collection office in St. Louis, Missouri, instead of MSHA's Arlington office. The Secretary does not oppose the request to reopen, but urges the operator to take steps to ensure that future penalty contests are timely filed.

Having reviewed Quikrete's request and the Secretary's response, we find that the failure to file the contests at the proper MSHA office was an inadvertent mistake. In the interest of justice, we hereby reopen these matters and remand them to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file petitions for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.

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

/s/ Mary Lu Jordan  
Mary Lu Jordan, Commissioner

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

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

Distribution:

Don Sanders  
Plant Manager  
The Quikrete Companies  
1083 Kleimann Lane  
P.O. Box 487  
Columbus, TX 78934

W. Christian Schumann, Esq.  
Office of the Solicitor  
U.S. Department of Labor  
201 12th St. South, Suite 500  
Arlington, VA 22202-5450

Chief Administrative Law Judge Robert J. Lesnick  
Federal Mine Safety & Health Review Commission  
1331 Pennsylvania Ave. N.W., Suite 520N  
Washington, DC 20004-1710

Melanie Garris  
Office of Civil Penalty Compliance  
Mine Safety and Health Administration  
U.S. Department of Labor  
201 12th St. South, Suite 500  
Arlington, VA 22202-5450

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

1331 PENNSYLVANIA AVE., N.W., SUITE 520N  
WASHINGTON, DC 20004-1710

March 31, 2017

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

v.

THYSSEN KRUPP INDUSTRIAL  
SOLUTIONS (USA), INC.

Docket No. CENT 2016-325-M  
A.C. No. 41-00283-403752-ZAL

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

**ORDER**

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) (“Mine Act”). The Commission has received a motion from the operator seeking to reopen a penalty assessment which had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 813(a). The Secretary states that he does not oppose the motion.

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

The granting of this motion is not precedential for the consideration of any other motion before the Commission.

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

/s/ Mary Lu Jordan  
Mary Lu Jordan, Commissioner

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

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

Distribution:

Margaret S. Lopez, Esq.  
Lauren M. Marino, Esq.  
Ogletree, Deakins, Nash, Smoak & Stewart, P.C.  
1909 K Street, N.W., Suite 1000  
Washington, DC 20006

W. Christian Schumann, Esq.  
Office of the Solicitor  
U.S. Department of Labor  
201 12th St. South, Suite 500  
Arlington, VA 22202-5450

Chief Administrative Law Judge Robert J. Lesnick  
Federal Mine Safety & Health Review Commission  
1331 Pennsylvania Ave. N.W., Suite 520N  
Washington, DC 20004-1710

Melanie Garris  
Office of Civil Penalty Compliance  
Mine Safety and Health Administration  
U.S. Department of Labor  
201 12th St. South, Suite 500  
Arlington, VA 22202-5450

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

1331 PENNSYLVANIA AVE., N.W., SUITE 520N  
WASHINGTON, DC 20004-1710

March 31, 2017

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

v.

AMERICAN TALC COMPANY

Docket No. CENT 2016-338-M  
A.C. No. 41-00869-399973

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

**ORDER**

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) (“Mine Act”). On April 29, 2016, the Commission received from American Talc Co. (“American Talc”) a motion seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

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

Records of the Department of Labor's Mine Safety and Health Administration ("MSHA") indicate that the proposed assessment was delivered on January 30, 2016, and became a final order of the Commission on February 29, 2016. On February 5, 2016, MSHA received a timely payment of \$162.00 for a different citation within the proposed assessment. A delinquency notification was mailed on April 15, 2016.

American Talc asserts that due to an overload of paperwork and other duties, the plant manager stepped in to assist in the filing of the contest. American Talc explains that the manager was unfamiliar with the contest process, and mailed an answer to the assessment and the contest form to Lisa Boyd, the Executive Director of the Commission, instead of sending the contest form to MSHA. American Talc states that it has taken steps to make sure that future contests are addressed to the correct location and recipient. The Secretary does not oppose the request to reopen, but urges the operator to take steps to ensure that future penalty contests are timely filed.

Having reviewed American Talc's request and the Secretary's response, we find that the timely mailing of the contest to the Commission rather than to MSHA was an inadvertent mistake. In the interest of justice, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.

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

/s/ Mary Lu Jordan  
Mary Lu Jordan, Commissioner

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

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

Distribution:

Adele L. Abrams, Esq., CMSP  
Law Office of Adele L. Abrams, P.C.  
4740 Corridor Place, Suite D  
Beltsville, MD 20705

W. Christian Schumann, Esq.  
Office of the Solicitor  
U.S. Department of Labor  
201 12th St. South, Suite 500  
Arlington, VA 22202-5450

Chief Administrative Law Judge Robert J. Lesnick  
Federal Mine Safety & Health Review Commission  
1331 Pennsylvania Ave. N.W., Suite 520N  
Washington, DC 20004-1710

Melanie Garris  
Office of Civil Penalty Compliance  
Mine Safety and Health Administration  
U.S. Department of Labor  
201 12th St. South, Suite 500  
Arlington, VA 22202-5450

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

1331 PENNSYLVANIA AVE., N.W., SUITE 520N  
WASHINGTON, DC 20004-1710

March 31, 2017

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

v.

METZGER REMOVAL, INC.

Docket No. SE 2016-207-M  
A.C. No. 31-00057-395250

Docket No. SE 2016-208-M  
A.C. No. 31-00057-395250

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

**ORDER**

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) (“Mine Act”). On April 28, 2016, the Commission received from Metzger Removal, Inc. (“Metzger”) a motion seeking to reopen a penalty assessment<sup>1</sup> that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

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

---

<sup>1</sup> Two dockets were created for assessment number 000395250—Docket Nos. SE 2016-207-M and SE 2016-208-M. Because they both deal with the same assessment, they should be considered duplicate dockets and resolved in tandem. Accordingly, we hereby consolidate docket numbers SE 2016-207-M and SE 2016-208-M. 29 C.F.R. § 2700.12.

Records of the Department of Labor's Mine Safety and Health Administration ("MSHA") indicate that the proposed assessment was delivered on October 26, 2015, and became a final order of the Commission on November 25, 2015. The Secretary's records further reflect that a delinquency notice was mailed on January 11, 2016.

Metzger asserts that it attempted to timely contest the assessment, but MSHA did not register two of the citations as having been contested. Metzger further states that as a result of this situation, when a settlement motion was submitted, a Commission Administrative Law Judge did not approve the settlement for the two uncontested citations. The Secretary explains that the Metzger mistakenly believed that the citations involved in this assessment were included in another assessment, which Metzger did timely contest. The Secretary does not oppose the request to reopen, but urges the operator to take steps to ensure that future penalty contests are timely filed.

Having reviewed Metzger's request and the Secretary's response, we find that the failure to contest the two citations herein was an inadvertent mistake by an inexperienced pro se operator. In the interest of justice, we hereby reopen these matters and remand them to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.

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

/s/ Mary Lu Jordan  
Mary Lu Jordan, Commissioner

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

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

Distribution:

Steven D. Weber  
Parker Poe Adams & Bernstein LLP  
Three Wells Fargo Center  
401 South Tryon Street, Suite 3000  
Charlotte, NC 28202

W. Christian Schumann, Esq.  
Office of the Solicitor  
U.S. Department of Labor  
201 12th St. South, Suite 500  
Arlington, VA 22202-5450

Chief Administrative Law Judge Robert J. Lesnick  
Federal Mine Safety & Health Review Commission  
1331 Pennsylvania Ave. N.W., Suite 520N  
Washington, DC 20004-1710

Melanie Garris  
Office of Civil Penalty Compliance  
Mine Safety and Health Administration  
U.S. Department of Labor  
201 12th St. South, Suite 500  
Arlington, VA 22202-5450

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

1331 PENNSYLVANIA AVE., N.W., SUITE 520N  
WASHINGTON, DC 20004-1710

March 31, 2017

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

v.

USIBELLI COAL MINE, INC.

Docket No. WEST 2016-300  
A.C. No. 50-00030-396182

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

**ORDER**

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) (“Mine Act”). On March 4, 2016, the Commission received from Usibelli Coal Mine, Inc. (“Usibelli”) a motion seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

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

Records of the Department of Labor's Mine Safety and Health Administration ("MSHA") indicate that the proposed assessment was delivered on November 17, 2016, and became a final order of the Commission on December 16, 2016. MSHA mailed a delinquency notice on February 1, 2016. Usibelli states that due to a weeklong shutdown of the mine for Thanksgiving, the proposed assessment was not reviewed in a timely manner. Usibelli asserts that it submitted a late-filed contest of the proposed assessment, and MSHA states that it received a contest form postmarked December 23, 2015. MSHA records also reflect that it received a partial payment of \$1,381.00 for this assessment on December 24, 2015. Usibelli states that it has instituted changes in its contest procedures to prevent future delays. The Secretary does not oppose the request to reopen, but urges the operator to take steps to ensure that future penalty contests are timely filed.

Having reviewed Usibelli's request and the Secretary's response, we find that the failure to contest the proposed assessment was an excusable mistake in that Usibelli missed the filing deadline by only a few days, has no history of previous defaults, and has revised its procedures to avoid future defaults. In the interest of justice, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.

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

/s/ Mary Lu Jordan  
Mary Lu Jordan, Commissioner

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

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

Distribution:

Donna Pryor  
Erik Dullea  
Jackson Lewis P.C.  
950 17th Street, Suite 2600  
Denver, CO 80202

W. Christian Schumann, Esq.  
Office of the Solicitor  
U.S. Department of Labor  
201 12th St. South, Suite 500  
Arlington, VA 22202-5450

Chief Administrative Law Judge Robert J. Lesnick  
Federal Mine Safety & Health Review Commission  
1331 Pennsylvania Ave. N.W., Suite 520N  
Washington, DC 20004-1710

Melanie Garris  
Office of Civil Penalty Compliance  
Mine Safety and Health Administration  
U.S. Department of Labor  
201 12th St. South, Suite 500  
Arlington, VA 22202-5450

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

1331 PENNSYLVANIA AVE., N.W., SUITE 520N  
WASHINGTON, DC 20004-1710

March 31, 2017

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

v.

GOOD BENTONITE COMPANY, LLC

Docket No. WEST 2016-336  
A.C. No. 48-01780-397886

Docket No. WEST 2016-335  
A.C. No. 48-01780-397886

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

**ORDER**

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) (“Mine Act”). On March 22, 2016, the Commission received from Good Bentonite Company, LLC (“Good Bentonite”) a motion seeking to reopen a penalty assessment<sup>1</sup> that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

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

---

<sup>1</sup> Two dockets were created for assessment number 000397886—Docket Nos. WEST 2016-336 and WEST 2016-335. Because these cases both deal with the same assessment, they should be considered duplicate dockets and resolved in tandem. Accordingly, we hereby consolidate docket numbers WEST 2016-336 and WEST 2016-335. 29 C.F.R. § 2700.12.

Records of the Department of Labor's Mine Safety and Health Administration ("MSHA") indicate that the proposed assessment was delivered on December 7, 2015. MSHA received partial contest paperwork, which was missing the sheet that identifies which violations the operator seeks to contest, on December 28, 2015. MSHA called Good Bentonite regarding the incomplete contest form on the same day, but did not receive a call back. The proposed assessment became a final order of the Commission on January 6, 2015, and a delinquency notice was mailed to the operator on February 22, 2016.

Good Bentonite asserts that it misread the Notice of Contest Rights that was included with the proposed assessment, and therefore did not file all of the necessary paperwork to contest the assessment. Good Bentonite states that the owner of the company was out of the office when MSHA called and did not get a message about the phone call from MSHA stating that the contest was not filled out correctly. The Secretary does not oppose the request to reopen, but urges the operator to take steps to ensure that future penalty contests are timely filed.

Having reviewed Good Bentonite's request and the Secretary's response, we find that the failure to file a complete contest was an inadvertent mistake. In the interest of justice, we hereby reopen these matters and remand them to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.

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

/s/ Mary Lu Jordan  
Mary Lu Jordan, Commissioner

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

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

Distribution:

Lacey Good  
Office Manager  
Good Bentonite Company, LLC  
3796 Lane 32 1/2  
Greybull, WY 82426

W. Christian Schumann, Esq.  
Office of the Solicitor  
U.S. Department of Labor  
201 12th St. South, Suite 500  
Arlington, VA 22202-5450

Chief Administrative Law Judge Robert J. Lesnick  
Federal Mine Safety & Health Review Commission  
1331 Pennsylvania Ave. N.W., Suite 520N  
Washington, DC 20004-1710

Melanie Garris  
Office of Civil Penalty Compliance  
Mine Safety and Health Administration  
U.S. Department of Labor  
201 12th St. South, Suite 500  
Arlington, VA 22202-5450

# **ADMINISTRATIVE LAW JUDGE DECISIONS**



**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

OFFICE OF ADMINISTRATIVE LAW JUDGES  
7 PARKWAY CENTER, SUITE 290  
875 GREENTREE ROAD  
PITTSBURGH, PA 15220  
TELEPHONE: 412-920-7240 / FAX: 412-928-8689

March 3, 2017

WARRIOR COAL, LLC,  
Contestant,

v.

SECRETARY OF LABOR,  
UNITED STATES DEPARTMENT  
OF LABOR (MSHA)  
Respondent,

SECRETARY OF LABOR,  
UNITED STATES DEPARTMENT  
OF LABOR (MSHA)  
Petitioner,

v.

WARRIOR COAL, LLC,  
Respondent.

CONTEST PROCEEDINGS

Docket No. KENT 2011-1084-R  
Order No. 8498873; 05/10/2011

Docket No. KENT 2011-1085-R  
Citation No. 8498874; 05/10/2011

Docket No. KENT 2011-1086-R  
Order No. 8498875; 05/10/2011

Docket No. KENT 2011-1088-R  
Citation No. 8498877; 05/10/2011

CIVIL PENALTY PROCEEDING

Docket No. KENT 2012-706  
A.C. No. 15-17216-280358

Mine: Cardinal

**DECISION**

Appearances: Eric Johnson, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for Petitioner;

Gary D. McCollum, Esq., Assistant General Counsel, Alliance Coal, Lexington, Kentucky, for Respondent.

Before: Judge Andrews

This proceeding is before me on a petition for assessment of civil penalty filed by the Secretary of Labor (“Secretary” or “Petitioner”), acting through the Mine Safety and Health Administration (“MSHA”), against Warrior Coal, LLC, (“Warrior” or “Respondent”), at its

Cardinal mine, pursuant to Sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815, 820 (“Mine Act” or “Act”). On May 9 and May 10, 2011, MSHA Inspectors conducted inspections of the #2 Unit of Respondent’s mine and issued citations and orders for alleged violations of the Mine Act. This docket involves five of the orders and citations issued pursuant to Sections 104 and 107 of the Act with a total proposed penalty of \$215,200.

The case was originally assigned to Administrative Law Judge William S. Steele. On November 29, 2012, the Secretary filed an unopposed motion to amend his petition to note citations and orders Nos. 8498874, 8498875, and 8498877 were contested pursuant to Commission Rule 20. On January 31, 2013, Judge Steele granted the Secretary’s request. On February 6, 2013, Judge Steele further ordered the dismissal of one contest proceeding, regarding Citation No. 8498876, which was paid in full by the Respondent. Subsequently, the above-listed dockets were reassigned to the undersigned.

The parties presented testimony and documentary evidence at the hearing held in Madisonville, Kentucky, on March 31 and April 1, 2015. After the hearing, each party submitted a post-hearing brief and a reply brief.<sup>1</sup> All of the evidence of record has been considered.<sup>2</sup>

### Stipulations

The parties submitted joint stipulations, marked as Exhibit JX-1:<sup>3</sup>

1. During all times relevant to this matter, Warrior Coal, LLC, (hereinafter referred to as Respondent) was the operator, as defined in Section 3(d) of the Mine Act, 30 U.S.C. § 802(d), of the Cardinal mine, Mine ID No. 15-17216.

---

<sup>1</sup> Throughout this decision the Secretary’s Post Hearing Brief will be cited as “SPHB” and the reply brief as “SRB”. Respondent’s Post Hearing Brief will be cited as “RPHB” and the reply brief as “RRB”.

<sup>2</sup> The findings of fact in this decision are based on the record as a whole and the Administrative Law Judge’s careful observation of the witnesses during their testimony. In resolving any conflicts in the testimony, the ALJ has taken into consideration the interests of the witnesses, or lack thereof, and consistencies, or inconsistencies, in each witness’s testimony and between the testimonies of the witnesses. In evaluating the testimony of each witness, the ALJ has also evaluated demeanor. Any failure to provide detail as to each witness’s testimony is not to be deemed a failure on the ALJ’s part to have fully considered it. The fact that some evidence is not discussed does not indicate that it was not considered. *See Craig v. Apfel*, 212 F.3d 433, 436 (8<sup>th</sup> 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).

<sup>3</sup> The Secretary’s exhibits will be marked “GX” followed by the number and Respondent’s exhibits will be marked “RX” followed by the letter.

2. The Cardinal mine is a “mine” as that term is defined in Section 3(h) of the Mine Act, 30 U.S.C. § 802(h).
3. At all material times involved in this case, the products of the Cardinal mine entered commerce or the operations or products thereof affected commerce within the meaning and scope of Section 4 of the Mine Act, 30. U.S.C. § 803.
4. Respondent produced 5,841,599 tons of coal at its Cardinal mine in 2010.
5. The proceeding is subject to the jurisdiction of the Federal Mine Safety and Health Review Commission and its designated Administrative Law Judges pursuant to Sections 105 and 113 of the Mine Act, 30 U.S.C. §§ 815 and 823.
6. MSHA Inspector Curtis Hardison, whose signature appears in Block 22 of Citation Number 8503299, was acting in his official capacity and as authorized representatives of the Secretary of Labor when he issued the citation.
7. MSHA Inspector David Winebarger, whose signature appears in Block 22 of Citation Numbers 8498874 and 8498877 and Order Numbers 8498873 and 8498875, was acting in his official capacity and as authorized representatives of the Secretary of Labor when he issued the citations and orders.
8. The citations and orders at issue in this proceeding were properly served by duly authorized representatives of the Secretary of Labor, Mine Safety and Health Administration, upon an agent of Respondent.

### **Citation No. 8503299**

#### Summary of the Evidence

On May 9, 2011 Inspector Curtis Hardison<sup>4</sup> (“Inspector Hardison” or “Hardison”) conducted an inspection of Warrior’s Cardinal Mine. Tr. at 9.<sup>5</sup> He arrived at approximately 7:15 am and first inspected the pre-shift books and mine map. Tr. 28, 29. The Preshift Reports for the

---

<sup>4</sup> Inspector Hardison graduated with a bachelor’s degree in Secondary Education, with a minor concentration in World History and a major concentration in Political Science and U.S. History, from the University of Southern Indiana, in 1998. Tr. 28. He began work for MSHA in 2006. Tr. 23. At time of inspection, Hardison was a full-time coal mine inspector with collateral duties as a special investigator; he also possessed accident investigation credentials. Tr. 27. As of hearing he was employed as the Field Office Supervisor in Morganfield, Kentucky. Tr. 23.

<sup>5</sup> Hereinafter the transcript will be cited as “Tr.” followed by the page number.

#2 Unit<sup>6</sup> show that for three consecutive shifts beginning with the examination during the first shift on May 8, 2011 no hazards were observed other than loose pins<sup>7</sup> in the #4 and #5 entries. GX-8. Accompanied by Warrior Safety Tech Randy Ivey<sup>8</sup> (“Ivey”) he traveled to the #2 Unit and began an imminent danger run across the working faces. Tr. 29. He also recorded his observations in his notes. GX-2. Hardison discovered that in the #7 entry at the last open crosscut the intersection had been mined wider than allowed by the mine’s roof control plan. Tr. 31, 51; GX-1, GX-2. It appeared the mining machine operator had taken a cut<sup>9</sup> too far over to the right side of the entry. Tr. 51, 52. Using a tape measure, he found that the entry was wider than 20 feet. Tr. 31. The entry measured from 25 feet wide to 20 feet wide for a distance of 27 feet. Tr. 31; GX-2, p. 3. The entry was widest at the intersection, and came back into compliance at 20 feet wide as you went toward the face. Tr. 32; GX-2, p. 8. The maximum allowable width for entries under the roof control plan in effect was 20 feet. Tr. 30, 31, 35; GX-3, p. 5. In the entry that had been cut too wide there was sloughage<sup>10</sup> and rib rashing, a crumbling off the side of the coal rib due to the pillar<sup>11</sup> taking more weight from the overburden.<sup>12</sup> Tr. 33, 53. He saw the entry had bad top.<sup>13</sup> The 20-foot width limitation came from a history of roof falls nationwide, especially present in the Western Kentucky coal seam. Tr. 36. Additional support was required and was promptly installed in the entry. Tr. 34, 35.

Inspector Hardison testified he was worried about a roof fall with rock striking miners. This was made reasonably likely by the wide entry, bad top and no supplemental support. Tr. 36,

---

<sup>6</sup> “Unit” as used throughout this decision will refer to the mining unit that was producing coal in the 2<sup>nd</sup> west panel.

<sup>7</sup> “Pins” is another term for bolts or roof bolts.

<sup>8</sup> Randy Ivey started in the mines in 1987 as an outby utility worker. He then worked loading for 4 years at Pyro, and started at Warrior in 1997. His experience includes power mover, belt mechanic, unit mechanic, greaser, and electrician. At the time of the hearing, he had been in the safety department for about 5 years. His certifications include surface and underground foreman and instructor, MET, electrician and dust sampling. Tr. 228-231.

<sup>9</sup> A “cut” is the part of a block of coal that is mined or cut out. “The swath of coal extracted by a continuous mining machine is called a ‘lift’ or ‘cut.’” *Excel Mining, LLC*, 34 FMSHRC 99, 102 (ALJ) (2012).

<sup>10</sup> “Sloughage” was described by Hardison as where the ribs start to rash, a crumbling off of the coal rib from the weight of the overburden. Tr. 33.

<sup>11</sup> A “pillar” is a column of coal normally left permanently to support the overlying roof strata in a mine. Advance mining usually results in a “room and pillar” type of array. For example, see the map at RX-C.

<sup>12</sup> “Overburden” is the material, of any nature, that overlies the coal deposits.

<sup>13</sup> “Top” is the mine roof; “Bad top” as used here refers to the condition of the mine roof.

37, 39; GX-2, p. 7. He wrote the intersection had high traffic with a lot of people working and they would have a lot of exposure to this area. GX-2, p. 4. This was in a high coal seam, and large rocks falling on someone would have a major impact, which could lead to permanently disabling or crippling injuries. Tr. 37; GX-2, p. 7. Hardison determined that injury was reasonably likely due to the entry width and the amount of exposure to miners. Tr. 39. He relied on his training and experience with roof falls to make this likelihood determination, as well as recollection of a previous accident at the Cardinal Mine eight years prior that led to a fatality. Tr. 36, 38. He also testified that entry widths and pillar sizes play a huge role in roof conditions, and as a result of these major safety factors, the widths are not allowed over 20-foot. Tr. 36, 37.

Hardison testified that any possible injury would be permanently disabling, but also testified “I guess I could have gone fatal.” He reached this conclusion by recollecting that miners in Western Kentucky had been killed by roof falls in the past, and that Warrior itself had seen a face boss killed in an accident involving falling rock. Tr. 38. Moreover, Hardison had met a miner recently who had been permanently crippled by falling rock in a mine in Elk Creek. Tr. 39.

Inspector Hardison made the likelihood and expected injury findings based on the following considerations: First, the roof conditions in the area; second, the entry width; and third, he noted that numerous miners traveled through the #7 entryway, both in shuttle cars and on foot. Based on these considerations, he concluded that there was an “extreme amount of exposure.” Tr. 39, 40. However, judging by the traffic in the area he had personally observed, he concluded two miners were likely to be affected by the condition, because while many miners would be temporarily exposed to the potential hazard, only two would be likely to occupy the entryway at any given time. Tr. 41.

Turning to negligence, Inspector Hardison assessed the level as “high”. He testified that high negligence was appropriate due to the obviousness of the condition, as there was no question that it was wide. Tr. 41, 42. He observed rib rashing and there was draw rock<sup>14</sup> everywhere, but the entry had not been closed off and was still being used. Tr. 42. Production continued instead of getting the area fixed to eliminate the hazard to miners. In his notes he wrote “There is bad broken up top, loose draw rock & ribs rashing badly”. GX-2, p. 4. Moreover, he concluded that with all the activity occurring near the entryway, including face bosses, the mine’s examiners, and foremen, management was aware of the condition or should have been aware of it. Tr. 43, 44; GX-2, p. 6. The area had been mined on the day shift or the second shift the previous day and went through the third shift. Tr. 42, 43. When Hardison made his imminent danger run the next morning, they were running coal and allowing men to use the entry. Tr. 42, 43. He stated “negligence is not only when it happens but it’s how long you’ve allowed this to happen.” Tr. 61, 62. He found there were no mitigating factors. Tr. 44. However, Hardison did testify he was unaware of wide entries in District 10 that had resulted in permanently disabling injuries. Tr. 60, 61.

---

<sup>14</sup> “Draw rock” is generally understood to refer to pieces of material in the roof or ribs that tend to fall easily when under pressure. *See, Excel Mining, LLC*, 33 FMSHRC 1421, 1423 n. 4 (2011)(ALJ). The term also refers to soft rock permeating coal seams, prone to falling after coal extraction.

Inspector Hardison testified that during his inspection the top looked bad in the #2 Unit, they were putting in a lot of roof support. Tr. 45. There was a lot of draw rock, clay veins<sup>15</sup> in the roof, slips<sup>16</sup> around the ribs, and some pretty tough roof on the whole Unit. Tr. 45, 46.

Rusty Vernon Smith<sup>17</sup> (“Smith”) testified for Respondent. Smith was the third shift Crew Leader, responsible for getting the unit ready for the next day including extending the belt line, pre-shifting the unit, and rock dusting. Tr. 252. He was working in the #2 Unit on the nonproducing third shift, the shift just prior to the day shift during which Hardison’s inspection was conducted. Tr. 255-257. Smith testified the roof conditions on the left side were better than average in his opinion. The ribs were loose with “regular typical sloughage”, and they were scaled.<sup>18</sup> Tr. 257, 258. At that time the height was worse on the left side of the Unit and the conditions encountered did not allow for full cuts to be taken. Tr. 257, 276.

Randy Ivey, a Warrior safety tech, testified for Respondent. Tr. 228. He also recorded notes regarding the inspection on May 9, 2011. RX-B. On the inspection with Inspector Hardison, he testified the only concern in the #2 Unit was the excessive width of the #7 entry. Tr. 239. When they took the second lift, the right side became wide in the advancing entry. RX-B. He further testified that 8-foot pins were installed as additional roof support to abate the citation. The cable bolts were put in the intersection and along the right side inby rib. Tr. 241, RX-B. The roof bolts looked good, the pin spacing was correct, he did not see any cracks or slips, the limestone roof thickness was more than adequate at 32 inches, and the overall roof conditions were very good. Tr. 240, 242, 243, RX-B. Ivey also opined that the width of the #7 entry did not appear to present a hazard to miners. Tr. 243. He did not notice any sloughage there and the top was good. Tr. 244. The area would have been mined on the second shift the day before; the third shift was not a production shift. Tr. 247.

---

<sup>15</sup> A “clay vein” is formed where the coal seam has been pulled apart and clay has been forced into the crevice. Tr. 71; AMERICAN GEOLOGICAL INSTITUTE, DICTIONARY OF MINING, MINERAL, AND RELATED TERMS 104 (2nd ed. 1996).

<sup>16</sup> A “slip” is a “[l]andslip, or subsiding mass of rock or clay in a quarry or pit; a minor landslide.” AMERICAN GEOLOGICAL INSTITUTE, DICTIONARY OF MINING, MINERAL, AND RELATED TERMS 514 (2nd ed. 1996). *See also*, Footnote 29.

<sup>17</sup> Smith first worked for Warrior in 2004 as a roof bolter and putting on belts for about 18 months. He then became a third shift Crew Leader, a position he held at the time of the hearing. He was responsible for getting the Unit ready for the next day. Tr. 251, 252. In 2005 he was certified as a Mine Foreman. He began in mining in 1985, performing all work except running a continuous miner. Tr. 253, 254.

<sup>18</sup> “Scaling” is the taking down of loose rock or coal that remains on the roof or ribs after mining.

Inspector Hardison finished his notes on May 9<sup>th</sup> with his observations of the left side of the #2 Unit. He had seen extremely bad top, lots of slips, gob<sup>19</sup> falling out when the miner cuts, heads<sup>20</sup> everywhere in the top, draw falling, ribs starting to rash at the top of the coal seam, coal ribs rashing, and what looked like a clay vein in the top. GX-2, pp. 13-15.

Inspector Hardison testified that on his way back to his office he thought about what he had seen that day. He recalled draw rock falling, heads everywhere in the roof, clay veins in the roof, and slips around the ribs. This caused him to seek guidance from his supervisor. Tr. 45-47.

Inspector Hardison issued Citation No. 8503299 to Warrior. The citation alleges a violation of 30 C.F.R. § 75.220(a)(1), "Roof control plan". The condition was described as follows:

There is an entry that has excessive width on #2 Unit. The #7 Entry is from 20 to 25 feet wide for a distance of 27 feet. The long diagonal distance from #7 right outby rib corner to #7 left inby rib corner is 45 feet 5 inches. This is a violation of the Company's Approved Roof Control Plan.

The safety standard provides:

Each mine operator shall 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. Additional measures shall be taken to protect persons if unusual hazards are encountered. 30 C.F.R. § 75.220(a)(1).

Inspector Hardison designated the violation as Significant and Substantial ("S&S"). He determined that injury was reasonably likely and could be reasonably expected to be permanently disabling to 2 persons. Hardison rated the negligence as high.

GX-1.

The Warrior Cardinal Mine Roof Control Plan in effect on May 9, 2011 was approved on March 9, 2011. In paragraph two of the cover letter of approval the minimum requirements were addressed. As pertinent here, the District Manager pointed out that:

Roof bolt spacing and widths of entries, rooms, and cross-cuts...are the maximum, and if during an inspection or investigation by MSHA, conditions warrant, the spacing and widths are subject to reduction.

---

<sup>19</sup> "Gob" is "[c]oal refuse left on the mine floor" AMERICAN GEOLOGICAL INSTITUTE, DICTIONARY OF MINING, MINERAL, AND RELATED TERMS 239 (2nd ed. 1996).

<sup>20</sup> "Heads" have been described as smooth round rocks, Tr. 72, and "big pieces of rock that hang from the roof". *Pyro Mining Co.*, 6 FMSHRC 1789, 1794 (1984) (ALJ). *See also*, footnote 30.

In the plan, supplementary roof support materials were specified. Also, under the heading of “Entry, Rooms, and Crosscuts Widths & Centers”:

No mining width, other than turnouts described in other areas of this plan, will exceed 20’.

Under the heading of “Safety Precautions for Roof Control Plan”:

1. This is the minimum Roof Control Plan and was formulated for normal roof conditions and the mining system described. Additional measures will be taken in accordance with 75.220 (a) (1) to protect persons if unusual hazards are encountered.
  
13. Unless using eight (8) fully grouted bolts, when the corners of pillars are cut off, (notches to the right or left), at least three bolts, a minimum of 12 inches longer than the bolt being used in the bolting cycle, will be installed midway of the notch area.

GX-3, pp. 5, 7, 8.

Inspector Hardison told Warrior representatives when issuing the citation that it involved a “Rule To Live By”,<sup>21</sup> and as a result, he would be recommending a specially assessed penalty. Tr. 56. He made no other recommendations concerning the #2 Unit. Tr. 56. Hardison issued no further citations on May 9<sup>th</sup>. Tr. 55-57.

After returning to the local MSHA district office, Hardison spoke with his supervisor, Mike Whitfield. Tr. 57. Hardison told Whitfield that he had some concerns regarding roof and rib conditions in the #2 Unit. Tr. 46. Whitfield in turn recommended that Hardison speak to another MSHA inspector, David Winebarger, a roof control specialist. Tr. 47. Hardison informed Winebarger about the roof and rib conditions that prompted him to speak to Whitfield. Tr. 47. Winebarger would travel to the Cardinal Mine to conduct an inspection the following day, May 10, 2011. Tr. 57, 67.

### Burden of Proof

In an enforcement action before the Commission, the Secretary bears the burden of proving any alleged violation. *Jim Walter Resources, Inc.*, 9 FMSHRC 903, 907 (May 1987). The burden imposed on the Secretary by the Mine Act is to prove alleged violations and related allegations such as gravity and negligence by a preponderance of the evidence. *Garden Creek Pocahontas Company*, 11 FMSHRC 2148, 2152 (Nov. 1989), citing *Consolidation Coal Co.*, 11 FMSHRC 966, 973 (June 1989); *Jim Walter Resources, Inc.*, 30 FMSHRC 872, 878 (Aug. 2008) (ALJ). Quoting the Supreme Court in *Concrete Pipe*, 508 U.S. 602, 622 (1993), the Commission observed that “[t]he burden of showing something by a ‘preponderance of the evidence,’ the

---

<sup>21</sup> The complete list of “Rules to Live By”, in three parts, is available to the public online at MSHA’s website: <http://www.msha.gov/focuson/RulestoLiveBy/RulestoLiveByI.asp>.

most common standard in the civil law, simply requires the trier of fact ‘to believe that the existence of a fact is more probable than its nonexistence.’” *RAG Cumberland Res. Corp.*, 22 FMSHRC 1066, 1070 (Sept. 2000), *aff’d*, 272 F.3d 590 (D.C. Cir 2001); *In re: Contests of Respirable Dust Sample Alteration Citations: Keystone Mining Corp.*, 17 FMSHRC 1819, 1838 (Nov. 1995), *aff’d sub nom. Secretary of Labor v. Keystone Coal Mining Corp.*, 151 F.3d 1096 (D.C. Cir. 1998).

### Significant and Substantial

A significant and substantial (“S&S”) violation is described in section 104(d) (1) of the Mine Act as a violation “of such nature as *could* significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard.” 30 U.S.C. § 814(d) (1) (emphasis added). The four-part test long applied to establish the S&S nature of a violation examines: “(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).

In addition to the *Mathies* criteria, the Commission has established that the S&S determination must be based on the particular facts surrounding the violation, *Texasgulf, Inc.*, 10 FMSHRC 498, 500 (Apr. 1988), and should be made assuming “continued normal mining operations.” *McCoy Elkhorn Coal Corp.*, 36 FMSHRC 1987, 1990-91 (Aug. 2014) (citing *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., Inc.*, 6 FMSHRC 1866, 1868 (August 1984); *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574-75 (July 1984). The Commission has also established that the operator may not rely on redundant safety measures to mitigate the likelihood of injury for S&S purposes. *Buck Creek Coal, Inc., v. FMSHRC* 52 F.3d 133 (7<sup>th</sup> Cir. 1995); *Brody Mining, LLC*, 37 FMSHRC 1687, 1691 (Aug. 2015).

The Commission has clarified that “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 2351 (October 5, 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)).

In 2014 the Seventh Circuit held that “A violation is significant and substantial if it *could* lead to some discrete hazard, the hazard was reasonably likely to result in injury, and the injury was reasonably likely to be reasonably serious.” *Peabody Midwest Mining, LLC v. FMSHRC* 762 F.3d 611, 616 (7<sup>th</sup> Cir. 2014) (emphasis added). The Circuit Court’s use of the term “could” is the same term embodied in section 104(d) (1) of the Act, set forth above. In *Knox Creek Coal Corp., v. Secretary of Labor*, 811 F.3d 148, 160 (4<sup>th</sup> Cir. 2016), the Circuit Court recognized that the *Mathies* test had been consistently applied by the Commission and ALJs for decades and adopted

by Federal Appellate Courts. However, in analyzing the second *Mathies* element which primarily accounted for the concern with the *likelihood* that a given violation may cause harm, the Court found “for a violation to contribute to a discrete safety hazard, it must be *at least somewhat likely* to result in harm.” *Id.*, at 162 (emphasis added). The Court reasoned that “the *second* prong of *Mathies* requires proof that the violation in question contributes to a ‘discrete safety hazard,’ which implicitly requires a showing that the violation is at least somewhat likely to result in harm.” *Id.*, at 613.

Recently, a majority of three Commissioners revisited the “reasonable likelihood” standard finding that “the second step requires a determination of whether, based upon the particular facts surrounding the violation, there exists a reasonable likelihood of the occurrence of the hazard against which the mandatory safety standard is directed”. *Sec’y of Labor v. Newtown Energy, Inc.*, 38 FMSHRC 2033, 2038 (Aug. 2016).<sup>22</sup> To establish this element, a clear description of the hazard at issue is required in order to determine whether the violation sufficiently contributed to that hazard. *Id.*

The roof control plan in effect specified the type and use of supplemental roof support materials, the maximum width of an entry, and as noted by the District Manager entry widths could be subject to reduction where warranted by conditions. It was contemplated that if the unusual hazard of a wide entry were encountered supplemental support would be required. Respondent has conceded the fact of the violation; therefore, the first element is established.

Respondent does not deny that the hazard contributed to and caused by the violation of its roof control plan was a potential roof fall or rib sloughage, but argues that this hazard was ultimately benign in nature. RRB p. 11. The abnormal conditions on the left side of the #2 Unit had been recognized and production was reduced to ten foot cut lengths with immediate roof bolting to ensure safe mining. Relying on the testimony and notes of Warrior employee Ivey, Respondent contends that the #7 entry roof conditions were very good, the roof bolts were tight and firm against the roof, there were no cracks or slips, the limestone roof thickness was more than adequate, and the overall roof in the entry was competent. RRB pp. 11, 12.

The Secretary contends the citation was properly designated S&S, since the excessive entry width created an area with inadequate roof support, contributing to the discrete safety hazard of a roof fall, and that roof falls pose one of the most serious hazards to miners. SPHB pp. 8, 11. The Secretary argues that Inspector Hardison’s credible testimony is entitled to substantial weight. *Id.* at 7. The entry was a working section traveled by miners on foot and in shuttle cars, and due to the weakened intersection there was a reasonable likelihood of injury. Further, with roof falls a leading cause of death in underground mines, such injury would be reasonably serious in nature. *Id.* at 10.

The discrete safety hazard contributed to by the violation of the roof control plan was a fall of roof. The particular facts established on this record are that in the #2 Unit the #7 entry had

---

<sup>22</sup> The Chairman and one Commissioner dissented from this interpretation on the basis that the Fourth Circuit Court in *Knox Creek* required at the second *Mathies* step only that the violation be shown to be “at least somewhat likely to result in harm”. *Newtown*, at 2052.

been mined 25 feet wide at an intersection, and proceeding inby came into compliance at 20 feet wide after a distance of about 27 feet. Under the mine's roof control plan this condition required the installation of additional roof support. At the time of the inspection, this additional roof support had not been installed. The measurements made at the time of the inspection clearly established that the entry was impermissibly wide and also defined the area affected by the measured distance the condition extended into the entryway.

This violation of the roof control plan did contribute to a measure of danger to safety in the active mining section. Inspector Hardison credibly testified that entry width and pillar size play a huge role in roof conditions; a wide entry increases the weight on the pillars from the overburden creating the potential for roof falls. In the notes he wrote that day, he memorialized his observations in the wide entry area of sloughage and rib rashing with crumbling off the side of the coal rib indicating the increased weight on the pillar, and broken up top with draw rock. Because of these major safety factors, mining widths are not allowed over 20-foot, with one exception not relevant here, under Warrior's roof control plan. The #7 entry was widest at the intersection, where numerous miners traveled on foot and in shuttle cars.

Commission Administrative Law Judges ("ALJs") have considered entry widths mined in excess of a mine's roof control plan. In *Mountain Edge Mining, Inc.*, 33FMSHRC 1290, 1295 (May 2011), Judge Moran found there was a discrete safety hazard, a measure of danger to safety, because exceeding the maximum mining width increased the likelihood of a roof fall and to conclude otherwise would mean that the roof control plan requirement was meaningless. Similarly, Judge Steele found that an entryway impermissibly wide by eight feet contributed to the potential of a roof fall. *Elk Run Coal Co.*, 36 FMSHRC 900, 915-16 (Apr. 2014). Recently, Judge Gill observed that roof control plans are tailored to the specific conditions that exist in each mine. He found that excessive cut widths contributed to the hazard of a roof fall. *Tri County Coal, LLC*, 37 FMSHRC 268, 288-89 (Feb. 2015). I agree with the reasoning of the judges in these cases.

The discrete safety hazard here is that miners would be exposed to the potential of a roof fall due to an inadequately supported, impermissibly wide roof during continued mining operations. The area had probably been mined on one or both shifts the day before and the condition had lasted through the third shift, which was a nonproducing maintenance shift. Therefore, the condition had lasted from the time the wide cut had been taken, through the remainder of that shift, throughout the following maintenance shift, and until the Inspector found it during the day shift on May 9<sup>th</sup>. That the area had otherwise been bolted according to the requirements for an entry of the correct width with bolts used in the bolting cycle does not change this determination. At the time of the citation, the safety precautions for additional measures in the form of added roof support had not been installed. Therefore, the failure to comply with the mine's roof control plan in an entry with excessive cut width did pose a discrete safety hazard to miners, that of a fall of roof. This was more than a mere technical violation of a mandatory safety standard.

The discrete safety hazard found here, a fall of roof, was reasonably likely to occur. Inspector Hardison credibly testified that the wide entry created the potential for roof falls. A wide entry roof fall had not occurred in that District, but Hardison relied on his experience with

roof falls, his training, and the history of other roof falls at Warrior and in Western Kentucky in making the likelihood determination.

In 1982 the Commission, referring to the Senate and House bills that ultimately became the 1969 Coal Act, noted that:

A prime motive in the enactment of the 1969 Coal Act was to “[i]mprove health and safety conditions and practices at underground coal mines” in order to prevent death and serious physical harm....One of the problems that greatly concerned Congress was the high fatality and injury rate due to roof falls. The legislative history is replete with references to roof falls as the prime cause of fatalities in underground mines. *Eastover Mining Co.*, 4 FMSHRC 1207, 1211 & n. 8 (Jul. 1982) (citations omitted).

The Commission has also noted:

Mine roofs are inherently dangerous and even good roof can fall without warning. *Consolidation Coal Company*, 6 FMSHRC 34, 37 (Jan. 1984).

And in a case where rib sloughage had increased the overall width of an entry weakening the roof and requiring installation of additional roof support, the Commission affirmed an ALJ’s finding that the violative roof conditions posed a high degree of danger to miners based on the present danger the miners faced in the area.<sup>23</sup> *Eastern Associated Coal Corp.*, 32 FMSHRC 1189, 1191-92, 1201 (Oct. 2010).

In the ALJ decisions cited *supra*, the judges found that impermissibly wide entries could lead to roof falls, leading in turn to permanently disabling or fatal injuries. *Mountain Edge Mining*, at 1295; *Elk Run Coal*, at 915-16; and *Tri County Coal*, at 288. Considering the critical role pillars play in supporting areas that have been mined, where an entry is too wide there would be less pillar mass where needed - along the ribs. Inspector Hardison’s testimony regarding the weight on the pillars along the ribs and the symptoms of rib sloughage and rashing is well taken. If these conditions were not dangerous, there would be little reason to establish maximum mining widths in roof control plans.

Therefore, considering the length of time the violative condition existed, and the credible evidence of rib rashing, sloughage, bad roof conditions, increased weight on the remaining pillar mass and the failure to install the required additional support until after the hazard was discovered, a roof fall was reasonably likely to occur.

Contrasting the third and fourth *Mathies* elements, which are primarily concerned with *gravity*, the seriousness of the expected harm, the Circuit Court in *Knox Creek* reasoned that at this stage of the analysis the existence of the hazard should be assumed; however, “evidence is still necessary to establish that the hazard is reasonably likely to result in serious injury.” *Knox*

---

<sup>23</sup> There was also “potting”, or material falling away from around existing roof bolts.

*Creek*, at 162, 164. At step three, the focus shifts to whether occurrence of the hazard would be reasonably likely to result in injury. *Newtown*, at 2037.

The Commission has determined that “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 2351 (October 5, 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 hazard established is that of a fall of roof and rock. As already set forth in this decision, roof falls are inherently dangerous and a serious risk to the health and safety of miners. Respondent argues that a roof fall was unlikely, relying on the testimony and notes of Safety Tech Ivey. Ivey stated he did not see any slips, sloughage or cracks in or adjacent to the #7 entry, the roof bolts looked good, the limestone roof thickness was more than adequate at 32 inches, the overall roof conditions were very good, and the entry did not appear to present a hazard to miners. However, this is not the correct standard to be applied to an impermissibly wide entry. Ivey’s opinion regarding the *appearance* of the roof conditions evades the *reasons* for the provisions in the mine’s roof control plan requiring additional support when an entry is mined too wide. The additional support is important to maintain the integrity of the roof in the overly wide entry in the absence of properly situated pillar mass that would provide the needed support.

Weighing the testimony of Ivey against that of Inspector Hardison, I am unable to assign any significant probative value to Ivey’s opinion. Instead, I credit Hardison’s more detailed and informed testimony. He credibly testified that entry widths and pillar sizes play a huge role in roof conditions, and a wide entry increases the potential for roof falls. He observed and recorded that there was bad, broken up top, loose draw rock everywhere, and ribs rashing badly. Impermissibly wide entries are a hazard to miners. Hardison recalled that miners in Western Kentucky had been permanently disabled and killed by falling rock and roof.

Ivey focused on the roof bolts already installed, the limestone thickness, and that he did not see cracks, slips or sloughage. To Ivey, the overall roof conditions were very good. But Hardison’s more detailed observations included loose draw rock, ribs rashing, and broken up top. To the conflicting evidence on sloughage, I credit Hardison’s observation of crumbling off of the side of the coal rib, rib rashing. These observations are more consistent with the testimony of Smith, that there was typical sloughage present on the shift just prior to the day shift. As to the roof conditions in the wide entry, Hardison specifically noted the broken up top and loose draw rock, whereas Ivey reported on the existing roof bolts and limestone thickness.

It is the greater risk of a fall of roof and rock presented by the failure to follow the mine’s own roof control plan that is at issue here. I find that injury was reasonably likely and could reasonably be expected to be at least permanently disabling. The Secretary has carried his burden by proving the seriousness of the hazard and the serious degree of harm that can be reasonably expected to occur. Therefore, the third and fourth elements are satisfied.

The above analysis, it should be noted, is also consistent with *Peabody*, wherein the Circuit Court found:

“...the question is not whether it is likely that the hazard...would have occurred; instead, the ALJ had to determine only whether, if the hazard occurred (regardless of likelihood), it was reasonably likely that a reasonably serious injury would result.”

*Peabody*, at 620.

In summary, I conclude that under either current Commission precedent or the Circuit Court decisions, the preponderance of the evidence found credible establishes it was likely that the roof fall hazard contributed to by the impermissibly wide entry was reasonably likely to result in injury causing events, and the injuries would be reasonably serious in nature. I find the violation of mandatory safety standard 30 C.F.R. § 75.220(a)(1) was S&S.

### Gravity

The term “gravity” is contained in Section 110(i) of the Mine Act in the context of factors to be considered by the Commission in assessing civil monetary penalties. Among those factors is “the gravity of the violation”. This is generally expressed as the degree of seriousness of the violation and is measured in terms of the likelihood of injury, the severity of such injury should it occur, the number of persons affected, and whether the violation is S&S. I have affirmed that the violation was S&S. The remainder of the gravity factors must be determined for every violation. The focus is on the *effect* of the safety hazard if it occurs.

Respondent argues that the gravity determinations should be reduced. The citation was a technical violation and not reasonably likely to result in injury. There would be little to no travel in the area as mining advanced in entry #7. RPHB pp. 23, 24; RRB pp. 10, 12.

The Secretary contends that the wide area was large enough to cover two miners and the hazard was likely to cause injury that would be reasonably serious in nature. Inspector Hardison’s designation of permanently disabling injury was not overstated. SPHB pp. 8, 10, 11.

Inspector Hardison determined that there was exposure of miners to the condition in the working section to the hazard. He determined that numerous miners travelled through the #7 entry, but based on the traffic he personally observed, he concluded that only two miners were likely to be affected by the hazard at any given time. That traffic in the future would be reduced as mining advanced does not change the conclusion that at a particular time two miners could be under the noncompliant roof.

The effect of a roof fall, should it occur, can be catastrophic. Hardison marked injury as reasonably likely. In his testimony, Hardison suggested he could have marked “fatal”. Of course, not all roof falls happen where miners are working; but miners under falling roof or large rock could suffer fatal injuries, as history tragically teaches. It follows that I agree with the seriousness of expected injury. Miners in that intersection at the wrong time would be exposed to

the risk of fall of extremely heavy material. Accordingly, I affirm the gravity determinations of the Inspector.

### Negligence

Section 110(i) of the Mine Act includes “negligence” as one of the six criteria the Commission is required to consider in assessing a penalty. The term is not defined in the Act, but over 30 years ago the Commission recognized that:

[e]ach mandatory standard... carries with it an accompanying duty of care to avoid violations of the standard, and an operator’s failure to meet the appropriate duty can lead to a finding of negligence if a violation of the standard occurred.

*A. H. Smith Stone Company*, 5 FMSHRC 13, 15 (Jan. 1983).

The Commission has also determined that to evaluate an operator’s negligence, consideration should be given to “what actions would have been taken under the same circumstances by a reasonably prudent person familiar with the mining industry, the relevant facts, and the protective purpose of the regulation.” *Jim Walter Resources*, 36 FMSHRC 1972, 1975 (Aug. 2014).

Under the divided penalty assessment authority mandated by Congress in the Act, it is MSHA that begins the process by *proposing* a monetary civil penalty based on the procedures contained in Part 100 of the Secretary’s regulations. Therein, the criterion of negligence is defined as:

Conduct, either by commission or omission, which falls below a standard of care established under the Mine Act to protect miners against the risks of harm. 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).

Negligence is further categorized into levels, including “no,” “low,” “moderate”, and “high” negligence, with the highest level being, “reckless disregard”. These levels are based on the degree of the operator’s knowledge of the violative condition or practice along with the existence or multiples of mitigating circumstances found to be present. The Secretary’s procedures are essentially formulaic and mechanical, reducing the level of negligence determined to a number of “points,” *Id.*, Table X, which are then added to other point evaluations to arrive at the calculated *proposed* penalty amount. 30 C.F.R. § 100.3, Tables I-XIV.

It is well settled that the Commission is not bound by the Secretary’s *proposed* penalties.

Judges may evaluate negligence from the starting point of a traditional negligence analysis rather than based upon the Part 100 definitions. Under such an analysis, an operator is negligent if it fails to meet the requisite standard of care—a standard of care that is high under the Mine Act...In making a negligence determination, a Judge is not limited to an evaluation of allegedly “mitigating” circumstances. Instead, the Judge may consider the totality of the circumstances holistically.

“[T]herefore a Commission Judge may find ‘high negligence’ in spite of mitigating circumstances or may find ‘moderate’ negligence without identifying mitigating circumstances.” *Brody Mining, LLC*, 37 FMSHRC 1687, 1701-02 (Aug. 2015). High negligence is considered an aggravated lack of care that is more than ordinary negligence.

*Id.*, at 1703, citing *Topper Coal Co.*, 20 FMSHRC 344, 350 (Apr. 1998).

Respondent contends the excessive width of entry #7 resulted from the mining machine operator simply taking a cut too far over on the right side of the entry. Respondent argues that the entry had properly installed roof bolts, and that the Secretary cannot show that mine management had knowledge of the condition. Respondent’s position is that the citation should be modified to low negligence based on significant evidence of mitigation of any risk due to the condition. RPHB at 29, 30.

The Secretary contends the wide entry had been mined on or before the second shift the day before, had existed through that shift, the third shift, and for hours during the shift on which it was found. Face bosses and the mine’s examiners would have been through the affected area and should have observed the condition, which was exceptionally obvious since it looked like a slice of pie. The wide entry should have been easily seen, but no steps were taken to correct the condition prior to the issuance of the citation. The Secretary also argues that no mitigating circumstances existed. SPHB pp. 12, 13.

Inspector Hardison determined the Respondent’s negligence in this citation to be “High.” Tr. 41, 42; GX-1. I agree.

The impermissibly wide entry was obvious. On his imminent danger run Inspector Hardison discovered the wide area; he credibly testified that there was no question it was wide. Warrior’s Safety Tech Ivey did not disagree. The measurements they took revealed a width of 25 feet at the intersection, and the entry continued to be too wide for 27 feet in by along the entryway. The condition had existed since at least the second shift the day before, long enough for numerous mine personnel to have travelled through the working area, including the mine’s own examiners, face bosses and foremen, and in particular the third shift Crew Leader. Other signs Hardison observed were broken up top, loose draw rock, and ribs rashing.

Respondent essentially argues that it did not have knowledge of the condition. The argument mischaracterizes the Secretary’s burden. Due to the obvious nature of the condition, the time it was in existence and the fact that mine personnel were in the area during the preceding third, nonproducing shift performing preparation work, the operator *should have*

*known* of the wide entry. Smith's testimony reveals there was significant activity in the area to extend belts, rock dust, and preshift the Unit. At the very least, the preshift examination should have found the hazard, recorded it, and had it corrected before the day shift accessed the area. Had the Inspector not discovered the violation, it is most likely the wide entry would have continued to exist uncorrected under continued normal mining operations. This failure to observe and correct a wide entry as prohibited in the mine's roof control plan falls well below the standard of care established to protect miners from harm. Under these facts and circumstances, a reasonably prudent person familiar with the mining industry, the relevant facts, and the protective purpose of the safety standard would have acted differently; closing off the area to install the required additional roof support and make the intersection and entryway safe for miners. I would also observe that the crew present at the time of the wide cut by the mining machine operator should have reported the error to their supervisor.

The duty of care to miners not addressed in the instant case was the installation of the required additional roof support called for in the mine's own roof control plan. Respondent argues for low negligence, but considerable mitigating circumstances were not present at the time of the citation. Indeed, I am unable to find any mitigating circumstance. I understand Respondent's position that good faith efforts were made to control the roof conditions in the #7 entry. And, Inspector Hardison cited no other violative condition that day. But this is not enough. Even if I found a mitigating circumstance, a reduction in the imputed negligence is not warranted. This is because all requirements for roof support must be followed to insure, to the extent possible, the safety of miners. The potential consequences are too dire to permit the operator to behave otherwise.

Respondent is probably correct when it offers that the violation resulted from the continuous mining machine operator simply taking a cut too far over to the right side of this particular entry. Because a mistake is unintentional does not mean it is benign. Roof falls are a highly dangerous risk to run in any context, and the "cut too far" in this case ran without additional support for about 27 feet. I affirm the designation of high negligence.

#### Specially Assessed Penalty

The Secretary's regulation, as currently constituted states:

Determination of penalty amount; special assessment.

- (a) MSHA may elect to waive the regular assessment under § 100.3 if it determines that conditions warrant a special assessment.
- (b) When MSHA determines that a special assessment is appropriate, the proposed penalty will be based on the six criteria set forth in § 100.3(a). All findings shall be in narrative form.

30 C.F.R. § 100.5.

In the Mine Act of 1977 the Secretary was authorized to issue regulations deemed appropriate to carry out any provision of the Act. 30 U.S.C. § 957. The Act provided for the

assessment of a civil penalty by the Secretary for violation of a mandatory health or safety standard. 30 U.S.C. § 820. On review of the special assessment regulation that had been established in 1978 and modified in 1982 the D. C. Circuit Court of Appeals found that the special assessment regulatory criteria were designed for “particularly serious or egregious violations.” *Coal Employment Project, et. al., v. Dole*, 889 F.2d 1127, 1129-30 (D.C. Cir. 1989). Although the regulation was revised in 2007 to remove reference to particular circumstances to be considered in special assessment reviews, the Circuit Court’s holding remains controlling precedent. At the time of the revision of the regulation in 2007, it was made clear that MSHA would have the discretion to determine which types of violations would be reviewed for special assessment. *See*, 71 FR 53054, 53063; 72 FR 13542, 13620-22.

If MSHA elects to waive regular assessment, the regulation specifically requires that all special assessment findings be in narrative form. 30 C.F.R. § 100.5(b). Therefore, the burden is on the Secretary to justify a proposed enhanced penalty under the standard announced by the D.C. Circuit Court that special assessments are reserved for “particularly serious or egregious violations.” *See, Oak Grove Resources, LLC*, 35 FMSHRC 3039, 3074 (Sep. 2013)(ALJ); *American Coal Company*, 35 FMSHRC 1774, 1824 (Jun. 2013)(ALJ); *American Coal Company*, 37 FMSHRC 1267, 1278-79 (Jun. 2015)(ALJ); *Traylor Mining, LLC*, 37 FMSHRC 1373, 1375 (Jun. 2015)(ALJ). This burden includes basing the proposed special assessment on the six penalty criteria in 30 C.F.R. § 100.3(a).

The Petition for the Assessment of the Civil Penalty in this case included the “Narrative Findings for a Special Assessment”. In the petition, this document was said to identify the reasons for a special assessment. However, it only set forth that MSHA had carefully evaluated the conditions cited and the Inspector’s information and evaluation, and that based on the six criteria of 30 C.F.R. § 100.3(a) Warrior would be assessed the enhanced penalty. The point calculations for either a regular or specially assessed penalty were not disclosed by the Secretary. The reasons supporting the decision to propose the enhanced penalty considering the facts and circumstances surrounding the violation, other than the boilerplate, were not provided in the Petition.

The Commission and its Judges are not bound by the Secretary’s Part 100 proposed penalty regulations. *Sellersburg Stone Company*, 5 FMSHRC 287, 291 (Mar. 1983), *aff’d* 736 F.2d 1147, 1151-52 (7<sup>th</sup> Cir. 1984); *Jim Walter Resources, Inc.*, 36 FMSHRC 1972, 1975 n. 4 (Aug. 2014); 29 C.F.R. § 2700.30(b). Those regulations apply only to the proposal of penalties by the Secretary and do not extend to the independent Commission. *Mach Mining, LLC, v. SOL*, 809 F.3d 1259 (D.C. Cir. 2016), citing *Brody Mining, LLC*, 37 FMSHRC 1687, 1701 (Aug. 2015). Commission Judges are accorded broad discretion in assessing civil penalties under the Mine Act, but this discretion is not unbounded and must reflect proper consideration of the six statutory penalty criteria set forth in section 110(i) and the deterrent purpose of the Act. *Hubb Corporation*, 22 FMSHRC 606, 611 (May 2000), citing *Westmoreland Coal Co.*, 8 FMSHRC 491, 492 (Apr. 1986) and 29 C.F.R. § 2700.30(a).

In determining penalty amounts the Commission must consider (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).

When considering the six statutory penalty criteria the Commission Judge must make findings and conclusions sufficient to give the operator and the regulated community appropriate notice of the bases for the assessed penalty and to provide a factual basis adequate to set forth a discernible path allowing for Commission or Court review. Where there is a substantial divergence from the Secretary's original penalty proposal, an explanation of the assessment is essential. *Douglas R. Rushford Trucking*, 22 FMSHRC 598, 600-01 (May 2000), citing *Sellersburg Stone Company* at 292-93; *Martin County Coal Corp.*, 28 FMSHRC 247, 261 (May 2000); *See also*, 29 C.F.R. § 2700.30(a).

Beyond the six statutory penalty criteria, the Commission Judge considers the potential deterrent effect of the penalty amounts assessed. In the Mine Act's legislative history, and numerous Commission and federal cases, deterrence is identified as a central tenet underlying the entire statutory scheme of imposing civil penalties. *Black Beauty Coal Co.*, 34 FMSHRC 1856, 1864-69 (Aug. 2012). On review of the legislative history of the Mine Act, the D.C. Circuit Court of Appeals determined:

From this history, we conclude that Congress was intent on assuring that the civil penalties provide an effective deterrent against all offenders and particularly against offenders with records of past violations.

*Coal Employment Project*, at 1133.

The penalty assessment findings and explanations of the Commission Judge need not be exhaustive, but must be adequate to show compliance with the requirement to consider and make findings on the statutory penalty criteria. *Cantera Green*, 22 FMSHRC 616, 621 (May 2000). All six of the criteria must be considered, but there is no requirement that equal weight be assigned to each one. *Thunder Basin Coal Company*, 19 FMSHRC 1495, 1503 (Sep. 1997). According to the circumstances of the case, there is discretion to assign different weights to the factors, and negligence and gravity may be weighed more heavily than the other four criteria. *Lopke Quarries, Inc.*, 23 FMSHRC 705, 713 (Jul. 2001); *Spartan Mining Company, Inc.*, 30 FMSHRC 699, 724-25 (Aug. 2008); *Musser Engineering, Inc.*, 32 FMSHRC 1257, 1289 (Oct. 2010).

Respondent argues the Secretary did not justify his deviation from the section 100.3 civil penalty tables in proposing a specially assessed penalty.

The Secretary contends the special assessment of \$30,200 is consistent with Congressional intent that penalties be an effective deterrent against future violations. Respondent has an extensive history of violations that includes violations of the same safety standard. Respondent is a large producer of coal, and there is no evidence that the penalty would adversely affect its ability to stay in business. In effect, the Secretary also contends that the gravity and negligence determinations of the Inspector were proper. SPHB, pp. 13-16.

The testimony of Inspector Hardison included his notice to mine management that he would recommend a specially assessed penalty because the violation involved a “rule to live by”, referring to the MSHA publication available to the industry and the public on the Administration’s website. The publication is an initiative by MSHA focused on 24 safety standards that were frequently cited in fatal accident investigations and were included as a result of MSHA’s analysis of conditions and practices that had contributed to 589 deaths. Among those fatalities were those that resulted from falling roof rock or rib in coal mines. The roof support safety standard cited in the instant case is one of the 24, and one of the listed conditions leading to fatalities is “Failure to install supplemental support...when adverse roof conditions are encountered.” Through outreach and education coal mine operators would be encouraged to identify and correct the hazardous conditions with the goal of reducing or preventing fatalities and serious accidents. MSHA enforcement would be directed toward confirming that violations related to these standards are not present in mines.

This non-regulatory issue, as important as it is for the information and guidance offered to mine operators, does not contain any notice to the mining community that a violation of one of the listed safety standards would result in a recommendation for or implementation of a specially assessed proposed penalty. I note, in particular, that while the Inspector testified to his recommendation for a special assessment, which may have been accepted by MSHA management, there was no information provided as to what actually lead to the amount proposed. The facts and circumstances relied upon and the reasons for proposing the enhanced amount are completely opaque to review by the undersigned. Clearly, non-regulatory issues of the Administration intended to improve safety, which by their nature primarily represent general guidance, cannot provide a *basis* for a proposed special assessment in the context of specific facts and circumstances in a particular case. While I agree that the Secretary did not justify his deviation from the section 100.3 penalty tables, this does not matter when independently considering the evidence to finally assess the penalty under the statutory criteria. Further, even if the reasons for the proposed assessment were available for review, which would at least provide some due process at the initial level of adjudication, I am not required to take such reasons into consideration in making a decision on the amount of the penalty to be charged.

*The operator’s history of previous violations.*

In the fifteen months prior to the issuance of Citation No. 8503299, Respondent was issued 629 citations at its Cardinal mine, 24 of which were violations of 30 C.F.R. § 75.220(a)(1). SPHB p. 14; GX-10. This is a significant history of violations. However, Warrior may have 240 production days each calendar year, about 300 in a 15-month period. Tr. 167. Therefore, when viewed against the very large size of this mine, the overall number and average rate of citations for either roof control plan violations or all violations during the 15-month period, an *egregious* violation history is not suggested. I conclude this is not an aggravating factor.

*The appropriateness of such penalty to the size of the business of the operator charged.*

At the time of the issuance of the citation, Respondent’s Cardinal mine operated five (5) production units and ranked second among all non-longwall underground coal mines in terms of

total coal production in the United States. Tr. 138; RPHB p. 3. In the year prior to this citation, 2010, the mine produced 5,831,599 tons of coal. JX-1. The very large size of this business weighs against any reduction in the penalty to be assessed. *See, Thunder Basin Coal Company*, 19 FMSHRC 1495, 1502 (Sep. 1997).

*Whether the operator was negligent.*

I have found the operator's negligence was "high". This is because there was shown an aggravated lack of care beyond "ordinary" negligence. However, there was no more than high negligence; the facts and circumstances do not establish, and the Inspector did not determine, a reckless disregard for the safety of miners. While mine management should have known of the wide cut, because it was obvious, actual knowledge is not shown on this record. The wide entry without supplemental support existed for about the time of two shifts, not an extensive period of time. In this case, there was not an extreme disregard of the duty of care owed to miners. While I do find high negligence, the degree was not *very high* or *particularly egregious*.

*The effect on the operator's ability to continue in business.*

As the Secretary notes in his brief, the Respondent provided no evidence at hearing that the penalty proposed would adversely affect its ability to continue in business. SPHB p. 15. The production of this mine, as noted above, would support a finding that the Secretary's proposed penalty would not impair the viability of the business. The lack of effect on Respondent's ability to continue in business also weighs against reduction in the penalty to be assessed.

*The gravity of the violation.*

I have found the violation to be S&S. The failure to install the required supplemental roof support when the wide entry was cut was serious. This was no mere technical violation, the wide roof area lacking properly positioned pillar support with evidence of rib rashing, sloughage, broken up top, and loose draw rock presented a dangerous situation. This represents an aggravating factor, weighing in favor of an enhanced penalty. However, while serious, the evidence found credible does not support a finding that the gravity was *particularly serious*.

*The demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.*

The Respondent's good faith is not disputed by the Secretary. SPHB p. 16. I find the Respondent moved quickly to support the roof along the rib where the wide cut was taken to abate the violation. This criterion is found to weigh in favor of the Respondent.

Because this case involves roof control, of great importance to the safety of miners, I weigh the factors of gravity and negligence more heavily than the other factors. *Lopke Quarries, Inc.*, at 713. Also, the combined factors of operator size and the ability to remain in business would support an enhanced penalty. The remaining two factors are either not aggravating or weigh in favor of Respondent. As to gravity and negligence, I find that neither meets the requirement of "particularly serious or egregious". *Coal Employment Project*, at 1129.

The discretion of a Commission ALJ to assess the penalty *de novo* is bounded by the statutory criteria and the deterrent purpose of the Mine Act. *Sellersburg* at 292. The weighted analysis above supports an enhanced penalty, and I do consider the deterrent effect of the penalty. Considering the size and production of this mine, it is important to provide an incentive to the operator to place a higher priority on adherence to its roof control plan. I find that an enhanced penalty of \$20,750 is consistent with the facts and circumstances established on this record, and would adequately serve as a deterrent.

### May 10, 2011

On May 10, 2011 Inspector David William Winebarger<sup>24</sup> (“Inspector Winebarger” or “Winebarger”) traveled to the Cardinal Mine to conduct an inspection. During the inspection and at the close-out meeting Winebarger was accompanied by MSHA Inspector Tony Sims (“Sims”). GX-5, p. 2; Tr. 155, 156, 183, 184, 189-191, 293. He had been asked to go to the mine the afternoon before, when he was briefed on the conditions in the #2 Unit by Inspector Hardison. Tr. 47, 67. Hardison wanted Winebarger, on behalf of the roof control department, to take a look at the conditions the mine was experiencing. Tr. 110. Winebarger wrote extensive notes that day, beginning with his arrival at the mine at 0730, the time of the day shift. GX-5, pp. 1, 2. In his testimony, he frequently referred to his notes; the hearing was held almost 4 years after the inspection.<sup>25</sup> He first examined the #2 Unit pre-shift and on-shift records and maps above ground. He talked to Bruce Morris<sup>26</sup> (“Morris”) and Tommy Kessinger<sup>27</sup> (“Kessinger”) about conditions on the #2 Unit. Tr. 67, 111. Morris and Kessinger reported they had been in this panel for three production days, and that the left side was not as good as the right side. GX-5, pp. 1-3. Morris and Kessinger said they would travel with Winebarger to the #2 Unit. Tr. 111.

---

<sup>24</sup> David Winebarger began work for MSHA in February of 2007. Tr. 64. Prior to joining MSHA Winebarger began work in the coal mine industry in 1971. Tr. 65. He became a mine foreman in 1975, and worked as a fire boss and foreman until 1978. Tr. 65. He also worked as a drill operator, mechanic, mine foreman and mining coordinator until 2003. Tr. 66. At the time of his inspection of the Cardinal Mine on May 10, 2011, Inspector Winebarger was a roof control specialist. Tr. 65.

<sup>25</sup> Due to the passage of this much time, and to provide clarity regarding events of this day, the testimony and notes of the witnesses, where available, will be considered together.

<sup>26</sup> Bruce Morris has been Warrior Coal’s Safety Director for the Cardinal Mine since 2009. Tr. 165. Morris’s mining career began in 1981, and his experience has “run the gamut of jobs within the mining industry.” Tr. 165-6. Morris is certified as a mine foreman, MET and MET Instructor, and also certified to run respirable dust. Tr. 166-7.

<sup>27</sup> Tommy Kessinger was Cardinal’s General Mine Superintendent. Tr. 142.

## The Imminent Danger Run

The #2 Unit consisted of entries #1 through #5 on the left and entries #6 through #9 on the right.<sup>28</sup> Tr. 68, 111, 114; GX-5, p. 3. To begin the imminent danger run Winebarger, Morris and Kessinger came in on the supply road, and then walked straight ahead down the #4 entry to the face. Tr. 68, 69, 111; GX-5, pp. 3, 4. When the group arrived, they were not mining coal. Tr. 89, 112.

In the #4 entry inby the spad 3+10 crosscut there were cavities with a roof height of 10 to 11 feet. GX-5, p. 4. There was a slip<sup>29</sup> running across the entry causing the rib and rock above it to be loose. Tr. 69; GX-5, pp. 4, 11. The loose rib had caused approximately 4 feet of chunky rock to fall out from above the coal during mining. Tr. 69; GX-5, pp. 4, 11, 14. There were also 2 unsupported heads<sup>30</sup> that were broken and cracked and appeared to be loose by the gaps around them. Tr. 72, 73; GX-5, pp. 4, 11. Although the mining height was typically 7 feet, with the rock falling out above the coal the entry and crosscut heights were 10 to 11 feet. Tr. 69, 70. Looking at the map, Winebarger testified that a slip went almost all the way across the section. Tr. 70, 71; GX-5, p. 42. In the #4 entry the slips in the roof were supported, but in the ribs they were not. Tr. 71. Winebarger observed clay veins in the entry; since the roof or coal was not consolidated, the areas around the clay vein were loose and not sturdy. He stated if a clay vein goes into a pillar, the pillar support would be weakened. Tr. 71, 72. At this location a citation<sup>31</sup> was issued to Morris. Kessinger scaled some of the corner of the loose rib down. GX-5, p. 5.

From the #4 entry the imminent danger run continued to the left side through the last open crosscut between the #4 and #3 entries. Tr. 74. There Winebarger found a lot of loose stack rock<sup>32</sup> in the center of the crosscut that had been bolted up. There was a cavity in the crosscut that had been created by mining. Tr. 75, 76; GX-5, pp. 6, 11. Stack rock had been supported in the roof but not in the ribs. There were loose heads in the ribs, but they were not broken. Tr. 76.

The imminent danger run moved on to the left to the #3 entry. There Inspector Winebarger saw 2 roof bolter operators placing a bolt at the left inby corner where there was an overhanging rock rib right next to the operator on the return side. Tr. 76, GX-5, p. 6. Winebarger

---

<sup>28</sup> Entries #1 through #9 of this section of the mine are shown by the marked up map in Winebarger's notes. GX-5, p. 42.

<sup>29</sup> A "slip" was described by Winebarger as a polished rock to which the limestone surrounding it does not adhere and falls off from around it. He testified unsupported slips could fall at any time. Tr. 70.

<sup>30</sup> Winebarger described "heads" as heavy, round, smooth, hard rocks of any size that are hard to support and can fall at any time. Tr. 72.

<sup>31</sup> This citation is not at issue in the instant case.

<sup>32</sup> "Stack rock" was described by Winebarger as thinly laminated shale that is not solid and flakes off, looking like slices of bread or the side of a deck of cards. Tr. 75, 76.

immediately withdrew the operators outby and an imminent danger order was issued to Morris and Kessinger. Tr. 77, GX-5, p. 6. Winebarger did not speak to the bolter operators about any previous efforts they had made on the condition. Tr. 116. At page 13 of his notes, Winebarger's drawing shows where the bolter was and the site of the imminent danger order. Tr. 85, GX-5, p. 13.

Inspector Winebarger did not remain in the #3 entry because he heard the top working, taking weight, over towards the #2 and #1 entries. He testified you could hear the fall of roof with rocks dropping, dribbling out and there was flaking and popping. Tr. 77; GX-5, p.7. In the #2 to #1 crosscut he found a pile of rocks that had fallen out where the top was working. One rock measured 3'x4'x18" thick and had been rock dusted; there were small rocks also. Tr. 78; GX-5, p. 7. There was also a slip running across the crosscut. GX-5, p. 12. While in this crosscut Winebarger was concerned because the top was still dribbling out over towards the #3 entry where he had issued the imminent danger order and the operators had been removed. Tr. 78, 79; GX-5, p. 7. After again looking at the roof there he went back toward the #2 entry. Tr. 79.

In the #3 to #2 crosscut there were 3 loose ribs with the corners broken up and rashed off. The roof was loose and working and there was a head in the middle of the crosscut. Tr. 79, GX-5, p. 12. In the #2 entry there was a loose and cracked rib on the left, inby the last open crosscut towards the face. Tr. 79. The rock above the coal was busted up, looking like slices of bread laying down flat. The right rib corner was also loose; there was no support in the ribs. Tr. 80; GX-5, pp. 7, 8, 12.

The imminent danger run continued to the #1 entry through the #2 to #1 crosscut Winebarger had already inspected. He found a rib on the left that was loose and busted up through to the outby crosscut. The rock above the coal was chunky looking and the top was starting to work a little and fall out. Tr. 80; GX-5, pp. 8, 12. There was a slip present that was partially unbolted; this appeared to be the same slip that crossed the Unit. Tr. 81, GX-5, pp. 8, 12, 42. The roof was supported, but the ribs were not. Tr. 81.

From the #1 entry Winebarger went back towards the #3 entry, and noted that the #2 to #1 crosscut was still dribbling some at the slip. GX-5, pp. 8, 9. It was here that Kessinger told Winebarger of the decision to move the left side of the Unit out. Kessinger had the entire left side flagged and barricaded off from the #1 through the #5 entries. GX-5, p. 9. Winebarger testified that the left side was shut down because it was getting progressively worse and could not be fixed; they did not have equipment such as an angle bolter to support the ribs. Tr. 83-85. Kessinger asked Winebarger if they could mine the right side until the 3<sup>rd</sup> shift. *Id.*

Winebarger returned to the #3 entry where an outby rib corner was loose and when pulled measured 12 feet long. Tr. 82, GX-5, pp. 10, 13. The rock where he had issued the imminent danger order was scaled down and measured 5' long, 3' thick and 2' wide. Tr. 82; GX-5, p. 29.

The imminent danger run then started towards the right side of the Unit, and when traveling through entry #5 Winebarger found the whole outby right-hand rib had flaked off. Tr. 82, 83. A worker was scaling the #5 to #6 crosscut, and at least 2 scoop buckets of rock and coal had been scaled off in that one crosscut. Tr. 83. In the #7 entry a half cut was unbolted at spad

4+10 indicating this unit had been running before he got there. GX-5, p. 15. In this entry a couple of ribs were pulled off and there were loose corners. Tr. 83, GX-5, p. 42. In entry #8 loose corners had been pulled, and one rock measured 3'x4'x8". Tr. 83, GX-5, p. 16. In entries #7, #8, and #9 he found the slip that was running across the Unit. Tr. 83, 84; GX-5, p. 42. Winebarger testified that the right side was not as bad as the left side. Tr. 83, 84. Kessinger asked if he could run the right side, and Winebarger determined it would be safe. GX-5, p. 17.

Inspector Winebarger testified that the conditions he found had existed from day one when they moved into the panel. He testified that according to Kessinger, the crosscuts between entries #1 and #2 and between #2 and #3 had been holed through 16 hours earlier. Tr. 84. He further testified that while he was there, the conditions continued to get worse. Tr. 132.

Inspector Winebarger's notes continued after the imminent danger run across the Unit through entry #9. For each citation and order he wrote down the determinations he had made. GX-5, pp. 18-36. He told Morris and Kessinger again what was issued. GX-5, p. 37. His notes also continued after traveling to the surface to do the paperwork for the citations that were issued. There a discussion took place with a number of mine employees including Morris, Kessinger and Anderson. Anderson objected to Winebarger that they had already made the decision to move the Unit before Winebarger went in, but Kessinger said that was the reason he had traveled with the Inspector, to make that decision. GX-5, pp. 37, 38. The conference became confrontational to the point that Winebarger could not do his work. Sims stated it was time to leave. GX-5, p. 40. Winebarger had to go to his office to write out the citations and hand deliver them later that day to Morris at the mine. GX-5, pp. 40, 41.

### **Order No. 8498873**

#### Summary of the Evidence

After observing the conditions in the #4 entry and the #4 to #3 crosscut, the imminent danger run went to the #3 entry where at spad 3+10 Inspector Winebarger saw 2 roof bolter operators replacing a loose bolt. Tr. 76, 90. In the left inby corner there was an overhanging rock rib right next to the operator on the return side. GX-5, p. 6. Winebarger testified the two roof bolter operators were working alongside, adjacent to a loose overhanging rock rib around 11 foot high that would fall and crush them. Tr. 91. In his notes he made a sketch of the #3 entry, showing the location of the imminent danger rock. GX-5, p. 13.<sup>33</sup> They were replacing a loose bolt in the roof; they were not trying to support the loose rock and did not have the machinery to accomplish support. Tr. 91, 92. The roof in the area was 10 to 11 foot high; the rock was 3 feet above the coal seam. Tr. 92, 93. Winebarger thought it was loose because it had a crack in it. Tr. 93. Winebarger, Morris, and Kessinger removed the two bolters from the area and Winebarger verbally issued the imminent danger order to Morris and Kessinger. Tr. 77, 78, 91-93; GX-5, pp. 29, 30; GX-6.

---

<sup>33</sup> Respondent also submitted a sketch, see Exhibit RX-K.

He did not remain in the #3 entry because he heard the top working<sup>34</sup> over towards the #1 entry and the miners had been removed and were no longer in imminent danger. Tr. 77, 93. The imminent danger run went on to the #2 and #1 entries, including the crosscuts. When he returned to the #3 entry the rock he had observed was down. He measured it as 5' long, 3' thick and 2' wide. Tr. 93. He did not know how the rock was removed. Tr. 93, 117.

Bruce Morris testified for the Respondent. May 9, 2011 was the second day of mining in the 2nd west panel. The Unit had moved from the first west panel where there were similar roof and rib conditions. Tr. 169, 170, 224. The left side of the working unit consisted of entries 1 through 5, and the right side 6 through 9. Tr. 171, 172. Morris testified the next day, May 10, 2011, that he arrived at the mine at around 5:30 am and joined Eric Anderson and Tommy Kessinger in the Foreman's office. They were talking about the #2 Unit. Tr. 181, 182. The third shift Foreman had called out some concerns about the #2 Unit; there had been problems cutting coal with the top coming out and some rib sloughage. Tr. 182, 183. At about 6:00 to 6:30 Anderson said to Kessinger he was going down to evaluate the need to move the unit and Morris said he would go along. Tr. 182. When MSHA Inspectors Winebarger and Sims arrived they talked with Morris, Kessinger, and Anderson about the #2 Unit and said they were going there. Tr. 183, 184. Morris said he and Kessinger were going there, so all of them would go together. Tr. 184. They travelled underground with the Inspectors at around 8:30 and got on the Unit at about 9:20. Tr. 184. Morris also created notes regarding the inspection on May 10<sup>th</sup>.<sup>35</sup> Tr. 180, 181; RX-A.

Morris testified no coal was being produced because Jesse Campbell, the day shift Foreman had shut the Unit down at about 8:50 to assess and deal with the conditions. Tr. 184, 185. He traveled first to entry #4, and Winebarger was also there. Sims went to the left side. Tr. 185. After Morris and Kessinger scaled an outby right rib in the #3 entry, Kessinger left to observe the right side of the Unit. RX-A, p. 1, # 6-8. In the last opening of entry #3 the roof bolter was in the intersection partially inby toward the face. Tr. 187-189; RX-E. They were spotting a pin in the roof next to the left inby rib. Tr. 186, RX-A, p. 1, # 9. When one of the operators started to install a pin, Morris noticed a piece of rock roof move. The rock was in the corner of the rib in the roof and had a visible crack in it that he thought needed to be addressed; he was concerned because he thought it was loose. Tr. 187, 219, 220; RX-E. He told the operator to move away from the area and scale the loose material down. Tr. 187; RX-A, p. 1, # 10. The miners told him they had tried to pull on it but could not get it down. Tr. 187. He recalled that neither Inspector was with him. Tr. 186, 187. They tried again, according to Morris, but were unsuccessful. Tr. 189. Morris then went on towards entries #2 and #1, and met with the Inspectors. Tr. 189. Up to this point no imminent danger order had been issued. The Inspectors had already passed through the #3 entry to get to where they met and talked. Tr. 189, 190. Morris also testified that Sims saw the rock and had the pinner stop and move, and Winebarger issued the imminent danger order. Tr. 189-191.

---

<sup>34</sup> "Top working" refers to the roof taking weight. Tr. 77.

<sup>35</sup> The notes are typewritten, unsigned, and bear the date of May 10, 2011.

Morris was asked to get Kessinger who was on the right side of the Unit. Tr. 190, 191. He found Kessinger and they discussed whether to continue or to move out of the Unit. Tr. 191, 192. They decided to move the left side of the Unit. Tr. 192, 193. When they got back to the Inspectors, they were issuing an imminent danger order. Tr. 194. Morris and Kessinger told the Inspectors they wanted to move the Unit, and started flagging out and endangering off that side of the Unit to keep people from going there. Tr. 194. Morris testified that the overhanging rock had been knocked down with a mining machine. Tr. 195. Since the machine had been needed to cut it down, Morris stated he had probably been incorrect in his evaluation of the rock. Tr. 195, 196. He also testified that the roof height in the left side was 10 to 11 feet in spots, and that abnormal mine heights are not a hazard if the roof is good and the ribs are fine. Tr. 172.

Eric Keith Anderson<sup>36</sup> (“Anderson”) testified for Respondent and also wrote notes<sup>37</sup> regarding the #2 Unit on May 10, 2011. At 9:04 am Jesse Campbell called and informed him that he was shutting the #2 Unit down due to rib pins<sup>38</sup> being too far from the ribs in several places. Tr. 150; RX-G. He recalled that abatement for the imminent danger order was to scale down the particular rib. Tr. 156. He did not speak to the Inspectors prior to the close-out of the inspection. Tr. 144.

Jesse Wilburn Campbell<sup>39</sup> (“Campbell”) testified for Respondent. On May 10, 2011 he was working as an assistant mine foreman and was on the #2 Unit. Tr. 281, 283-84. He was on the Unit at about 7:50 am and had two cribs built at the #7 wide entry from the day before. He traversed all of the entries, and evaluated the left side. Tr. 286-289. There were some loose ribs, pinning that needed attention and some rib rash. He shut the Unit down at about 8:50. Tr. 288, 290, RX-F. Prior to MSHA’s arrival, they were correcting things that needed to be done. Tr. 300. He had two miners pulling ribs down with pry bars, one miner use a scoop for rib sloughage, and other miners spotting pins and watching the pinner. Tr. 291. The MSHA Inspectors arrived at 9:20. Tr. 290, 291. He had men spotting pins in the #3 entry. Tr. 291. He recalled he told the Inspectors he had shut the Unit down. He was involved in abatement of the imminent danger order. Tr. 293. Since they could not get the rock with a bar, he called the miner man to get it down. Tr. 293, 294.

---

<sup>36</sup> Anderson holds a B.S. Degree in Engineering and Mines. At the time of the hearing he was General Manager of Operations at a sister operation of Warrior Coal. He had held the same position at Warrior beginning in January 2005. Tr. 136. After graduating in 1996 he served in various roles, mostly in management for 15 of his 20 years of mining experience. Tr. 139, 140.

<sup>37</sup> The notes at RX-G are handwritten, dated and signed.

<sup>38</sup> Rib pins are bolts located in the roof closest to the rib. Tr. 160.

<sup>39</sup> Campbell has been a Warrior Coal employee since 1996. His experience there includes work as a lead man, face boss/section foreman, assistant mine foreman, and outby mine foreman. Tr. 278, 279. His career in mining began in 1972 as a laborer, and after he got foreman papers he worked as a section foreman. Tr. 281. Of his 44 years in mining, at least 39 have been in management. Tr. 281, 282.

## The Mine Act

Section 107(a) provides that:

If, upon any inspection or investigation of a coal or other mine which is subject to this Act, an authorized representative of the Secretary finds that an imminent danger exists, such representative shall determine the extent of the area of such mine throughout which the danger exists, and issue an order requiring the operator of such mine to cause all persons, except those referred to in section 104(c), to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such imminent danger and the conditions or practices which caused such imminent danger no longer exist. The issuance of an order under this subsection shall not preclude the issuance of a citation under section 104 or the proposing of a penalty under section 110.

30 U.S.C. § 817(a).

Section 104(c) provides that:

The following persons shall not be required to be withdrawn from, or prohibited from entering, any area of the coal or other mine subject to an order issued under this section:

- (1) any person whose presence in such area is necessary, in the judgment of the operator or an authorized representative of the Secretary, to eliminate the condition described in the order;
- (2) any public official whose official duties require him to enter such area;
- (3) any representative of the miners in such mine who is, in the judgment of the operator or an authorized representative of the Secretary, qualified to make such mine examinations or who is accompanied by such a person and whose presence in such area is necessary for the investigation of the conditions described in the order; and
- (4) any consultant to any of the foregoing.

30 U.S.C. § 814(c).

## The 107(a) Order

The Condition or Practice described in Order Number 8498873, in pertinent part, was:

Two roof bolter operators were observed installing a roof bolt in the roof in the # 3 entry on MMU-002, 2<sup>nd</sup> west panel. A loose rib was observed on the inby left

corner right adjacent to the roof bolter operator on the return side of the bolter. The 2 miners were removed from the area and the loose rib scaled down. The loose rock that was pulled down measures up to 5 ft. in length up to 3 ft. thick and 2 ft. in width. The cavity height in this entry measures 11ft. 4 inches where the roof bolter operators were observed.

GX-6.

### Contentions

Respondent contends that Bruce Morris directed the roof bolter operators to remove the rock before the order was issued, and the presence of those miners in the area was necessary to eliminate the hazard. Further, the rock did not constitute an imminent danger since it was not loose but firmly affixed to the coal rib and pillar requiring a continuous mining machine to rip it down. The Inspector did not speak to the bolter operators about the rock or any efforts to remove it. In addition, MSHA lacked the authority to remove the bolter operators from the area, the Inspector abused his discretion, and the 107(a) order should be vacated. RPHB, pp. 56-59.

The Secretary contends that when in the #3 entry on the imminent danger run Inspector Winebarger observed an overhanging rock 11 feet above the floor next to roof bolter operators who were replacing a rib bolt. Further, the bolter operators were not attempting to either support or remove the rock. Winebarger reasonably believed the rock was loose and likely to fall because it was visibly cracked and had no support beneath it. In addition, when Morris saw the rock he also thought the rock was loose. The Secretary argues that it was Winebarger who withdrew the miners to safety, and the 107(a) order was not an abuse of discretion. SPHB, pp. 17, 20, 21. Also, the Inspector was not required to interview the bolter operators prior to issuing the order. SRB, p. 5

### Findings and Conclusions

Inspector Winebarger along with Morris and Kessinger traveled to the #2 Unit and arrived on the left side at the #4 entry, where the imminent danger run began. They were not mining coal, because Assistant Mine Foreman Campbell had just stopped the mining due to rib rash, loose ribs, and some pinning that needed to be done. From the #4 entry the imminent danger run proceeded to the #3 entry.

It is at this point the testimony of Inspector Winebarger and that of Respondent's Morris is not in agreement. Winebarger testified that Morris and Kessinger were with him when he saw the 2 roof bolter operators replacing a loose roof bolt next to the rib where there was an overhanging rock about 11 feet off the floor that could fall and crush the operator working adjacent to that rib. But Morris testified that when he went into the #3 entry, Winebarger was not there, the Inspector having already moved through the entry and on to the entries #2 and #1 area. Morris testified that it was he who saw the roof bolter operators spotting a pin next to the left inby rib and also saw the rock in the corner of the rib that needed to be addressed. Further, it was he who told the operators to move away from the area, and he also told them to scale the loose material down.

I find Inspector Winebarger's version of the sequence of events to be credible. This is because it is more consistent with the discovery of an apparently dangerous condition during an imminent danger run. The order of the events was also recorded in his notes, supporting his recollections in testimony. GX-5, pp. 3-17. Winebarger testified that he, Morris and Kessinger together removed the miners from the area and he verbally issued the imminent danger order to Morris and Kessinger.

The testimony of Morris would have one believe the Inspector had been through the #3 entry, but this is contradicted by his testimony that he saw the same thing Winebarger saw: roof bolter operators installing a roof bolt next to a rib where there was an overhanging and apparently loose large rock above them. Obviously, if Winebarger had been there and removed the miners from the area, Morris could not have been the person who first discovered the apparently dangerous situation. I find Inspector Winebarger's testimony that both he and Morris were in the #3 entry at the same time to be credible; they saw the same activity occurring at the same place with the same apparently loose, unsupported rock overhanging the working bolter operator. They both decided the miners must be removed from the area. This is when the imminent danger order and withdrawal occurred and was in effect, rather than at some time later and in a different area.

It is credible that Morris subsequently ordered the rock scaled down. Inspector Winebarger continued the imminent danger run to the area of the #2 and #1 entries, and he testified he did not know how the rock was scaled down. This provided the opportunity for Respondent to present uncontroverted testimony that the rock turned out to be affixed to the rib requiring the miner machine to scale it down. However, this after the fact circumstance is not controlling.

The imminent danger order was properly issued, and the section 104(c) argument is not supported by the evidence found credible. The testimony of both Inspector Winebarger and Morris was that the bolter operators were not addressing the overhanging rock, but were installing a roof bolt next to the left inby rib. Therefore, the miners were not engaged in abating the apparent hazard. I find credible that only after the miners had been withdrawn from the area-subject to the order-would they then be ordered to go and scale the rock down. Not until they were working to get the rock down was their presence in the area necessary to eliminate the condition.

The argument that the rock turned out to not be dangerous and hence the order should be vacated is misplaced. The Commission has established that an Inspector "must act quickly to remove miners from a situation he believes is hazardous". *Blue Bayou Sand and Gravel, Inc.*, 18 FMSHRC 853, 859 (Jun. 1996), citing *Island Creek Coal Co.*, 15 FMSHRC 339, 346-47 (Mar. 1993). Clearly, both Winebarger and Morris thought, on observation, that the unsupported overhanging rock with a visible crack was hazardous. Under the circumstances presented to the Inspector, it would have been unreasonable to engage in any kind of investigation of the rock before withdrawing the miners from the area. Indeed, Inspector Winebarger reasonably concluded based on the information available to him when he saw the rock that an imminent danger existed. *Island Creek* at 346. This is because the rock had a visible crack and was unsupported, indications that it could be loose and fall on the miners working below. This

presented to both Winebarger and Morris the type of impending hazard that required the immediate withdrawal of miners. *Utah Power & Light Co.*, 13 FMSHRC 1617, 1621 (Oct. 1991); *Island Creek*, at 345. Considering the scene presented to the Inspector, allowing the bolter operators to continue to place the roof bolt next to the rib under the rock could reasonably be expected to cause death or serious physical harm unless the rock was first removed. *Knife River Construction*, 38 FMSHRC 1289, 1291 (Jun. 2016), citing 30 U.S.C. § 802 (j).

Inspector Winebarger's perception was reasonable that the fall of the overhanging rock several feet above the coal seam and the working bolter operator was imminent. Quick action to remove the miner from under the apparent hazard and threat to his safety was consistent with the definition of an imminent danger, a condition "which could reasonably be expected to cause death or serious physical harm before such condition or practice can be abated" 30 U.S.C. § 802 (j). I find the preponderance of the evidence found credible supports the Inspector's decision to issue the imminent danger order. The order was objectively reasonable at the time issued, and I further conclude the Inspector did not abuse his discretion and authority in issuing the 107(a) order. *Connolly-Pacific Company*, 36 FMSHRC 1549, 1555 (Jun. 2014).

### **Citation No. 8498874**

#### Summary of the Evidence

Like his notes regarding the imminent danger run, Inspector Winebarger's notes regarding 104(a) citation # 8498874 are extensive, covering 9 handwritten pages. GX-5, pp. 18-26. The Condition or Practice recorded on the citation itself is very detailed, both as to the location and the description of the multiple adverse conditions he found across the #2 mining Unit:

The ribs where persons work and travel were not being supported or otherwise controlled on the #2 unit in the 2<sup>nd</sup> west panel. Loose ribs and corners were observed from the # 1 entry to the # 5 entry in the last open xcut spad #3+10 and entries inby to the face. The roof and ribs between #1-2 entries in the locc are still working and a large rock measuring 3 ft x4 ft x18 inches was found on the mine floor in this area. In addition, there were loose heads and stack rock present in the locc between #3-4 entries. There are slicken sided slips, clay veins, stack rock, heads and loose draw rock present in the entire area. The last open xcut in the # 8 entry at spad 4+00 on the outby side has 2 loose corners. When scaled the chunk rock measures 1 ft. x 3ft x18 inches on the right side and 3ft x4 ft. x 8 inches on the left side. Several small pieces of rock were pulled from these outby ribs as well. There is a face boss and mine foreman present on the unit.

Standard 75.202(a) was cited 25 times in two years at mine 1517216 (25 to the operator, 0 to a contractor).

Winebarger determined that injury was highly likely and could be expected to be fatal to 1 person; he evaluated the violation as S&S. He found the operator's negligence to be high, and although he did not record on the citation that the violation was considered an unwarrantable

failure, the Secretary argued this at the hearing and in his post hearing brief. GX-4; SPHB, pp. 28-34.

The safety standard cited provides:

The roof, face and ribs of areas where persons work or travel shall be supported or otherwise controlled to protect persons from hazards related to falls of the roof, face or ribs and coal or rock bursts.

30 C.F.R. § 75.202(a).

Inspector Winebarger testified he issued this citation because the rib conditions were about as severe as anywhere he had ever worked, and were so widespread they were difficult to map. Tr. 85. There was no rib support anywhere on the section, the ribs were not controlled. It was not possible to remove all of these hazards because they did not have the needed equipment. Tr. 76, 86. Winebarger described a loose rib as busted up or flaking off and a hazard since the rib can fall. Tr. 73, 74. The hazard was falling slabs of rock, mostly from above the coal seam, that would result in a fatality. Tr. 86. He wrote that slabs of rock falling from up to 11 feet would crush a miner. GX-5, p. 25. He testified that MSHA tech support had recommended installation of rib support for areas with a height of 7 feet or more. Tr. 87. Winebarger also testified the area was a working section, traveled every shift every day. Tr. 87, 88. In his notes he recorded his finding that there was no rib protection across the entire section. GX-5, p. 24.

Inspector Winebarger further testified these hazards were widespread across the whole left side of the Unit, and part of the right side. Tr. 88. He wrote that the injury was highly likely because clay veins, slips, heads and stack rock were so widespread that if mining continued some miner would be struck and killed. GX-5, pp. 25, 26. He stated that just being present on the Unit even without regular mining, with the continuing working and falling out, injury would have occurred sooner rather than later. Tr. 87. Although there were 15 miners working on the section that day only 1 person would be exposed, referring in his notes to the roof bolter operator he saw in imminent danger. GX-5, p. 24.

High Negligence was attributed to the operator by Inspector Winebarger because the conditions were extensive and obvious, and had existed for up to 3 days. Tr. 88, 89. He testified the conditions on the Unit were obvious, all you had to do is look, and you did not have to look very hard. Tr. 88. Winebarger determined that no attempt had been made to correct the hazards, to control the ribs. Tr. 88; GX-5, p. 26. Management, especially the face boss and mine foreman present, the preshift examiners, and anyone who walked on the Unit should have known of the conditions. Tr. 89. He wrote the slips, clay veins, heads, stack rock and roof rock up to 11 feet high above the coal seam were obvious and apparently ignored. GX-5, p. 24.

No mitigating circumstances were found by Inspector Winebarger. Although they were not mining coal during his imminent danger run this was not a factor since they had been mining prior to his arrival. Tr. 90. The only abatement steps taken were that Morris and Kessinger would scale what he pointed out but he observed no other scaling on the left side. Tr. 90, 131, 132. The shorter cuts did not fix the conditions, since there were still bad ribs. Tr. 133. Winebarger also testified that the slips in the ribs were not supported. Tr. 134.

Inspector Winebarger testified he evaluated the violation as an unwarrantable failure because the conditions were obvious, extensive and there were people working with supervisors present. Tr. 90, 91. He wrote the conditions existed for at least 16 hours, but the overall conditions most likely existed 24 to 48 hours. GX-5, p. 25. He stated that typically he did not issue an unwarrantable failure only after he put the mine on notice, but rather where a problem is ignored and there was no attempt whatsoever to mitigate. Tr. 133.

Third shift Crew Leader Smith testified about the conditions on the third, nonproducing shift that ended just before the inspection was conducted during the day shift on May 10, 2011. He testified there was no excessive weight or sloughing off on the left side of the Unit. Tr. 265. He also testified hazardous rib conditions were not observable. Tr. 268. Further, multiple slicken sided slips were not observed in entries #1 through #5, nor were stacked rock, clay veins, unsupported heads, or loose draw rock. Tr. 268-270. Smith believed the mine was adequately supporting the roof and ribs at the end of the shift. Tr. 275. However, he also testified they had advanced very little at that time, taking shorter cuts and pinning well. Tr. 258, 259.

Assistant Mine Foreman Campbell testified he was at the mine early on May 10, 2011. He wanted to go to the #2 Unit to follow up on the citation written the day before. Tr. 284-286. He dropped down at about 7:15 am arriving at the Unit about 30-35 minutes later. He went directly to the #7 entry where he had 2 cribs installed at the entry offset. He went on to the #9 entry, and then went from right to left across the Unit. Tr. 286, 287. Campbell further testified that across the Unit he found some loose ribs and corner pins that needed to be spotted, but the area from entry #4 through entry #1 needed more attention. He talked to Section Foreman Nathan Boone suggesting shutting the Unit down to get the conditions fixed. Tr. 288. This included the right side also because he was concerned about rib rash there. The Unit was shut down at 8:45 am and he called to notify Anderson. Tr. 289. He then instructed to men to spot pins, pull ribs down, and watch the roof bolters. Tr. 291, 295. In his opinion, the mine was not failing to support the ribs; they were not required to bolt the ribs and did not have a truss bolter at that time. Tr. 294, 295. Miners were not withdrawn from the left side; they were correcting the things that needed to be done. Tr. 300.

General Mine Manager Anderson was part of the morning discussion with Kessinger and Morris. Anderson testified he was informed of the deteriorating conditions on the #2 Unit requiring shorter cuts and additional bolting to better control the roof. Tr. 141-145, 148. It was decided Kessinger and Morris would evaluate the conditions that morning and a determination would be made whether to move the Unit to a new location later that day. Tr. 144, 153. He further testified that Campbell called out at 9:04 am to report mining activity was shut down on the #2 Unit after 8:50 am due to rib pins being too far from the ribs and the need to spot corner and rib pins. Tr. 149, 150; RX-G. He also testified this could mean there was sloughage off the ribs, damaged pins, installation of the pins too far from the ribs, or entry cut too wide. Tr. 150, 151. It was Kessinger and Morris that went to evaluate a potential move out of the area; he was not actually down there. Tr. 157, 163. Prior to their evaluation, miners were not removed from the #2 Unit. Tr. 161.

Anderson testified and wrote down his opinion on the mitigating circumstances that existed that day. They had only been in that area for 3 days, barely enough time to determine if

the conditions would persist. They were taking short cuts on the left side to control the roof, they shut down mining on the Unit due to the conditions they found, and the hazards were being corrected when MSHA was there. Tr. 147, 148, 156; RX-G, RX-F. Further, they decided to move the Unit, MSHA did not make them move. RX-G.

Morris testified for Respondent regarding this citation, and there are some notes at Exhibit RX-A. He opined the roof conditions on May 10, 2011 were pretty good, and his impression was they needed to continue scaling the ribs to clean off the sloughage. Tr. 198. The coal seam was about 7 feet high on average; on that day the left side had some high places, up to 10 or 11 feet. Tr. 169, 172. Morris said abnormal roof height is not a hazard if the roof is good and the ribs are fine. Tr. 172. At the morning meeting with Kessinger and Anderson he understood there were problems on the #2 Unit with the top coming out and some rib sloughage, but at that time it was his understanding the mine was providing adequate support to the roof and ribs. Tr. 181-183. When the Inspectors arrived, they all traveled to the #2 Unit together. Tr. 184. When they got to the Unit a couple of miners were scaling and there were other miners on the right side. There were also 2 pin men and 2 car drivers watching the pin men put up a pin. Tr. 185. He and Kessinger did not think the rib conditions were great; they did have the Unit move out. Tr. 198.

Morris testified there was a lot of scaling going on, there was rock on the floor, and a scoop was also used to clean the ribs. Tr. 199, 226. Referring to Exhibit RX-F, Morris pointed out there had been two 10-foot cuts taken on the left side with immediate bolting to keep rock from falling on their miners. Tr. 200, 201. Exhibit RX-F shows that two 10-foot cuts were taken in the #2 entry on the left. When he was told of the rib citation, the mitigating circumstances he offered were that they were working on the conditions, they were scaling on the Unit, and he and Kessinger were down there to investigate the Unit. Tr. 155, 156, 202-204. In the notes are the arguments that Morris and Kessinger made to the Inspectors: The Unit was shut down at 8:45 am; Scaling and roof bolting was in progress before the group arrived on the Unit; Management had already talked about moving the Unit that morning if necessary to get away from the bad conditions; and Kessinger was going to the Unit to assess the conditions and make a decision to move or not. RX-A, #18. In the comment section of these notes, it was reported several miners stated they had been scaling ribs before the Inspectors arrived on the Unit. *Id.*

### Contentions

Respondent contends that the Secretary failed to prove the fact of the violation, since Warrior acted as a reasonably prudent mine operator would under the circumstances. RPHB, pp. 30-33. It was further argued that, even if the fact of the violation were proved, the Secretary's gravity and negligence determinations should be reduced because the violation was not highly likely to cause an injury nor did the Respondent act with high negligence. RPHB, pp. 33-35. In addition, the unwarrantable failure designation was not properly justified by the Secretary. RPHB, pp. 35-39; RRB, pp. 13, 14. Also, the Secretary failed to justify the proposed massive special assessment. RRB, pp. 6, 7.

The Secretary contends that a reasonably prudent person familiar with the industry would have supported the ribs, and no testimony or evidence that the ribs were supported was provided

by Respondent. SPHB, pp. 25, 26. The Secretary argues the violation was highly likely to produce a fatality and was S&S. SPHB, pp. 26-28. The operator's negligence was high and there were no mitigating circumstances. SPHB, p. 30. It is further argued the violation is one of unwarrantable failure. SPHB, pp. 28, 30-34. Even mine management realized that scaling was not sufficient to eliminate the conditions; they gave up attempting to scale the area and flagged off the left side of the #2 unit. SPHB, p. 26. A penalty of \$70,000.00 was specially assessed. SPHB, p. 34, 35.

### Findings and Conclusions

There was a violation of safety standard 75.202(a). This safety standard requires, in pertinent part, that the ribs where persons work or travel must be supported or controlled to protect them from falls or bursts of coal or rock from the ribs. Respondent argues that the mine acted in a reasonably prudent manner under the circumstances, mining shorter cuts to adequately support the roof. However, the shorter cuts did not change the conditions found in the ribs. Just before the Inspectors with Morris and Kessinger arrived on the Unit that morning Campbell had halted mining, in part, to scale the ribs. But when the inspection party was on the left side of the Unit, the only scaling was by Morris and Kessinger on ribs pointed out by Inspector Winebarger. In the face of the adverse, hazardous rib conditions identified across the entire left side of the Unit, this effort was inadequate. In addition to loose and crumbling ribs, there were slips and clay veins weakening pillars that would need to be supported. There was stack rock in the ribs not supported. Campbell testified the mine was not required to support the ribs. However, there was no truss bolter available to accomplish rib support. Sloughage with scaling alone, especially in the entries and crosscuts with abnormal mine height, could increase the width of the mined area potentially calling for additional rib bolts or other measures for roof stability. I find Winebarger's testimony that there was no rib *support* anywhere on the section to be credible. The existence of compromised but unsupported ribs gives rise to operator liability. *Asarco, Inc.*, 8 FMSHRC 1632, 1634-36 (Nov. 1986), *aff'd*, 868 F.2d 1195 (10th Cir. 1989). Respondent's belief there was no violation is not reasonable.

There are three elements required in the evaluation of this safety standard. First, it must be determined if the cited area is one where persons work or travel; second, the area must be supported or otherwise controlled; and third, such support must be adequate to protect persons from falls or bursts of rib. *Oxbow Mining, LLC*, 35 FMSHRC 932, 944 (Apr. 2013) (ALJ).

The #2 Unit was a working section. Although mining had been halted at the time of the imminent danger run, there had been mining at the beginning of the shift, and the left side was not barricaded off until after entries #4 through #1 had been inspected. On the right side, considered safe at the time, mining continued until the third maintenance shift.

On May 10, 2011 across the #2 Unit there were ribs with adverse, hazardous conditions in many areas that were not supported or otherwise controlled. The rib conditions were such that scaling alone could not meet the protections intended by the safety standard; miners were not protected from rib falls or bursts. It was not until Morris and Kessinger traveled with the Inspectors and observed the full extent of the adverse conditions that the decision was made to move out of the left side and barricade off that part of the Unit.

A reasonably prudent person familiar with mining and the protective purposes of the safety standard would have provided support and control of the ribs on the left side of the #2 Unit during the two production shifts and the maintenance shift before mining was started on the next day shift. Campbell was on the Unit at about 7:45 am, and it did not take him long to move across the entire Unit and decide to halt mining. But there was no truss bolter available and where needed, the ribs could not be supported. Such action as was taken to try to improve the ribs by scaling did not meet the reasonably prudent person test. Persons were not protected from falls or bursts of rib.

### Significant and Substantial

I have found that there was a violation of the safety standard, thereby satisfying the first element of the S&S analysis.

The hazard contributed to by violation of the safety standard was the fall of coal and rock from the ribs. The record establishes the average mining height was about 7 feet, but in a number of areas on this Unit the height was up to 10 or 11 feet due to roof fall and cavities created during the mining cycle. Respondent's Morris testified that abnormal roof height is not a hazard as long as the roof is good and the ribs are fine. But the ribs were anything but "fine". The number of adverse geologic conditions found, recorded and credibly testified to by Inspector Winebarger as set forth above during his imminent danger run and specific to this citation in both the roof and ribs clearly establishes the danger to safety contributed to by the lack of support and control of the ribs. Winebarger described the hazard of slabs of rock falling, mostly from above the coal seam that could crush a miner. He found no rib protection across the entire Unit. Although Winebarger determined roof support was generally adequate despite the cavities, he also found slips, heads, stack rock, and clay veins, and that rib support was lacking. The attempt to control the loose rib conditions by scaling alone was not possible; the adverse conditions required additional support but equipment such as a truss bolter was not available. Scaling resulted in large amounts of rib coal and rock, removed in a couple of areas by scoops. The large amount of scaling of the ribs and corners would contribute to the width of the mined areas and call for additional roof bolting to place rib pins, and this activity was observed by Winebarger. Scaling at best removed already loose rib coal and rock but did not serve to support or otherwise control the ribs. This is because hazards such as slips, clay veins, stack rock, and heads remained unsupported in the ribs in a number of areas across the Unit.

The safety standard cited, as relevant here, requires the ribs to be supported or otherwise controlled to protect miners from the hazards of falls or bursts of coal or rock from the ribs. Conditions such as slips and clay veins in a rib weaken support of the roof normally provided by the pillar and require stabilization of the rib in that area. That this Unit was in an unstable area, particularly on the left side, is well illustrated by what was happening in the area of entries #1 through #3 where the top was working and some roof rock was audibly dropping out. In this same area there were loose, busted up and cracked ribs; corners loose, broken up and rashed off; the rock above the coal was busted up and chunky looking; and there was no support in the ribs. Evidence was not presented to show that in rib areas where there were adverse and hazardous geologic conditions miners were protected by scaling alone. Instead, the evidence shows that there was a danger to miners from rolls and bursts due to unsupported, uncontrolled ribs.

Winebarger testified the left side could not be fixed due to the lack of equipment. This testimony is consistent with the decision of Kessinger and Morris to move the Unit out when they observed the conditions during the imminent danger run. There was a discrete safety hazard contributed to by the violation.

I find the violative condition existed for about 24 hours. Inspector Winebarger was told by Kessinger the area from entry #1 through #3 had been holed through 16 hours prior to the inspection. Winebarger testified the conditions had existed from the first day, May 8, 2011, when the Unit had moved into the panel. Tr. 84. Based on the evidence of record, the most likely time the conditions became evident was during the day shift on May 9, 2011, the day before this inspection. This was when Inspector Hardison observed, but did not cite, conditions including coal ribs rashing badly, slips around the ribs, and ribs starting to rash at the top of the coal seam.

Due to the widespread nature of the adverse conditions, particularly on the left side, the Inspector's estimate could be accurate. My finding is limited to about 24 hours based on the direct observations of Inspector Hardison and the evidence shorter cuts were taken on May 9<sup>th</sup>, a recognition of adverse conditions limiting advancement in the coal seam. RX-F. I do not find credible the testimony of third shift Crew Leader Smith that at the end of the shift just prior to the imminent danger run the ribs were adequately supported. Not only does the weight of the evidence establish this was not correct, the testimony is also contradicted by that of Assistant Mine Foreman Campbell who was on the Unit less than an hour after the end of that shift and found there was a need to halt mining to fix conditions including the loose ribs.

Under continued normal mining operations the adverse conditions in the ribs would have remained; the ribs could not be adequately supported because there was no equipment, such as a truss bolter, available on the Unit. There is no evidence the various adverse geologic conditions would improve if mining continued to advance in the panel even if the existing rib conditions could be supported. To the contrary, conditions were deteriorating even during the imminent danger run. It was Kessinger and Morris who decided to move the Unit, an acknowledgement that the conditions could not be fixed. It follows the area could not be made safe for miners.

The hazard was reasonably likely to occur because without rib *support* anywhere on the section, the ribs were not *controlled*. As discussed above scaling alone, even as extensive as reported by Winebarger, Morris and Campbell in their testimony could not adequately control the ribs to insure the safety of miners. Many coal ribs were loose, as were some rock ribs above the coal seam. They are a hazard since coal and rock can fall off of the rib and strike miners. Winebarger testified the rib conditions were about as severe as anywhere he had ever worked and were so widespread they were difficult to map. He was concerned about slabs of rock falling from a height of 10 to 11 feet, capable of crushing a miner. He testified that the conditions were so widespread that with continued mining some miner would be struck and killed. Just being present on the Unit with the roof working and the fall of coal and rock injury would have occurred sooner rather than later. It is clear there were many areas, particularly on the left side, where the ribs and corners were loose. An outby rib corner in the #3 entry was loose and when pulled measured 12 feet long. A whole outby right-hand rib had flaked off in the #5 entry. The Secretary has shown a fall or burst of rib was reasonably likely to occur, and the second element is established.

The hazard of a fall of coal and rock from the ribs in the mining Unit would be reasonably likely to result in injury. Any such fall, burst or roll from a rib is a serious threat to the safety of miners. There was evidence of rock and coal that had fallen and ribs that were loose in the panel mined by the #2 Unit. On the imminent danger run Inspector Winebarger found a slip that caused a rib to be loose and about 4 feet of chunky rock had fallen out from above the coal. The slips in the ribs were not supported, and where a clay vein went into a pillar the pillar support was weakened. Loose ribs had corners broken up and rashed off. One rock from a loose corner measured 3 feet by 4 feet by 8 inches. Being struck by coal or rock from a rib can have lethal consequences. Here, the Secretary has shown that the resulting injury or injuries would be reasonably likely to be very serious, including fatal. Therefore, the 3rd and 4th elements are also satisfied.

The hazard of a coal and/or rock fall from a loose, unsupported rib contributed to by the violation of safety standard 75.202(a) was reasonably likely to result in an injury causing event, and such injury would be reasonably serious in nature. I find the Secretary has established by a preponderance of the credible evidence the violation was S&S.

### Gravity

Inspector Winebarger determined and the Secretary argued that injury was highly likely and could be expected to be fatal to 1 person. Respondent argued the violation was not highly likely to cause an injury and the gravity determinations should be reduced. Since the rib conditions could not be supported or otherwise controlled by scaling alone, and the rib conditions were extensive across the Unit where mining had taken place and there were miners working on “correcting” the conditions at the time of the imminent danger run, injury was highly likely. The fall of very heavy slabs of rock and coal from the ribs striking a miner would cause a fatality. Winebarger determined only 1 miner would be at the place of a fall, and this determination was reasonable. I affirm the gravity findings of Inspector Winebarger.

### Negligence

The operator failed to exercise a high standard of care to protect miners from the risks of harm from falls or bursts of the ribs. From at least the day before the inspection, the operator and its agents knew or should have known of the serious conditions in the ribs across the #2 Unit. The conditions were obvious; Inspector Winebarger’s notes and the map document the easily seen hazards. Despite these adverse rib conditions mining did take place during the two shifts on May 9<sup>th</sup>, and mining started on the day shift on May 10<sup>th</sup> until halted just before the imminent danger run. The Secretary argued there were no mitigating circumstances, and Winebarger testified he found none. However, his testimony was variously to the effect that either no attempt was made, or that the abatement steps taken of scaling and shorter cuts were not adequate to control the ribs. What is established on this record is that the rib conditions could not be supported or otherwise controlled with the equipment available. The miners were attempting to correct the ribs but could not. Since *some* work was done on the ribs, albeit unsuccessful, the negligence is somewhat mitigated. Therefore, I find moderate negligence on the part of the operator and its agents.

## Unwarrantable Failure (UWF)

The unwarrantable failure 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.” The term is not defined by the Act, but the Commission has established that “unwarrantable Failure” is “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). And further, that unwarrantable failure is characterized by such conduct as “reckless disregard,” “intentional misconduct,” “indifference,” or the “serious lack of reasonable care.” *Id.* at 2003-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 193-94 (Feb. 1991); *see also Buck Creek Coal*, 52 F3d 133, 136 (7<sup>th</sup> Cir 1995).

The Commission has also established that the aggravating factors to be examined are the extent of the violative condition, the length of time that it has existed, whether the violation is obvious or poses a high degree of danger, whether the operator has been placed on notice that greater efforts are necessary for compliance, the operator’s efforts in abating the violative condition, and the operator’s knowledge of the existence of the violation. *Consolidation Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2000). Although all seven of the factors must be considered, some factors may be irrelevant to a particular factual scenario. *Id.* at 353; *Wolf Run Mining Co.*, 35 FMSHRC 3512, 3520-21 (Dec. 2013). Further, some factors may be less important than other factors under the factual circumstances. *IO Coal Company, Inc.*, 31 FMSHRC 1346, 1351 (Dec. 2009). All of the relevant facts and circumstances of each case must be examined to determine if an actor’s conduct is aggravated, or whether mitigating circumstances exist. *Id.* at 1351; *Eastern Associated Coal Corp.*, 32 FMSHRC 1189, 1193 (Oct. 2010). Therefore, it is not necessary to find that all factors are relevant or deserving of equal weight.

### *Extent of the violative condition.*

The purpose of considering the extensiveness of a violation is to factor in the scope or magnitude of the violation. *Eastern Associated Coal Corp.*, 32 FMSHRC 1189, 1195 (Oct. 2010) (emphasis added). Traditionally, extensiveness has been determined by examining the extent of the affected area as it existed at the time the citation was issued. *Id.*; *Dawes Rigging & Crane Rental*, 36 FMSHRC 3075, 3079 (Dec. 2014). This can include the number of persons affected by the violation. *Dawes*, at 3079-80.

At the time of this citation there were 15 day shift miners on the Unit and the scope of the violation embraced the entire panel where the #2 Unit was active. Most of the entries and crosscuts, particularly on the left side, had adverse geologic conditions not only in the roof but also in the ribs. At least half if not more of the area had ribs that could not be supported or controlled with the equipment and methods available to the miners. Although the right side, entries #6 through #9, was considered safer, there were slips, loose ribs and corners, and scoop bucket loads of rock and coal had been scaled off the ribs. Clearly, the violative conditions were extensive.

*Length of time the violative condition existed.*

The Commission has long considered analysis of the duration of a violation to be required, *Windsor Coal Company*, 21 FMSHRC 997, 1001-1004 (Sep. 1999), and therefore a necessary element of the unwarrantable failure analysis. *IO Coal Company, Inc.*, 31 FMSHRC 1346, 1352 (Dec. 2009). The Commission has permitted duration to be established through the use of circumstantial evidence. *See, Enlow Fork Mining Co.*, 19 FMSHRC 5, 16 (Jan. 1997). The duration element may be affected by a determination of whether an operator's good faith belief of the non-existence of the violation was reasonable. *IO Coal*, at 1352-53.

Respondent argues the roof and rib conditions existed for-at most-*less than* 24 hours. RPHB, p. 37. This argument is not persuasive. The third shift Crew Leader Smith testified the conditions looked good between 4 am and 5 am, the time of his preshift examination on May 10<sup>th</sup>. Smith's testimony that slips, stack rock, clay veins, unsupported heads and loose draw rock were not observable on the left side of the Unit during the nonproducing shift before the arrival of the day shift on May 10<sup>th</sup> is not credible. It is more probable than not that essentially the same adverse conditions existed from the time of the day shift on May 9<sup>th</sup>. Inspector Hardison had already seen and documented the conditions in his notes. Before Smith's shift Hardison had already discussed the conditions with his supervisor and Inspector Winebarger. The production report for the first shift on May 9<sup>th</sup> shows the left side of the Unit advanced only 8 to 15 feet. During the next shift only 10 foot cuts were taken on the left. On the May 10th day shift, before mining was halted, only two 10-foot cuts were taken. RX-F. Smith's testimony is not credible; the weight of the evidence reveals there were conditions limiting advancement beginning, at least, on the morning of May 9<sup>th</sup>.

However, I also do not find Inspector Winebarger's opinion that the conditions existed from day one, May 8<sup>th</sup>, when the #2 mining Unit turned into the panel to be persuasive. I understand the opinion of an Inspector, here one with experience and the expertise of a roof control specialist, is entitled to considerable weight. And there is evidence that the mine had encountered adverse conditions before and pulled out of other sections of the mine. *See*, RPHB, p. 6; Tr. 191, 223, 224. But I focus here on the credible evidence of what Inspector Hardison saw on the Unit the day before; extremely bad top, lots of slips, draw rock falling, heads everywhere in the roof, clay veins and coal ribs rashing with ribs starting to rash at the top of the coal seam. These discoveries show the rib conditions were becoming obvious by or during the time of that day shift. Although Hardison did not issue a citation, he did see the conditions, and decided to seek the guidance of his supervisor, after which he met with Roof Control Specialist Winebarger. I conclude that the violative conditions existed from the time of the day shift on May 9<sup>th</sup> until the Unit moved out of the area on May 10<sup>th</sup>.

*Whether the violation was obvious.*

Respondent acknowledges the conditions were obvious in nature. RPHB, at 38.

*Whether the violation posed a high degree of danger.*

Although the level of danger is but one relevant factor to be considered in evaluating whether a violation is unwarrantable, the factor of dangerousness may be so severe that, by itself, it warrants a finding of unwarrantable failure. *Manalapan Mining Company, Inc.*, 35 FMSHRC 289, 294 (Feb. 2013). The Commission has relied upon the high degree of danger posed by a violation to support an unwarrantable failure finding. *See, IO Coal Company, Inc.*, 31 FMSHRC 1346, 1355 (Dec. 2009); *Midwest Material Company*, 19 FMSHRC 30, 34 (Jan. 1997) (citations omitted).

The circumstances presented to the miners on the #2 Unit did pose a high level of danger. But the factor of dangerousness was not so severe as to warrant, by itself, a finding of UWF. The conditions existed about 24 hours. The rib conditions during that time were not completely ignored; there were attempts by scaling to remove loose material. This proved ineffective and management decided to move the Unit out of the area. I find that during the 24-hour existence of the hazardous rib conditions, the violation did pose a high degree of danger.

*Whether the operator was placed on notice that greater efforts were necessary for compliance.*

A mine operator may be put on notice that it has a recurring safety problem in need of correction where there is a history of similar violations. *Black Beauty Coal Company*, 703 F.3d 553, 566 (D.C. Cir. 2012); *Peabody Coal Company*, 14 FMSHRC 1258, 1264 (Aug. 1992). An operator with such a history should have a heightened awareness of a continuing serious safety problem. *Black Beauty*, at 567; *IO Coal Company*, 31 FMSHRC 1346, 1353 (Dec. 2009); *San Juan Coal Company*, 29 FMSHRC 125, 131 (Mar. 2007) (citing cases). The history of violations as well as any past discussions with MSHA can serve to place the operator on notice that greater efforts were necessary to assure compliance with the safety standard. *Consolidation Coal Company*, 35 FMSHRC 2326, 2342 (Aug. 2013) (citing cases).

Consideration of prior violations is not limited to the same regulation or those occurring in the same area within a continuing time frame. *IO Coal*, at 1354; *San Juan Coal*, at 131; *Peabody* at 1263. It is not required that the past violations were also caused by unwarrantable failure. *Consolidation Coal Company*, 23 FMSHRC 588, 595 (Jun. 2001); *see also, Eagle Energy, Inc.*, 23 FMSHRC 829, 838 (Aug. 2001).

There was a history of 18 violations of the same safety standard in the 15 months prior to the issuance of the instant citation. During the same period, there were a total of 629 citations. The question, not answered on this record, is whether any of the prior violations involved failure to support or otherwise control ribs. It is not shown that the operator had such a history of rib control violations that there should have been a heightened awareness of this type of serious safety problem. The safety standard speaks to both roof and ribs, but the citation here was issued specifically for dangerous, unsupported ribs. The total number of citations was certainly significant; but this was a very large mine subject to very frequent and sometimes even multiple inspections in a single day. *See, Tr.* 178, 231, 232. Further, there is no evidence of past discussions with MSHA regarding adverse rib conditions that would place the operator on notice

that greater efforts were required to comply with the safety standard. The Secretary offered no such evidence, instead relying on other factors such as obvious and extensive. SPHB, pp. 32-34.

*The operator's effort in abating the violative condition.*

An operator's efforts in abating the violative condition is also a factor established by the Commission as determinative of whether a violation is unwarrantable. *San Juan Coal Company*, 29 FMSHRC 125, 134 (Mar. 2007); *IO Coal Company*, 31 FMSHRC 1346, 1356 (Dec. 2009); *Consolidation Coal Company*, 35 FMSHRC 2326, 2342 (Aug. 2013). Abatement efforts prior to or at the time of the inspection may support a finding that the violation was not unwarrantable. *New Warwick Mining Company*, 18 FMSHRC 1568, 1574 (Sep. 1996), citing *Utah Power & Light Company*, 11 FMSHRC 1926, 1933-34 (Oct. 1989). Conversely, efforts to abate post-citation, efforts found to be insufficient, or subordination of efforts to other work may be found to be irrelevant or support a finding that the violation was unwarrantable. *Enlow Fork Mining Company*, 19 FMSHRC 5, 17 (Jan. 1997); *Peabody Coal Company*, 14 FMSHRC 1258, 1263 (Aug. 1992); *San Juan Coal* at 134-35.

That scaling was done prior to the inspection can be accepted as credible because there was coal and rock on the floor during the imminent danger run, and scoops were in use removing large amounts of the material that had been scaled down. Some scaling during the inspection was done by Kessinger and Morris, and Inspector Winebarger observed some scaling by miners on the Unit. However, these efforts have been found to be insufficient to support or control the hazardous rib conditions, and therefore the scaling that was done is not relevant to this determination. *See, U.S. Steel Mining Co.*, 6 FMSHRC 1573, 1574 (Jul. 1984); *McCoy Elkhorn Coal Corp.*, 36 FMSHRC 1987, 1991 (Aug. 2014). The left side was shut down and barricaded off during the imminent danger run, but the violative conditions had already been documented in entries #4 through #1, and thereafter some of the same conditions were found on the right side where mining continued through the second shift. However, mine management did evaluate the conditions on the Unit and did ultimately decide to move out of the area.

*The operator's knowledge of the existence of the violation.*

Findings regarding the knowledge of an operator of the existence of violation are critical to the evaluation of the operator's efforts, or lack thereof, in abating the condition. *San Juan Coal Company*, 29 FMSHRC 125, 134 (Mar. 2007). The operator's knowledge may be established where the operator had reason to know or should have known of the violative condition. *IO Coal Company, Inc.*, 31 FMSHRC 1346, 1356-57 (Dec. 2009); *Emery Mining Corp.*, 9 FMSHRC 1997, 2002-04 (Dec. 1987); *Drummond Company, Inc.*, 13 FMSHRC 1362, 1367-68 (Sep. 1991), quoting *Eastern Associated Coal Corp.*, 13 FMSHRC 178, 187 (Feb. 1991).

At the time of the day shift on May 9, 2011 the adverse geologic conditions in the ribs and roof of the Unit were visible. Inspector Hardison became concerned about the slips, clay veins and rib rashing he had seen when he was on the Unit. That he did not issue a citation at that time does not mean the conditions did not exist or that the ribs were adequately supported. Rather, if an Inspector can spot problems in an active mining area, certainly the mine's own foremen, face bosses, and examiners should also see those problems. I find the operator should

have known of the violative rib conditions at least by the day shift on May 9<sup>th</sup>. The meeting of mine managers Kessinger, Morris and Anderson in the early morning hours of May 10<sup>th</sup> to discuss what they had heard about the conditions on the #2 Unit does not suggest the conditions were not known by mine personnel before that time. Instead, this suggests prior knowledge by those on the Unit reported in some manner to management before the meeting.

Respondent acknowledged the conditions were obvious, and the Secretary relies on this and the extent and danger of the unsupported ribs in arguing the UWF assessment should be affirmed. Under the facts and circumstances presented in this case, I find the most important factor is whether the operator had notice that greater efforts were needed to insure the support or control of ribs that contained adverse and potentially dangerous geologic conditions. As set forth above, acceptable evidence of such notice is lacking. In addition to a lack of discussions with MSHA and a compelling history of violations, there are other reasons to place the greatest weight on this factor. The roof control plan<sup>40</sup> in effect at the time of the inspection did not contain provisions for supporting or otherwise controlling the ribs, except that loose material would be taken down under certain circumstances not relevant here. GX-3, p. 18. Respondent's Assistant Mine Foreman Campbell testified that the mine was not required to bolt the ribs and did not have a truss bolter at the time. The mine was not prepared to address rib support. The lack of requirements to be followed when encountering adverse rib conditions also suggests that the operator was not on notice that such conditions must be addressed with adequate support methods. Further, the behavior of mine management reveals a preference for abandoning areas with these types of rib conditions rather than attempting support measures. I understand the rib conditions on the #2 Unit were extensive and presented a high level of danger; however, as Inspector Winebarger observed the mine was working to control the roof. I conclude the mine was not on notice that more than taking down loose rib material was required. Examining the totality of these factors, I find the UWF determination was not supported.

#### Specially Assessed Penalty

The Secretary proposed a specially assessed penalty of \$70,000. However, it is the role of the judge to independently determine the penalty to be assessed for this violation under the six criteria set forth in § 110(i) of the Mine Act.

In the 15 months preceding the issuance of this citation there were only 18 violations of the same safety standard. There were 629 total violations. SPHB p. 34; GX-10. As noted above for citation # 8503299, there would be about 300 production days in a 15-month period. Although the total of 629 is significant, since one or more inspections are essentially on a daily basis at Warrior's Cardinal mine the rate of violations is not great. Although not controlling, how many of the 18 roof control violations also involved the ribs is not known. The Cardinal mine is very large and very productive; the history of previous violations is not an aggravating factor.

The proposed penalty is not inappropriate to the very large size of the business of this operator. The Cardinal mine produced 5,841,599 tons of coal in 2010. Controller tonnage totaled 32,831,873. The penalty as proposed would not affect this large operator's ability to remain in

---

<sup>40</sup> The roof control plan will be discussed in greater detail below.

business. This violation was serious, the S&S determination was affirmed and there was the potential for a fatal injury. While serious, the gravity factor was not “particularly serious or egregious”. *Coal Employment Project*, at 1129.

I have reduced the negligence determination from high to moderate after fully considering all of the evidence found credible surrounding the violation. I have also found the UWF determination not supported. The Secretary accepted that Respondent did demonstrate good faith in abating the violation after notification.

The greatest weight is placed on the factor of gravity because this violation involved the safety standard governing roof, face and rib support and control. Such support is crucial to the safety of miners. Here, the focus was on the lack of adequate rib support in the area of mining that had many adverse and dangerous geologic conditions in both the ribs and roof. The potential for a fatal fall, roll or burst of rib existed in many entries and crosscuts of the #2 Unit. The serious nature of this violation supports an enhanced penalty.

Also supporting an enhanced penalty is the large size of the operator and its ability pay the proposed penalty charged and remain in business. However, the history of violations is not an aggravating factor; the negligence of the operator is reduced from high to moderate and the violation was not the result of an unwarrantable failure of the operator. Mine management did ultimately shut down the Unit and move out of that section of the mine.

The special assessment is not supported but the weighted analysis, particularly the gravity, supports an enhanced penalty. The deterrent effect of the penalty to be charged is considered. Where there are unsupported ribs that could result in a fatality, the operator must be encouraged to place a higher priority on controlling those conditions to ensure the safety of its miners. I find that an enhanced penalty of \$30,500 is consistent with the facts and circumstances established, and would adequately serve as a deterrent.

### **Order No. 8498875**

#### Summary of the Evidence

The initial action for this order was citation # 8498874, discussed above, and issued the same day for the ribs on the left side of the Unit not supported or otherwise controlled. That citation included the entire Unit in the area affected, since there was a loose corner in entry #8 on the right side. This order focused on the left side, entries #1 through #5. The Condition or Practice was described as:

An inadequate pre shift was conducted on the #2 unit MMU-002 in that hazardous ribs were observed in entries #1 thru # 5 entries. Multiple slicken sided slips, stack rock, clay veins, heads and loose draw rock was widespread across these entries. The existence of these abnormal mining conditions have caused excessive mining heights up to 11 ft 4 inches. These hazards were not noted in the preshift exam record book on the surface and were not corrected before the start of the shift.

Standard 75.360 (a)(1) was cited 2 times in two years at mine 1517216 (2 to the operator, 0 to a contractor).

Inspector Winebarger determined injury was highly likely, could reasonably be expected to be fatal to 1 person, and was significant and substantial. He found the negligence to be high, and although not explained in the order, the Secretary argued the violation constituted an unwarrantable failure.

GX-8, SPHB at 41-43.

Inspector Winebarger testified he issued this order because of an inadequate preshift examination. The hazards he found underground were not identified or recorded with corrective action, if any, in the record book before he went to the Unit. Tr. 94. In his notes he wrote the hazards were not entered into the record book on the surface; only loose bolts were recorded as hazards in entries #1, #2, #4, #7 and #8. GX-5, p. 31. The hazards he had found and discussed previously, such as the unsupported loose ribs, were not identified in the preshift examination. Tr. 95. Winebarger was of the opinion the loose ribs, broken heads, slips, stack rock and excessive mining heights would have been present prior to his inspection because these conditions did not happen all at once. He believed some hazards existed for up to 3 days, from day one, and some were probably from the shift before his inspection for a period of at least 16 hours. GX-5, p. 32. The latter was based on Kessinger's statement that the two crosscuts from entry #1 to entry #3 had been holed through 16 hours before. The slips were evident, you could see them. Winebarger further testified that 4-foot of rock above a 7-foot coal seam is not mined intentionally. Tr. 95-97.

During his testimony, Inspector Winebarger reviewed the preshift examiner's reports. The two records for May 8, 2011 contained only loose pins observed on the second shift. The three reports for May 9, 2011 also had only loose pins observed on the first shift, and otherwise no hazards were reported. For May 10, 2011, the morning he was there, a number of loose pins and a damaged pin were reported and corrected. But none of the hazards he had found were listed. Tr. 98, 99; GX-8.

Inspector Winebarger testified the safety standard cited required a certified person to preshift the area before people work or travel. Tr. 94. All hazards the examiner comes across are required to be put into the examination report. The preshift examinations are important because the next shift needs to know what they are walking into. Tr. 99. If hazards are entered into the book foremen, supervisors or whoever is in charge will have a better opportunity to get those hazards corrected. Not knowing about hazards creates a false sense of security for miners going to the section. Tr. 101.

The hazard identified by Inspector Winebarger was loose falling rock ribs that would cause a fatality. He testified the excessive mine height of 11 feet and the weight of slabs of rock, roughly 4 to 5 tons, would definitely kill you. Tr. 100. He wrote in his notes that rock and coal had already fallen; there were multiple slicksided slips, clay veins, stack rock, heads, loose draw rock and loose overhanging ribs. GX-5, pp. 32, 33. Winebarger considered a fatality to be

highly likely because the conditions were already there. The conditions had caused mining heights to be up to 11' 4" and miners worked in the area the entire shift. Although they were not then mining coal the ribs were still falling and you could get hurt or killed. Over 3 shifts 30 or 40 people would be exposed but Winebarger thought it reasonable only one person would be hurt or killed. Tr. 100, 101; GX-5, pp. 32, 33.

Inspector Winebarger attributed high negligence to the operator because the hazards were obvious and extensive and no support was being done. He testified it is the examiner's job to look for hazards, observe them, correct them and most definitely record them. Tr. 101, 102. In his notes he wrote the examiner should have observed the widespread conditions during the examination and reported or flagged and recorded the hazards in the record book. GX-5, pp. 31, 32. He found no mitigating circumstances, and stated none were offered. Tr. 102.

Inspector Winebarger also determined the violation was an unwarrantable failure. He testified up to 15 people were exposed all day long going in and out of the entries to do their jobs. The conditions were widespread across the section, obvious and extensive, and some big rocks were falling. Tr. 102.

Rusty Smith, the third shift Crew Leader, testified there was just rib sloughage on May 10, 2011 that they scaled. Tr. 259. He conducted the preshift examination prior to the oncoming day shift, starting at about 4 am. Tr. 261, RX-D. On the examination he found the hazards he reported, a number of loose pins, and a damaged pin. Tr. 262. Smith also testified that conditions not necessarily rising to the level of a hazard would not be recorded in the book. Tr. 264. He had been scaling all night, but this did not rise to the level of a hazard and he was not required to record it. Tr. 264, 265. During that third shift he did not hear or see evidence of ribs taking excessive weight or sloughage off on either side of the Unit. Tr. 265. Smith further testified there were no hazardous ribs or slicksided slips in entries #1 through #5. Tr. 268. He observed no stacked rock or loose unconsolidated material between the roof and the coal seam at these entries. Tr. 269. Further, there were no unsupported heads or loose draw rock in these entries. He did not remember observing any clay veins, but stated clay veins are everywhere in a coal mine and 90 percent of the time they are not a hazard. Tr. 269, 270. He did agree that an unsupported slip is a hazard. Tr. 277. He also agreed the mine was encountering conditions that did not allow it to take full cuts on the left side on May 9<sup>th</sup> and May 10<sup>th</sup> and assumed but did not know whether the conditions were also present on May 8<sup>th</sup>. Tr. 276. After he called out his examination there would not be anyone at the face of the Unit until the coal run got there at 7:00 or 7:15 am. Tr. 272, 273. Smith believed the mine was adequately supporting the roof and ribs at the end of his shift on May 10<sup>th</sup>. Tr. 275.

Jesse Campbell was an Assistant Mine Foreman on May 10, 2011, substituting for another miner. Tr. 281. He was not assigned to a particular Unit. Tr. 283. He received the preshift call out at 5:20 am. Tr. 285. He wanted to go to the #2 Unit to follow up on the citation written the day before. Tr. 284, 286. At the #7 entry he had two cribs built at the offset. Tr. 287. He then went to the #9 entry and also went from right to left across the Unit. Tr. 287. He found some loose ribs and some corner pins that needed to be spotted, but when at entries #3, #2, and #1, he considered that more was needed. He talked to Section Foreman Nathaniel Boone, and decided to shut the run down to get "this stuff fixed". Tr. 288. The entire Unit was shut down

because in addition to the left side he was concerned about rib rash on the right side. He shut the Unit down at 8:45 am and called General Mine Manager Anderson. Tr. 288, 299. Campbell testified that a pin needed to be spotted in the #3 entry, two miners started pulling ribs down, and a scoop was used where some ribs had sloughed. Tr. 291. He testified that under the roof control plan they were not required to engage in rib bolting because they did not have a truss bolter at the time. Miners were assigned to scale and work on the ribs. Tr. 295. When asked if he believed Smith had performed an inadequate preshift examination, Campbell replied he did not, and added he had followed Smith for years and he never did an inadequate preshift examination. Tr. 296.

Safety Director Morris also testified regarding this order. At the meeting with Kessinger and Anderson he understood the conditions on the #2 Unit included rib sloughage and the top coming out. Tr. 181, 183. When on the Unit there were miners scaling and pinning. Tr. 185. An outby corner rib between #4 and #5 had a piece of coal 2' by 2½' by 8" that appeared to be broken loose from the remainder of the rib. RX-A, p. 1, # 5. The right outby rib in #3 had loose coal that he and Kessinger scaled. *Id.*, # 7. Morris agreed that an examiner needed to record a hazardous condition even if it is corrected. Tr. 221. Morris opined that in the year prior to that day there had been 7 or 8 citations for violations of the preshift examination standard. Tr. 201, 202. He testified that Smith was the "lead man" on the third shift, an agent of the operator. Tr. 206.

General Mine Manager Anderson testified he was not actually down on the Unit that day. Tr. 163. But he wrote in his notes the hazards were being corrected when MSHA was there. RX-G. Since the conditions were being addressed as they arose, he stated the hazards might not make it into the record book. Tr. 145. However, Anderson agreed an examiner must list all hazards encountered during their examination. Tr. 160.

The safety standard cited provides, in pertinent part:

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.

30 C.F.R. § 75.360(a)(1).

### Contentions

Respondent contends the order should be vacated because in accordance with 75.360(a)(1) a preshift examination was performed by Smith between 4 and 5 am. Also, Smith reported and flagged for correction a number of conditions. Further, the Secretary failed to demonstrate the existence of a hazard at the time of the preshift examination. RPHB pp. 40-45; RRB pp. 15, 16; RX-D.

The Secretary contends the geological conditions of slips, clay veins, stacked rock and heads are exposed from the moment an area is mined. The widespread hazardous conditions were present and observable during the preshift examination. Also, a preshift examiner must adequately find and record hazardous conditions in the preshift examination book. Further, the safety standard requires that an adequate examination be performed. SPHB pp. 35-38; SRB pp. 3,4.

### Findings and Conclusions

Well before Smith's preshift examination in the early morning hours of May 10, 2011 the adverse geological conditions on the #2 Unit had been observed. The morning of the day shift on May 9, 2011 Inspector Hardison had seen ribs rashing badly, sloughage, draw rock falling, slips around the ribs and clay veins and heads in the roof. Smith's testimony was essentially that he did not see any of these conditions, and in his opinion the roof and ribs were adequately supported at the end of his shift. But his testimony was inconsistent, since he also acknowledged that conditions were being encountered that did not allow for full cuts of coal to be taken. Further, mine management had been informed by the third shift Foreman of his concerns about the conditions, and that was the topic of the conversation early that morning between Kessinger, Morris and Anderson. This was only about an hour after Smith's examination. At about 7:45 a.m. Campbell was on the Unit and an hour later he halted mining because of the conditions. Smith's testimony was not credible; the widespread hazards were present and observable at the time of his examination on May 10<sup>th</sup>.

The Commission long ago discussed the requirements under the preshift safety standard:

Under 75.360(a), a certified examiner must conduct a preshift examination within 3 hours before 'the beginning of any shift and before anyone on the oncoming shift . . . enters any underground area of the mine . . . .' Subsections (b) through (g) of section 75.360 set forth the *required elements* of the examination.

*Enlow Fork Mining Company*, 19 FMSHRC 5, 12 (Jan. 1997) (emphasis added).

Subsection (a)(1) cannot, as argued by Respondent, be read in isolation. To do so could produce the absurd result that virtually any examination of an underground area, however cursory, would satisfy the safety standard. In the instant case, involving hazardous conditions in an active mining area, Subsection (b) is applicable:

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...

30 C.F.R. § 75.360(b).<sup>41</sup>

---

<sup>41</sup> As constituted prior to April 6, 2012.

Smith did report loose pins and a damaged pin. In his testimony he denied there was sloughage on either side of the Unit or hazardous ribs or slips in entries #1 through #5. He testified in these entries he observed no stacked rock or loose unconsolidated material between the roof and the coal seam, and no unsupported heads or loose draw rock. He did not remember any clay veins. His justification for not reporting these types of conditions was essentially that conditions not rising to the level of a hazard would not be recorded in the book. I have found there were multiple hazards present in the #2 Unit at the time and that Smith's testimony was not credible. It was more likely than not that the hazards observed by Inspector Winebarger during the imminent danger run existed 4 hours earlier during Smith's preshift examination. The Secretary has met his burden and there was a violation of the preshift examination safety standard.

### Significant and Substantial

Respondent contends that the Secretary failed to demonstrate the violation was likely to cause an injury and the gravity determinations should be reduced. RPHB pp. 46, 47.

The Secretary contends there was a high likelihood of a reasonably serious injury and the failure to perform an adequate examination exposed miners to unknown and unknowable hazards. SPHB pp. 39-41.

The Federal Mine Safety and Health Act of 1977 retained verbatim the requirements for the preshift, on-shift, and weekly examinations from the Federal Coal Mine Health and Safety Act of 1969.<sup>42</sup> These three types of mine examinations are required and together constitute several layers of examinations to ensure miner safety. They are designed to create a multi-layer, prophylactic approach to the identification and correction of hazardous or unsafe conditions in the mine. The preshift examination focuses on ensuring that any hazardous or unsafe conditions manifested since the last examination can be identified and altered before anyone enters the mine.

The Commission has recognized that preshift examinations are "of fundamental importance in assuring a safe working environment underground." *Buck Creek Coal*, 17 FMSHRC 8, 15 (Jan. 1995); See also, *Jim Walter Resources, Inc.*, 28 FMSHRC 579, 598 (Aug. 2006). The preshift requirement has been described as "the linchpin of Mine Act safety protections." *Manalapan Mining Co., Inc.*, 18 FMSHRC 1375, 1391 (Aug. 1996). If certain hazardous conditions are observed during a preshift examination, the conditions can be communicated by the preshift examiner's report to the incoming shift of miners so they may prepare to work in the conditions reported. Working conditions in underground coal mines are dynamic, and without an adequate preshift examination the incoming miners are vulnerable to potentially unsafe conditions. The crew accessing the working area of the mine may not be aware of the hazards around them until it is too late to correct those hazards and prevent an accident.

The first element of the S&S analysis has been satisfied; I have found there was a violation of the preshift safety standard.

---

<sup>42</sup> Sections 303(d)(1), (e), and (f) of the Act.

The failure in this case to conduct a preshift examination during the non-producing third shift that was adequate to communicate the types of hazardous rib conditions that were present meant that the day shift crew would access the #2 Unit mining area unaware of the extensive nature of the hazardous conditions, particularly on the left side. The extensive rib conditions, which could not be properly supported or controlled, constituted a measure of danger to the safety of those day shift miners. The hazardous conditions have been described in this decision and included unsupported slips in the ribs with loose rock above the ribs, clay veins weakening pillar support, unsupported stack rock in the ribs, loose and cracked ribs that were not supported, and overhanging rib rock. Scaling alone was not able to correct the hazards. The violation of the safety standard did contribute to the hazard of miners proceeding to work in dangerous conditions without advance warning of what they would encounter.

The preshift safety standard is directed against hazardous conditions required to be identified and communicated in such a manner that incoming shift miners will be aware of any dangers and challenges they will face in their assigned work areas. The danger that was present on the #2 Unit, especially the left side, was the fall, roll or burst of loose, unconsolidated and unsupported rib material.

I have found the hazardous conditions had existed for at least 24 hours before the MSHA inspection, and under continued normal mining operations the hazards would have continued to exist because equipment was not available to properly support or control the ribs. Inspector Winebarger testified to his opinion that some conditions he found had lasted up to three days; however, I have found the best evidence to be the observations of Inspector Hardison at the time of the first shift the day before Winebarger's inspection. Inspector Winebarger testified the hazards he found underground were not recorded in the record book. For the morning of May 10, 2011, only a number of loose pins and a damaged pin were reported as corrected. But Winebarger found, among other hazards, unsupported loose ribs that had not been reported. The danger as a result was a false sense of security created for miners going to the section, where loose falling coal and rock ribs could kill them. The defensive and contradictory testimony of preshift examiner Smith that the ribs were adequately supported at the end of his shift, about 7:15 am, was not credible. Further, it was Campbell who soon after the start of the next day shift at about 7:45 am found loose ribs on the Unit and even more that needed to be fixed on the left side. By 8:45 am Campbell and Boone decided to shut the entire #2 Unit down. The facts and circumstances surrounding the violation show that the hazard of a fall, roll or burst of loose, unsupported rib material was reasonably likely to occur.

Therefore, the second element is established.

Over the period of 3 shifts of the #2 Unit in the second west panel 30 to 40 people would work their entire shift and be exposed to the hazards that were not reported on the preshift examinations. Considering the extensive and serious nature of the hazards presented to the miners, I agree with Inspector Winebarger's testimony that a fatality was highly likely. He observed coal and rock that had fallen and was still falling. Therefore, I find injury could be reasonably expected to occur, and such injury could be reasonably likely to be very serious, even fatal.

Therefore the third and fourth elements are satisfied. It was reasonably likely that the violation of the preshift standard contributed to the hazard of miners exposed to dangerous rib conditions and that this was reasonably likely to result in injury causing events that would be reasonably serious in nature. I find the violation was S&S.

### Gravity

I also affirm the other gravity determinations. Although many people would be exposed, it was reasonable to conclude that in the event the hazard occurred only 1 person would be hurt or killed.

### Negligence

Respondent argued the Secretary failed to demonstrate high negligence on the part of Warrior because there had been extensive efforts to recognize report and correct hazards in the #2 Unit.

The Secretary argued there were inadequate examinations for up to 3 days. The examiner should have seen the obvious and extensive hazardous conditions that were present at the time of the examination.

Inspector Winebarger testified it is the examiner's job to look for hazards, observe and correct them, and most definitely record them. And that is what a reasonably prudent person familiar with the mining industry and the protective purpose of the examination regulation would do to avoid a violation of the standard. But Winebarger saw on his inspection that no support of the ribs was being done. Campbell testified they did not have a truss bolter for rib bolting at the time, but that only served to show that the rib conditions were such that the hazards were beyond the mine's ability to install rib support. Winebarger wrote the preshift examiner should have observed the widespread hazards and flagged and recorded them in the record book. He testified no mitigating circumstances were offered, and he found none. It is true that the mine's roof control plan in effect at the time did not address rib bolting, but hazards are required to be reported. If Warrior personnel were recognizing, reporting and correcting the hazards as contended by Respondent, the claimed reports were not recorded in the record book. The preshift examiner did not report and record obvious and extensive hazards that existed on the #2 Unit the morning of May 10, 2011. I agree with the determination of high negligence on the part of the operator.

### Unwarrantable Failure

Respondent contended the alleged hazardous conditions were not present at the time of the preshift examination, that it existed for only 4 to 5 hours, and the conditions posed little danger since the Unit was shut down at approximately 8:45 am before the order was even issued.

The Secretary argued the important factors were the obvious and extensive nature of the conditions, and that miners had worked underground without the benefit of an adequate preshift examination.

*Extent of the violative condition.*

The unreported rib hazards existed across the mining unit. Most of the hazards were on the left side, entries #1 through #5, as recorded in the order, but there were some loose, rashing ribs on the right side also. This was not an isolated failure limited to one rib location. Inspector Winebarger testified, and the map he marked up revealed, that the rib conditions were so widespread they were difficult to map. Further, there were many types of adverse geologic conditions present that should have been reported for the safety of the incoming day shift. The number and type of hazardous conditions identified by the Inspector in many entries were such that the reporting violation here was very extensive.

*Length of time the violative condition existed.*

Although adverse rib conditions had not been reported on any of the preshift examinations beginning on May 8, 2011, the last examination conducted before this order was issued was between approximately 4 and 5 am on May 10, 2011. Inspector Winebarger credibly testified the hazardous conditions did not happen all at once. The dangerous conditions existed on the left side for at least 24 hours and until Kessinger and Morris approached Inspector Winebarger and told him that side was being flagged off. This was perhaps about 5 hours after the preshift examination. At first thought, this would not appear to be a long period of time. But it was long enough for the day shift crew to access the area and begin working, including some mining. Since the time bridged two shifts and affected outgoing and incoming miners, in the context of this violation, this period of time was significant.

*Whether the violation was obvious.*

Inspector Winebarger reviewed the preshift reports on the surface, but upon accessing the Unit was confronted by unreported rib and roof conditions. As he proceeded from entry #4 to the left to entry #1, the hazardous conditions became more numerous in the entries and crosscuts. He described many ribs and corners with loose material, ribs rashing off, and slips in the ribs, and he could hear the roof working, falling out and dribbling rock. Based on the record before me and the evidence found credible, the failure to perform an adequate preshift examination was very obvious.

*Whether the violation posed a high degree of danger.*

In the opinion of the undersigned, the danger presented to the incoming miners on that morning cannot be overstated. The outgoing miners on the maintenance shift had been exposed to rib conditions they were not equipped to control. Inspector Winebarger testified just being on the Unit, even without mining, an injury would occur. The incoming day shift miners had no warning of the multiple dangerous rib conditions in the entries and crosscuts on the left side of the Unit. Although not much mining was accomplished, the short cuts that were taken were in the #2 entry, in the area found to be particularly dangerous with the top working and dribbling out rock. The day shift miners were still on the Unit until Morris and Kessinger flagged the left side off. The fact that mine management, upon evaluating the left side of the Unit, quickly

decided to abandon that area supports a determination that the failure to report the hazardous rib conditions posed a very high degree of danger.

*Whether the operator was placed on notice that greater efforts were necessary for compliance.*

There is no evidence of actual notice to the operator regarding inadequate preshift examinations and efforts towards compliance. Here, there did not need to be any such notice. Part of the mine safety landscape since the Coal Act, the examinations are routine and well understood, even if from time to time the requirements are ignored. In this case, the most important factors are the obvious, extensive and dangerous unreported hazardous conditions. And, the length of time the unreported hazards existed was sufficient to expose third shift and day shift miners to the danger of falling material.

*The operator's effort in abating the violative condition.*

Not until mine management in the persons of Morris and Kessinger actually travelled to and evaluated the conditions in the left side of the Unit was there an abatement by flagging off and moving out of the left side. The evidence shows that the scaling efforts, which were ongoing in the Unit, could not control the loose rib hazards. The day shift had already performed some mining. Simply put, the abatement efforts were too little, and too late.

*The operator's knowledge of the existence of the violation.*

It was the third shift Foreman, not Crew Leader Smith, who alerted mine managers to the conditions on the #2 Unit and prompted the meeting of Morris, Anderson and Kessinger, that began about 5:30 am on May 10th. Adverse conditions had already been observed the day before by Inspector Hardison, but not reported on mine examinations. Smith testified that during the third shift there were none of the conditions found by Inspector Winebarger including sloughage on either side of the Unit. But he also testified that conditions not necessarily rising to the level of a hazard would not be recorded in the book. There was knowledge of hazardous conditions not reported by Smith. The third shift Foreman had alerted mine management to the conditions, motivating the early morning meeting of the three upper level managers. It was Campbell who received the preshift call out at 5:20 am, but when he went to the Unit and observed entries #3 to #1 he consulted with Boone and shut the entire Unit down. Campbell was an Assistant Mine Foreman that day, and with knowledge of the preshift examination his testimony that Smith had not performed an inadequate preshift examination is not credible. Warrior's managers knew or should have known the preshift examination was inadequate.

I find the inadequate preshift examination was an unwarrantable failure on the part of the operator.

### Penalty

There is a history of past preshift examination violations, the standard here was cited 2 times in 2 years at the Warrior mine. The overall number of past violations is more extensive. For this large mine, however, the rate of either is not high. The specially assessed penalty is

appropriate to the size of the operator's business and would not affect the operator's ability to remain in business. I have found high negligence because the failure to observe and record very obvious and very extensive rib hazards did not meet the required high standard of care under the Mine Act to protect miners against the risks of harm. There was an aggravated lack of care that was more than ordinary negligence. This was a particularly serious violation. The inadequate preshift examination was S&S, and an unwarrantable failure. This very serious failure to report hazards occurred in the #2 active mining Unit and exposed miners to the danger of injury, even death. The area was abandoned soon after higher level management personnel personally evaluated the conditions.

The most important factors in assessing the penalty, similar to the rib control violation, are gravity and negligence, both in this order *very* serious in nature. Preshift examinations are critical to the safety of miners. I find, for the reasons expressed, that this was an egregious violation and the specially assessed penalty of \$70,000 was fully justified.

### **Citation No. 8498877**

#### Summary of the Evidence

This citation alleged a violation of 30 C.F.R. § 75.223(a)(1). The Condition or Practice set forth:

Revisions to the roof control plan were not proposed by the operator when conditions indicated that the plan is not suitable for controlling the ribs. The plan is inadequate that excessive mining heights up to 11 ft. 4 inches) existed on the #2 In the 2<sup>nd</sup> west panel. These excessive mining heights were caused by abnormal mining conditions such a stack rock, loose heads, clay veins, slips in the roof ribs which caused the mine roof to fall out during the mining process. The operator shall revise the current roof control plan to address rib support during the mining process.

Revision to the roof control plan was submitted on May 10, 2011 but not approved. The citation was terminated on May 12, 2011 after a revision to the roof control plan was approved.

Inspector Winebarger determined injury was highly likely and could reasonably be expected to be fatal to 1 person. He also determined the gravity to be S&S, and the negligence on the part of the operator to be high.

GX-9.

Inspector Winebarger testified there were rib conditions in the area of mining that were not addressed in the roof control plan. Tr. 104. He wrote in his notes the plan did not address how the ribs would be controlled in the excessive mining heights as found on the #2 Unit on May 10th. GX-5, p. 34. He also testified the operator is required to revise their plan when it is not suitable for the conditions present, and the plan did not address rib support. Tr. 103, 104. In the morning discussions with the mine managers he had learned the mine had faced similar

conditions during the past week and had chosen to move out of that panel. Tr. 105. Winebarger further testified the roof control plan is important because it provides a mine-wide minimum to protect people. The plan in effect at the time had been approved in March 2011. Tr. 104, 128, 130.

The hazard, Winebarger testified, was the fall of ribs due to excessive mine heights, the slips, the stack rock, the heads and all of the conditions that were present. The concern for rib control was predominantly the rock above the coal seam; the slips in the ribs were not supported. Tr. 104, 130, 134. Injuries would be fatal, the same as for the 75.202(a) citation and the imminent danger order he had issued because the rock was heavy, the ribs were loose, and slips and clay veins were present. These conditions were not addressed in the roof control plan. Tr. 105. He wrote roof support alone would not control the ribs and rock ribs, and the plan was inadequate. The conditions had existed for 3 production days, since the Unit moved into the section on May 5. GX-5, p. 35.

Inspector Winebarger testified injury was highly likely because the triggering effect was already present. Tr. 106. He also wrote if mining continued in the conditions it was highly likely a miner would be killed since the slabs and chunk rock were large and heavy. Of the 15 miners there, one person would be exposed. GX-5, p. 36. Winebarger also testified he attributed high negligence to the operator because the section foreman, the mine examiner and other management persons knew or should have known of the conditions but choose to ignore them. Tr. 106, 107. Other than the decision to move the Unit, no mitigating circumstances were taken or offered. Tr. 107.

Assistant Mine Foreman Campbell testified that under the roof control plan, they were permitted to scale on ribs, but not engage in rib bolting because they did not have a truss bolter at the time. Tr. 295. In subnormal conditions they always narrowed entries and put in extra support. In his opinion, the mine's roof and rib control plan was adequately supporting the roof. Tr. 296, 297. He recalled they hit abnormal conditions in both the first west and second west areas, took care of it, and moved out. Tr. 298-300. Campbell further testified the mine is not required to submit a plan addendum upon encountering subnormal conditions. Tr. 297.

General Manager of Operations Anderson testified that at the time of the morning meeting he knew of no violations of the approved roof control plan. Tr. 144, 162. He wrote in his notes they had only been mining in the setup for 3 days, barely enough time to determine if the conditions would persist. When MSHA got there the Unit was shut down to correct the hazards they, not MSHA, had found. The decision was made to move the #2 Unit after Kessinger evaluated the conditions. RX-G. He also testified to abate the citation they had to submit a plan change. While he did not recall the measures put in at the time, he believed the addendum provided for mining heights, controlling the ribs, and relocating the Unit. Tr. 157.

Safety Director Morris testified the roof control plan is reviewed every 6 months. He thought the mine had maybe been cited once for this safety standard. Tr. 205.

The safety standard cited provides, in pertinent part:

(a) Revisions of the roof control plan shall be proposed by the operator –

- (1) When conditions indicate that the plan is not suitable for controlling the roof, face, ribs, or coal or rock bursts...

30 C.F.R. § 75.223(a)(1).

The Warrior Cardinal Mine Roof Control Plan in effect on May 10, 2011 contained the following provisions:

Under the heading of “Safety precautions for roof control plan”:

1. This is the minimum Roof Control Plan and was formulated for normal roof conditions and the mining system described. Additional measures will be taken in accordance with 75.220 (a) (1) to protect persons if unusual hazards are encountered.<sup>43</sup>

Under the heading of “Safety Precautions for the Installation of Arches and Square sets”:

1. Prior to the installation, a company official shall examine the area to be supported. Loose material from the roof and ribs that pose a hazard to the miners shall be taken down. When material cannot be removed, other protection, such as a canopy, shall be provided.

GX-3, pp. 7, 18.

### Contentions

Respondent contends the citation should be vacated because a revision of the roof control plan was not indicated on May 10, 2011 and was rendered unnecessary by the shutdown of the #2 Unit at 8:45 am and the later decision to relocate the Unit. RPHB, p. 52. The testimony of Anderson was that only one change was made to the RCP, that when encountering high conditions Warrior could relocate to another location, something Warrior always had the ability to do. In the alternative, Respondent requests that the citation be modified to a technical violation of the standard. RRB, p. 18.

The Secretary contends that at the time of the inspection the roof control plan did not contain any provision to control the numerous, widespread hazardous rib conditions observed on the #2 Unit, and there were no known proposed revisions. The rib conditions were not supported in any way, and the plan did not cover any form of support related to any type of rib condition. The plan provisions were not just unsuitable, they were nonexistent. Respondent did not revise the plan until after the issuance of the citation. SPHB, pp. 44, 45. The #2 Unit had not been relocated upon the Inspector’s arrival, and Respondent’s ability to move the production unit was irrelevant. For the conditions, no revisions had been submitted and no MSHA review had been conducted. SRB, p. 4.

---

<sup>43</sup> As set forth in citation #8503299, safety standard 75.220(a)(1) requires the roof control plan to be suitable to the prevailing geological conditions.

## Validity

Despite the fact that this hearing was years after the citation was issued, a copy of the roof control plan as revised and approved on May 12, 2011 is not of record. Respondent's Anderson was asked about the revisions:

Q Do you recall what – what types of provisions were required under the MSHA approved roof control plan addendum?

A Not on top of my head. I believe it related to the mining height and—and controlling the ribs. I don't recall what the measures were put in at that time. I know I've seen it. I just can't recall right off the top of my head.

Q Do you recall if one of the potentially corrective actions for encountering high roof conditions would be for the mine to choose to re-locate the unit?

A Yes.

Tr. 157.

While professing he could not recall the revisions Anderson nonetheless believed that mine heights, controlling the ribs, and re-location of the unit were the revisions at the time.

The Secretary is correct that the roof control plan in effect did not contain any form of support related to any type of rib condition such as the hazardous ribs on the #2 Unit. The reference to 75.220(a)(1) is the general requirement that the plan be suitable to the prevailing geologic conditions. The only specific reference to ribs in the mine's plan was in the context of the installation of arches and square sets. In those circumstances loose material from the roof and ribs that pose a hazard to miners shall be taken down. GX-3, p. 18, #1. Rib support was not addressed. The safety standard is clear that *when* conditions indicate the plan is not suitable for controlling the ribs or coal or rock bursts *revisions shall* be proposed by the operator.

There is testimony indicating the operator had encountered similar adverse conditions in another area of the mine. The #2 Unit had just moved out of the first west panel before turning into the second west panel. However, evidence of the specific conditions prompting abandoning first west was not developed, and this citation was issued regarding the circumstances encountered in the second west panel.

As already discussed, Inspector Winebarger's opinion that the multiple hazardous rib conditions existed from the first day of mining on May 8, 2011 may be correct; however as also discussed I have found the best evidence of the conditions to be the observations of Inspector Hardison on the first, day shift on May 9, 2011. Hardison was troubled by what he saw, but deferred to the experience and area of responsibility of the District's Roof Control Specialist.

Since mine management was present in the active mining area for the two production shifts on May 9<sup>th</sup>, this was *when* revisions to the roof control plan should have been proposed, if

not sooner depending on the experience and knowledge gained in the first west panel. Failing those opportunities, during the third, maintenance shift scaling was performed but failed to *control* and could not *support* the hazardous rib conditions. The third shift foreman alerted upper level mine management to the conditions and the meeting of the managers took place before the MSHA inspectors arrived. This was the next opportunity to timely submit proposed revisions. Then, when on the Unit at the time of the imminent danger run, Morris and Kessinger personally observed the conditions and quickly decided to abandon the left side of the Unit. The hazardous ribs at that time were not controlled by the ongoing scaling. A truss bolter was not available to support the ribs. As set forth in the citation, the roof control plan needed to be revised to address *rib* support. I find there was a violation of the cited safety standard and the citation was validly issued.

### Significant and Substantial

The fact of the violation has been established, and the first element has been satisfied.

Respondent contends this was a technical violation. I disagree. In failing to revise the roof control plan in the face of hazardous rib conditions not covered in the plan, miners could form the belief that addressing loose, unstable ribs with more than scaling was not required. Campbell testified they were not required to support the ribs because they did not have a truss bolter. Third shift crew leader and examiner Smith ignored the readily apparent conditions, claiming no need to report conditions not rising to the “level of a hazard”. Yet on the same third maintenance shift the foreman was so concerned he alerted upper mine management to the conditions. The management members were concerned enough to meet in the early morning hours, even before that shift ended. Under these circumstances, the hazard contributed to by the violation comes into clear focus – hazardous rib conditions were not required to be properly supported or controlled by the mine’s own roof control plan, and would exist under continued normal mining operations with the consequence of rib falls, rolls or bursts.

As discussed *supra* in citation #8498874 such a hazard, a fall of rib rock or coal, was highly likely to occur. Scaling alone did not address the hazard. The miners did not have the equipment to support the ribs and correct the hazard. Inspector Winebarger described the slabs of rock and chunk rock as large and heavy, and credibly determined injury was highly likely and it was reasonably likely a miner would be killed. The remaining elements of the analysis are satisfied; the failure of mine management to provide the minimum requirements for hazardous rib support and control in the mine’s roof control plan was S&S.

Injury was highly likely and could reasonably be expected to be fatal to 1 person. The gravity determinations are affirmed.

### Negligence

The operator’s duty to miners, in the context of this citation, is to maintain a current, approved roof control plan that provides the minimum standards suitable for controlling the roof, face, ribs or coal or rock bursts. Under the safety standard, revisions must be proposed *when* the plan in place is not suitable to control hazardous ribs. Cardinal’s plan was not suitable when the

#2 Unit turned into the second west panel and soon encountered adverse geologic rib and roof conditions. Efforts were made to control the roof, but the miners could not control the extensive rib hazards, particularly on the left side of the panel. By the time of the day shift on May 9, 2011 the mine foremen and examiners knew, or should have known that revision to the roof control plan was required. During the third, maintenance shift, even if the examiner failed to report the hazards, the mine foreman alerted upper level management about the adverse conditions and there was another opportunity to submit a revision for approval. Not until the inspection uncovered the inadequate plan and the citation was issued was a revision proposed.

Inspector Winebarger's testimony appears to suggest the mine's ability to move a mining Unit is a mitigating circumstance. But timing is important. The first encounter with hazardous conditions not covered in the roof control plan is when revision must be proposed. A decision may also be made to move the mining Unit away from the hazards; but this does not mitigate the operator's duty to revise the plan even if the mining Unit is moved.

Proposing revision to a roof control plan when newly encountered and hazardous mining conditions are discovered is not an onerous task for experienced mine managers. The first revision was submitted the day of the inspection, showing that the task is not very time consuming. While there were opportunities over about a 24 hour time period to timely prepare and submit a revision for approval, I do observe there is evidence mine personnel were heavily engaged in dealing with a very challenging mining environment during that time. The relatively short time frame and the distraction of working in adverse geologic conditions that defied safe control may be viewed as a mitigating circumstance in the failure to timely submit a plan revision. Under the facts and circumstances presented, an aggravated lack of care is not demonstrated here.

Therefore, I find that the negligence to be attributed to the operator is more appropriately designated as moderate.

### Penalty

The Secretary proposed a specially assessed penalty in the amount of \$45, 000. I have affirmed that the violation was S&S, but reduced the negligence to moderate, and this was not an unwarrantable failure on the part of the operator. I do not affirm the special assessment proposed, but independently assess a penalty under the statutory criteria.

As with the citations already discussed, even the penalty charged would not affect the operator's ability to continue in business, and would not be inappropriate to the very large size and high productivity of this mine. There was perhaps one past violation of this standard and further the *rate* of previous violations does not suggest an egregious violation history. The operator did, on the date the citation was issued, submit the first proposed revision.

Also as with other violations, the most important considerations in determining the penalty are the gravity of the violation and the negligence of the operator. The failure of mine management to propose a revision to their roof control plan in a timely manner when the prevailing geologic conditions warranted attention to this requirement is a serious matter. Miners

could have, and here apparently did, form a belief that support and control of ribs other than by scaling was not required. The potential consequences of such a belief system in the context of the hazards that existed in the second west panel are dire. While ideally mine management should have been aware their roof control plan was not suitable to address the rib conditions that existed, and acted with more urgency to submit revisions, I have reduced the negligence to moderate in recognition of the distraction possibly caused when miners were struggling to maintain a safe environment but were unable to do so.

Considering the facts and circumstances surrounding this violation, and the deterrent purposes of the Act, I assess a penalty of \$8,000.

### **ORDER**

It is **ORDERED** that Citation No. 8503299 is **AFFIRMED**; the civil penalty assessment is reduced to \$20,750.

It is **ORDERED** that Order No. 8498873 is **AFFIRMED** as written.

It is **ORDERED** that Citation No. 8498874 be **MODIFIED** to reduce the negligence from “high” to “moderate” and to delete the finding of unwarrantable failure; the civil penalty assessment is reduced to \$30,500.

It is **ORDERED** that Order No. 8498875 is **AFFIRMED** as written; the civil penalty assessment is \$70,000.

It is **ORDERED** that Citation No. 8498877 be **MODIFIED** to reduce the negligence from “high” to “moderate”; the civil penalty assessment is reduced to \$8,000.

The Respondent is **ORDERED** to pay a total civil penalty assessment of \$129,250 within 30 days of the date of this decision.<sup>44</sup> Upon receipt of payment, this case is **DISMISSED**.

/s/ Kenneth R. Andrews  
Kenneth R. Andrews  
Administrative Law Judge

---

<sup>44</sup> Payment should be sent to: MINE SAFETY AND HEALTH ADMINISTRATION, U.S. DEPARTMENT OF LABOR, PAYMENT OFFICE, P.O. BOX 790390, ST. LOUIS, MO 63179-0390.

Distribution: (Certified Mail)

Eric Johnson, Esq., U.S. Department of Labor, Office of the Solicitor, 211 7<sup>th</sup> Avenue North,  
Suite 420, Nashville, TN 37219.

Gary D. McCollum, Esq., Assistant General Counsel, Warrior Coal, LLC, 1146 Monarch Street,  
Lexington, KY 40513.

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

OFFICE OF ADMINISTRATIVE LAW JUDGES  
721 19<sup>th</sup> STREET, SUITE 443  
DENVER, CO 80202-2536  
TELEPHONE: 303-844-5266 / FAX: 303-844-5268

March 6, 2017

JONES BROS., INC.,  
Contestant,

v.

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

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

v.

JONES BROTHERS INC.,  
Respondent.

CONTEST PROCEEDINGS

Docket No. SE 2016-218  
Citation No. 8817595; 04/06/2016

Docket No. SE 2016-219  
Citation No. 8817596; 04/06/2016

Mine: S.R. 141 Project, DeKalb Co.  
Mine ID: 40-03454

CIVIL PENALTY PROCEEDING

Docket No. SE 2016-246  
A.C. No. 40-03454-410595

Mine: Jones Brothers Mine

**DECISION AND ORDER**

Before: Judge Miller

This case is before me upon notices of contest and 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). These dockets involve nine citations and orders issued pursuant to Sections 104(a) and 104(g)(1) of the Act with originally proposed penalties totaling \$2,940.00. On January 23, 2017, Jones Brothers Inc. filed a motion contesting the jurisdiction of the Mine Safety and Health Administration over its operation. Jones asserts that its operation was a “borrow pit” and therefore not subject to inspection by MSHA. I denied that motion in an order on February 2, 2017, and found that MSHA did have jurisdiction to issue the citations. That order is incorporated here.

In a joint motion to the court on February 22, 2017, the parties indicated that Jones Brothers Inc. wishes to appeal the order on the issue of jurisdiction to the Commission, but does not wish to otherwise contest the citations and orders or the proposed penalties in these dockets. The parties agree that apart from the jurisdiction issue, there are no remaining issues of fact.

I accept the representations of the Secretary as set forth in the penalty petition. I have considered the representations and documentation submitted in this case and conclude that the proposed penalties are appropriate under the criteria set forth in Section 110(i) of the Act. The parties' Joint Motion for Final Decision and Order is **GRANTED** and the citations are affirmed as issued. Respondent is hereby **ORDERED** to pay the Secretary of Labor the sum of \$2,940.00 within 30 days of the date of this decision. Upon receipt of payment, the contest cases are **DISMISSED**.

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

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

Willow Eden Fort, Office of the Solicitor, U.S. Department of Labor, 618 Church St, Suite 230,  
Nashville, TN 37219

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

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

OFFICE OF ADMINISTRATIVE LAW JUDGES  
7 PARKWAY CENTER, SUITE 290  
875 GREENTREE ROAD  
PITTSBURGH, PA 15220  
TELEPHONE: 412-920-7240 / FAX: 412-928-8689

March 7, 2017

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

v.

CONSOL PENNSYLVANIA COAL CO.,  
LLC,  
Respondent.

CIVIL PENALTY PROCEEDING

Docket No. PENN 2016-132  
A.C. No. 36-10045-402245

Mine: Harvey Mine

**DECISION AND ORDER**

Appearances: Anthony Fassano, Esq., for the Petitioner, U.S. Department of Labor,  
Office of the Solicitor, Philadelphia, Pennsylvania

Patrick Dennison, Esq., for the Respondent, Jackson Kelly, LLC,  
Pittsburgh, Pennsylvania

Before: Judge Steele

This case is before me upon a petition for assessment of a civil penalty, pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d). A hearing was held in Pittsburgh, Pennsylvania on September 20, 2016.<sup>1</sup> The parties subsequently submitted post-hearing briefs.

**STATEMENT OF THE CASE**

This case concerns an alleged violation of 30 C.F.R. § 75.403, “Maintenance of incombustible content of rock dust.” On December 22, 2015, two MSHA inspectors traveled to the Harvey Mine for a five-day inspection. During the course of this inspection, a rock dust sample was taken in the No. 3 Entry of the mine. After the sample was sent off for laboratory testing, it was found to be non-compliant under rock dusting regulations. As a result, Citation No. 9073907 was issued to the Respondent. The inspector who issued the citation and the supervising inspector who accompanied him differed at hearing on where the sample was taken. The contemporaneous notes of the issuing inspector, as well as the language of the citation, contradicted the testimony of the inspectors at hearing. The discrepancies between the evidence

---

<sup>1</sup> The above-captioned proceeding contained two 104(a) citations. The parties settled Citation No. 7033725 prior to hearing. The Court issued a Decision Approving Partial Settlement and Order to Pay on November 22, 2016.

presented by the Secretary and the testimony offered at hearing, as well as contentions made by the Respondent, raised questions as to where the sample was actually taken.

## STIPULATIONS

At hearing the parties entered the following joint stipulations into the record:

1. The operations of Respondent at the Mine at which the citations in this matter were issued are subject to the jurisdiction of the Act.
2. The above-captioned proceeding is subject to the jurisdiction of the Federal Mine Safety and Health Review Commission, and its assigned Administrative Law Judges, pursuant to Sections 105 and 113 of the Act.
3. Respondent was an “operator,” as defined in §3(d) of the Act, 30 U.S.C. § 802(d), at the Mine at which the Citations in this matter were used.
4. The Citations in this matter were issued and served by a duly authorized representative of the Secretary of Labor upon an agent of Respondent at the date, time and place stated therein as required by the Act.
5. True copies of the Citations in this matter were served on Respondent and/or its agents as is required by the Act.
6. The Citations contained in “Exhibit A” attached to the Secretary’s petition in the case bearing Docket No. PENN 2016-132 are authentic copies of the subject Citations, with all the appropriate modifications or abatements, if any.
7. Payment of the total proposed penalty in this matter will not affect Respondent’s ability to continue in business.
8. Respondent demonstrated good faith in the abatement of the alleged violations.
9. Pursuant to 30 C.F.R. §§ 75.402-403, Respondent was not required to rock dust the 3A entry from the face outby 40 feet.
10. With the exception of Respondent’s exhibit R-1, the parties stipulate to the authenticity of the exhibits referenced in the parties Prehearing Statements (with all amendments thereto) but not the relevancy or truth of the matters asserted therein.
11. The R-17 Assessed Violation History Report (Government Exhibit 7) is an authentic copy and may be admitted as a business record of the Mine Safety and Health Administration.

12. Consol escort Albert Stein traveled with the inspector on December 22, 2015 when the rock dust sample at issue was collected.

Sec'y's Br., 3-4.<sup>2</sup>

#### **SUMMARY OF THE TESTIMONY AND RECORD**

On December 22, 2015, Inspector Jason Detrick<sup>3</sup> and his supervisor, Inspector Tom Bochna<sup>4</sup>, performed a five day spot-check at the Harvey Mine, operated by the Respondent, Consol Pennsylvania Coal Company. Tr. 28.<sup>5</sup> The Harvey Mine is a mine that liberates a large amount of methane, necessitating these inspections under the Mine Act. Tr. 28; 30 U.S.C. § 813(i). Inspector Detrick began inspecting on his own in October 2015. Tr. 52-53.

As part of his inspection, Inspector Detrick took a rock dust sample in the No. 3 Entry of the Harvey Mine. Tr. 37. Inspector Detrick also sampled the air for methane concentrations. Tr. 45. The methane detected within the tested area was .5 percent. Tr. 45. The rock dust sample contained 66.2 percent incombustible content. Tr. 48.

---

<sup>2</sup> References to the Secretary's brief will be styled as "Sec'y's Br.", followed by the referenced page number. References to the Respondent's brief will be styled as "Resp't's Br.", followed by the referenced page number.

<sup>3</sup> At time of hearing, Jason Detrick had been an MSHA inspector for approximately two and a half years. Tr. 19. Before joining MSHA, Detrick was a coal miner for Alpha Natural Resources at the Emerald Coal Mine for seven years. Tr. 19-20. Detrick worked there as a loading machine operator, operated a continuous miner, and was a shield operator. Tr. 19-20. Detrick was also chairman of the health and safety committee at the mine for the United Mine Workers Local 2258, which involved the escorting of inspectors on their inspections. Tr. 20. Prior to his work at Alpha Natural Resources, Detrick worked for approximately a year at the Powhatan No. 6 Mine, in Bel Air, Ohio. Tr. 20. Detrick also worked for Maple Creek Mining, Inc., for two and a half years, beginning as a general laborer. Tr. 21. Before joining Maple Creek Mining, Inc., Detrick worked for Mathies Coal in the supply house of a mine for approximately two and a half years. Tr. 21-22. Detrick testified that as an inspector trainee he took hundreds of rock dust samples. Tr. 23. While working as a miner, Detrick assisted MSHA inspectors with the collection of their rock dust samples. Tr. 25.

<sup>4</sup> At time of hearing, Thomas Bochna had been a supervisory coal mine health and safety inspector for approximately two and a half years. Tr. 93. Prior to becoming a supervisor, Bochna was a regular mine inspector beginning in February of 2008. Tr. 94. Before joining MSHA, Bochna worked for 30 years at the Emerald Mine in Waynesburg as an hourly employee. Tr. 95. Bochna holds an associate's degree in mining technology from Penn State. Tr. 95. Bochna testified that he has collected hundreds of rock dust samples over the years. Tr. 97.

<sup>5</sup> References herein to the September 20, 2016 hearing transcript are styled as "Tr.", followed by the referenced page number.

The inspection party on December 22, 2015, consisted not just of Inspectors Detrick and Bochna but also Albert Stein, safety escort for the Harvey Mine, and Steve Apperson, the supervisor of safety at the Mine. Tr. 36. Detrick testified that no mining was ongoing at the time and that ventilation controls were in place and adequate at the time of inspection. Tr. 77. Parameter checks, which generally take place within the first hour of operation and are a prerequisite before progressing into mining, were ongoing. Tr. 43, 84.

Citation No. 9073907 was issued on December 30, 2015, to Albert Stein<sup>6</sup>, the Harvey Mine's company representative, eight days after Inspector Detrick took his sample. GX-1.<sup>7</sup> The citation alleges a violation of 30 C.F.R. § 75.403, "Maintenance of incombustible content of rock dust." GX-1. The citation's "condition or practice" section reads:

According to lab analysis results of rockdust bag sample 0155450AA collected on 12/22/2015 in the #3 Entry (40 ft outby the face) of the 3A Section Return Spad#87+34.09 the sample is non compliant. The rockdust sample is 66.2% incombustible content instead of the required 82.0% due to the presence of 0.5% of methane. The results of the rockdust analysis are attached to the citation. Standard 75.403 was cited 7 times in two years at mine 3610045 (7 to the operator, 0 to a contractor). Supporting rock dust sample bag numbers: 0155450AA.

GX-1.

The citation was signed by supervising Inspector Bochna. Tr. 68.

According to Inspector Detrick, 30 C.F.R. § 75.403 requires that rock dusting be performed by the Respondent 40 feet outby the working face and beyond. Tr. 58. At hearing, Detrick testified that as part of the inspection he was required to take a rock dust sample in the affected area. Tr. 37. Detrick reported that the sample location was black, dark, and dry, suggesting that adequate rock dust had not been applied in the area. Tr. 37, 41.

Detrick testified that before sampling he stood at the last row of supported bolts from the working face, and Inspector Bochna stood approximately twelve to fourteen feet from the working face. Tr. 37- 38. Using a 25 foot tape measure held at one end by Inspector Bochna,

---

<sup>6</sup> Albert Stein was employed by Consol Energy for five years at the time of hearing as a safety inspector. Tr. 128, 129. Stein was a safety inspector for Consol at the time of citation as well. Tr. 130. Stein worked at the Harvey Mine for approximately three years. Tr. 129. Prior to working for Consol Energy, Stein was employed by Siemens as an electrical technician. Tr. 129. Stein has his Pennsylvania and West Virginia black hats and is certified for surface and underground mining. Tr. 129. Stein also has his "machine runners." Tr. 129. Prior to his employment at Consol as a safety inspector, Stein was also an industrial engineer and a safety tech. Tr. 130. Stein holds an associate's degree in specialized technologies from Triangle Tech. Tr. 130.

<sup>7</sup> The Secretary's exhibits are styled "GX-", followed by the exhibit number referenced. The Respondent's exhibits are styled "RX-", followed by the exhibit number referenced.

Detrick walked out 25 feet, made a mark on the rib, and waited for Bochna to come up to the point marked on the rib. Tr. 75. Then he measured out another 15 feet. Tr. 75. Detrick testified that Inspector Bochna then directed him to give the operator the benefit of the doubt and measure out eight to ten feet further. Tr. 37. At hearing, Inspector Detrick testified that he was “anywhere from 62 to 64 feet outby the working face,” when he took his sample. Tr. 38.

Inspector Detrick testified that he then took a rib sample, putting half in his rock dust bag, and giving the other half to Stein. Tr. 38-39. Inspector Detrick testified that he asked Al Stein if there were any problems with either where or how he took the sample, and that Stein said no. Tr. 39. Inspector Detrick also testified that Harvey Mine safety supervisor Steve Apperson was concerned about the area and that Apperson pledged to work a rock dust hose around the corner to rock dust the area. Tr. 41-42, 46.

Inspector Detrick testified that, while in the area, he used a multi-gas detector and discovered a half percentage of methane, as well as methane in every working face throughout his inspection. Tr. 45. After collecting the rock dust and gas samples, Detrick mailed them to the national laboratory for testing and analysis. Tr. 45. Upon receiving the results of the testing, and learning the samples taken contained 66.2 percent incombustible content (instead of the required 82 percent, given the half percent presence of methane in the gas sample), Inspector Detrick issued Citation No. 9073907. Tr. 47-48.

Detrick testified that he was concerned about a methane ignition within the No. 3 Entry of the Harvey Mine where the samples were taken.<sup>8</sup> Tr. 48-50. Detrick testified that the combination of float coal dust in the Entry, as well as the presence of methane in the area, would make an ignition more violent than a simple coal dust or methane ignition on its own. Tr. 50. Detrick also testified that the likely injuries from such an ignition would affect ten to twelve people with injuries including smoke inhalation and burns. Tr. 51. These injuries, Detrick testified, could cause lost work days, permanent disabilities, or fatalities. Tr. 51.

During cross-examination, Inspector Detrick acknowledged that MSHA’s Mine Academy trains inspectors to describe with particularity the nature of each alleged violation. Tr. 53. Inspector Detrick acknowledged that, according to MSHA Mine Academy training, each citation or order must include the location of the violation, and that failing to provide the location may impede an operator’s attempts to abate the violation. Tr. 54. Detrick also acknowledged that the Mine Academy instructs inspectors to note the persons who traveled with the inspector, and that the notes and citation must accurately capture all relevant facts of the violation. Tr. 54-55.

---

<sup>8</sup> At hearing, the Secretary introduced into evidence an accident investigation report of a methane and/or dust ignition that occurred at the Harvey Mine in January of 2015, as GX-5. Tr. 31-35. The Respondent objected to its introduction on the grounds that Inspector Detrick had no personal knowledge of the events described in the report, that the events occurred nearly two miles from those in the instant matter, and that there was a discrepancy regarding the dating of the report. Tr. 31-32. The Respondent also objected to the introduction of the investigation report on the grounds that the report had no relevance toward determining whether the citation was Significant and Substantial or not. Tr. 32. This Court, as stated at hearing, assigns very little weight to this exhibit, while still considering it admitted, given that the Inspector had no personal knowledge regarding the report. Tr. 33.

In the same exchange at hearing Detrick acknowledged that the citation appeared to state the sample was taken at spad 87 + 34.09.<sup>9</sup> Tr. 56-57. Inspector Detrick acknowledged that the plain text of the citation appeared to contradict testimony he offered at hearing that the samples were taken over 60 feet from the working face, but asserted that his testimony at hearing was accurate. Tr. 57. Inspector Detrick testified that when he submitted the samples to the national laboratory, he labeled them as taken 40 feet from the working face, and not over 60 feet. Tr. 59. Inspector Detrick testified that his contemporaneous notes contained the measurement of 40 feet outby the working face to mirror the language of the mandatory safety standard in question, 30 C.F.R. § 75.403. Tr. 40; *see also* Tr. 37. Inspector Detrick testified that the spad number was meant to be a reference point for future inspectors to return to in order to ensure proper termination of any potential citation. Tr. 57.

Inspector Detrick testified that he did not note the presence of Inspector Bochna or company representative Steve Apperson in his notes for the December 22 inspection, despite their accompanying him on his inspection that day. Tr. 62-63. Detrick stated at hearing that he did not document in his notes on December 22 any conversation he had with Steve Apperson regarding the condition of the Entry or its need for rock dusting. Tr. 66-67.

Inspector Detrick and the Respondent's attorney, Patrick Dennison, had the following exchange at hearing:

Q: Would you agree with me today, based on your testimony, you didn't accurately describe with particularity the violation?

A: That's correct, and as you said, yes, I was a new inspector at the time, and I'm not using that as a crutch by any means.

Tr. 60.

Inspector Detrick later stated that "[i]f I'm guilty of anything, it is not accurately describing where I took the rock dust sample." Tr. 66. Detrick affirmed that he took an accurate and representative rock dust sample. Tr. 66-7. Inspector Detrick testified that he took his sample from the rib of the affected area and did not take samples from the roof or floor of the mine. Tr. 70. Inspector Detrick testified that he did not cone and quarter the sample as taught at the Mine Academy, and that on most inspections, cone and quartering is not done. Tr. 71.

Inspector Bochna, Detrick's supervisor, also testified regarding the December 22 inspection. Tr. 101. Bochna testified that he stood at roughly the last strap, or the last bolt away from the working face, holding the tape measure, while Detrick drew the length of the tape out. Tr. 100-101. Bochna estimated he was approximately fourteen feet from the working face when

---

<sup>9</sup> Spads are triangular pieces of metal embedded in the ceiling of a mine, fixed by engineers, and used to guide a mining machine in the course of mining or locate miners in the case of emergency. Tr. 121-22, 165. The numbers indicate the distance from the spad's location to the mine's entrance, which is designated the zero point. Tr. 164, 172. Thus, spad 87 + 34.09 was 8,734 feet and 9 hundredths of a foot from the mine entrance at the time of inspection. Tr. 172.

the measurements began. Tr. 101. Bochna asserted that Detrick was approximately 50 feet from the working face when the sample was collected. Tr. 101. Bochna could not recall any conversations with either Steve Apperson or Albert Stein during the collection of the sample or after the collection of the sample. Tr. 102.

Looking over Citation No. 9073907, Inspector Bochna testified that it stated the sample was taken 40 feet outby the working face “roughly in that area” of spad 87 + 34.09. Tr. 104; GX-1. Bochna asserted that the operator has an independent incentive to properly mark and measure spads, because failure to do so could lead to unforeseen consequences in the mining process. Tr. 106-107.

Inspector Bochna could not recall at hearing what length tape measure was used in determining the distance for the citation. Tr. 109. Bochna could not recall if he was required to move in order to measure, as would be necessary if Inspector Detrick used a 20 or 25-foot tape measure. Tr. 110. Bochna testified that he would expect to see how the distance was measured in the notes of Citation No. 9073907, but that information was not included in the citation or Inspector Detrick’s contemporaneous notes. Tr. 112. Bochna could not recall definitively at hearing whether Inspector Detrick took a band sample, consisting of the roof, ribs, and floor, or instead a rib sample alone. Tr. 118.

Inspector Bochna testified at hearing that he would not know, simply by reviewing the citation, where exactly the rock dust sample was taken by Inspector Detrick. Tr. 121. He further testified that he did not see Inspector Detrick take a sample. Tr. 126.

At hearing, the Respondent introduced testimony from three witnesses: Albert (“Al”) Stein, Terry Reamer, and Doug Bell.

Albert Stein was a safety inspector at the Harvey Mine in December of 2015, and accompanied the inspectors on their December 22, 2015 inspection. Tr. 129-130, 132. At hearing, Stein testified that he handwrote notes on a notepad during the inspection.<sup>10</sup> Tr. 133. The admission of these notes, introduced in typewritten format as RX-1, was objected to by the Secretary. Tr. 135. The Court overruled the objection and agreed to admit the notes with the caveat that the exhibit’s weight would be considered post-hearing. Tr. 137. The weight assigned Stein’s typewritten notes in deciding this case is discussed *infra*.

Stein testified that he saw Inspector Detrick take his rock dust sample. Tr. 139. Stein testified that the sample was taken at spad 87 + 34.09. Tr. 140. Stein testified that neither Inspector Detrick nor Inspector Bochna measured where they sampled. Tr. 141. Stein testified that Inspector Bochna pointed to the spad in the ceiling and directed Inspector Detrick to, “[t]ake [the sample] from this area.” Tr. 141.

---

<sup>10</sup> Stein testified that his typed notes did not differ from his handwritten notes. Tr. 137. Stein testified that once a notepad was filled, it was discarded. Tr. 138. Notes are typed up if a citation is subsequently issued. Tr. 137-138. Once the notes are stored on the mine’s computer system, the handwritten notes are discarded. Tr. 137-138.

Stein testified that Detrick did not take a band sample, but did collect more than just a rib sample. Tr. 142, 162. Stein testified that Inspector Detrick reached as high as he could into the corner of the roof and rib, and dusted down a sample into his rock dusting pan. Tr. 140. Then, Stein testified, Detrick proceeded to take a sample from the floor on the other side of a canvas ventilation shield. Tr. 141. Stein testified that without a tool to reach the roof, Inspector Detrick could not have taken a sample from the roof. Tr. 143.

Stein's testimony differed from Inspector Detrick's regarding the state of the No. 3 Entry. Tr. 144. Stein testified that the area was a grayish color. Tr. 144. Stein testified that the area was thoroughly rock-dusted and effectively ventilated. Tr. 144. Using a mine map, labeled RX-2, Stein testified that a current of positive air pressure ran along the wall until it came to the working face of the No. 3 Entry. Tr. 144-145. Once the positive air pressure struck the working face, it would rebound back out of the No. 3 Entry and travel to the exterior. Tr. 144-145. The mine map was drafted by Harvey Mine engineers and draftsmen. Tr. 145; GX-2.

Stein, using the mine map, testified that the No. 3 Entry was lined on one side by a canvas shield. Tr. 145; RX-2. This canvas shield helped guide positive air pressure from the No. 1 and No. 2 entries into the No. 3 Entry. Tr. 145. Once the positive air current struck the working face, it would travel along the other side of the canvas shield, eventually to fans that blow the air out of the mine. Tr. 147.

At hearing, Stein used an enlarged section of the mine map to visually demonstrate that on December 22, 2015, spad 87 + 34.09 was marked on the mine map as fifteen feet from the working face. Tr. 148; RX-3. Stein also testified that he took his own methane measurements during the inspection. Tr. 149. Stein testified that, using an Altair pocket detector, he reached up into the corner nearest the last strap from the working face, twelve inches from the roof and rib, and took a gas sample. Tr. 149. According to Stein, the sample read .45 percent methane. Tr. 149. The Altair sample's reading was memorialized in Stein's transcribed notes. Tr. 148, RX-1.

Stein testified that the roof and ribs were in good condition in the No. 3 Entry. Tr. 150. Stein testified that "Tensor" brand roof mesh was secured between straps of bolts placed every four to five feet. Tr. 150-151. Stein also testified that there was no mining ongoing in the No. 3 Entry on December 22, 2015. Tr. 151-152. Eventually mining would begin again in the section. Tr. 157.

The Respondent introduced Terry Reamer<sup>11</sup> at hearing, a draftsman and surveyor-transit man at the Harvey Mine.<sup>12</sup> Tr. 169.

As a surveyor and draftsman, Reamer was responsible for map-making at the Harvey Mine, as well as advancing the sights of the Harvey Mine while underground. Tr. 170-171. Advancing a sight involves taking a previous day's sight and beginning from that point. Tr. 170. Afterward, Reamer uses a back sight to advance a line of sight to the furthest in-by point of the Entry. Tr. 171. This is necessary to keep mining on course, as well as keeping detailed records of the mine's layout for mapping purposes. Tr. 171. Reamer testified that spads are used as guideposts to measure distances within the mine, sometimes as fixed points for advancing the sights. Tr. 172.

Reamer testified that he installed spad 87 + 34.09 on December 16, 2015. Tr. 173. A copy of Reamer's time book, labeled RX-5, was admitted, which appears to show that Reamer recorded advancing the sights in the No. 3 Entry on December 16, 2015. Tr. 173-174; RX-5. A copy of the mine's underground field notes from December 15-16, labeled RX-6, were used by the witness to support his testimony. Tr. 174-175. Reamer testified that the underground field notes from that day, as seen in RX-6, include an Entry listing spad 87 + 34.09. Tr. 176; RX-6.

Reamer testified that he shared the location of the spad with his colleague, Doug Bell. Tr. 178.

Doug Bell<sup>13</sup> testified at hearing for the Respondent. Tr. 178. He testified that, on December 15, 2015, he was employed as a transit-operator and drafter in the Harvey Mine. Tr.

---

<sup>11</sup> Reamer worked with Consol for over twelve years at the time of hearing. Tr. 168. Reamer worked previously as a draftsman at Mine 84. Tr. 168. Reamer has his Pennsylvania experienced miner card, as well as assistant mine foreman papers. Tr. 169. Reamer also took an associate's degree in drafting and design, as well as a bachelor's degree in industrial technology, from California University of Pennsylvania. Tr. 169-170.

<sup>12</sup> The Secretary objected to the testimony of Terry Reamer and Doug Bell, two of the Respondent's witnesses at the hearing. Tr. 166-167. The Secretary argued at hearing that the testimony of Terry Reamer and Doug Bell should be restricted to what each had personal knowledge of. Tr. 166-167. The Secretary contended this was due to Reamer and Bell's status as lay witnesses without personal knowledge of the events of December 22, 2015. Tr. 166-167. The Court allowed both to testify at hearing.

<sup>13</sup> Doug Bell, a current employee of the Harvey Mine, began work there in May of 2012 as a transit operator. Tr. 179. He still held this position at time of hearing. Tr. 179. Prior to work at the Harvey Mine, Bell worked for Consol Energy out of the Monongah office as a surface and underground surveyor, responsible for the survey of three mines. Tr. 179-180. Prior to his work at Monongah, Bell was an engineering technician at Mine 84. Tr. 180. Bell also has his Pennsylvania miners papers, as well as his "machine runners." Tr. 181. Bell has two associate's degrees, one in land surveying, the other in forestry technology, both from Glenville State College. Tr. 181. Bell had been engaged in survey work for fifteen years at time of hearing. Tr. 181.

181. Bell's duties included using a surveying instrument, called a "transit," to locate and map out parts of the mine. Tr. 182. Using distances from the company field book, Bell drafted maps of the mine in computer software. Tr. 183.

Bell testified that he measured the distance from spad 87 + 34.09 to the working face. Tr. 185; RX-6. This was performed on December 30, 2015, as part of a monthly review conducted by the mine to determine how much mining had taken place in the last 30 days. Tr. 185. Bell testified that on December 30, 2015, spad no. 87 + 34.09 was fifteen feet distant from the working face. Tr. 185. Bell also testified that the distance of the spad from the working face could not have changed between December 22, 2015 and December 30, 2015, as no mining had taken place in the No. 3 Entry until January of 2016. Tr. 189.

## LAW AND REGULATIONS

### Burden of Proof and Standard of Proof

The Secretary must prove the basis of a violation by a preponderance of the evidence. *Jim Walter Resources, Inc.*, 28 FMSHRC 983, 992 (Dec. 2006), *RAG Cumberland Resources, Corp.*, 22 FMSHRC 1066, 1070 (Sept. 2000), *Jim Walter Res., Inc.*, 9 FMSHRC 903, 907 (May 1987). This includes every element of the citation. *In re: Contests of Respirable Dust Sample Alteration Citations: Keystone Mining Corp.*, 17 FMSHRC 872, 878 (Aug. 2008).

The Commission has held that “[t]he burden of showing something by a ‘preponderance of the evidence’ the most common standard in the civil law, simply requires the trier of fact ‘to believe that the existence of a fact is more probable than its nonexistence.’” *RAG Cumberland Resources Corp.*, 22 FMSHRC 1066, 1070 (Sept. 2000), quoting *Concrete Pipe & Products of California, Inc. v. Constr. Laborers Pension Trust for S. California*, 508 U.S. 602, 622 (1993).

The United States Supreme Court has held that “[b]efore any such burden can be satisfied in the first instance, the factfinder must evaluate the raw evidence, finding it to be sufficiently reliable and sufficiently probative to demonstrate the truth of the asserted proposition with the requisite degree of certainty.” *Concrete Pipe & Products of California, Inc. v. Constr. Laborers Pension Trust for S. California*, 508 U.S. 602, 622 (1993). The assessment of evidence is a process of weighing, rather than mere counting: “[T]here is a distinction between civil and criminal cases in respect to the degree or quantum of evidence necessary to justify the [trier of fact] in finding their verdict. In civil cases their duty is to weigh the evidence carefully, and to find for the party in whose favor it preponderates.” *Lilienthal's Tobacco v. United States*, 97 U.S. 237, 266 (1877).<sup>14</sup>

---

<sup>14</sup> “What is the most acceptable meaning of the phrase, proof by a preponderance, or greater weight, of the evidence? Certainly the phrase does not mean simple volume of evidence or number of witnesses. *One definition is that evidence preponderates when it is more convincing to the trier than the opposing evidence.* This is a simple commonsense explanation which will be understood by jurors and could hardly be misleading in the ordinary case.” 2 McCormick On Evid. § 339 (7th ed.), emphasis added.

### Assessment of Credibility

As trier of fact, this Court is free to accept or reject, in whole or in part, the testimony of any witness. In resolving any conflicts in testimony, this Court has taken into consideration the demeanor of witnesses, their interests in the case's outcome, or lack thereof, consistencies or inconsistencies in each witness's testimony, and any other corroborative or conflicting evidence of record. Any failure to provide detail as to each witness's testimony is not to be deemed a failure on the Court's part to have fully considered it. The fact that some evidence is not discussed does not indicate that it was not considered. *See Craig v. Apfel*, 212 F.3d 433, 436 (8th Cir. 2000) (administrative law judge is not required to discuss all evidence and failure to cite specific evidence does not mean it was not considered).

### Regulations

30 C.F.R. Section 75.402, "**Rock dusting**," provides that:

All underground areas of a coal mine, except those areas in which the dust is too wet or too high in incombustible content to propagate an explosion, shall be rock dusted to within 40 feet of all working faces, unless such areas are inaccessible or unsafe to enter or unless the Secretary or his authorized representative permits an exception upon his finding that such exception shall not pose a hazard to the miners. All crosscuts that are less than 40 feet from a working face shall also be rock dusted.

30 C.F.R. § 75.402.

30 C.F.R. Section 75.403, "**Maintenance of incombustible content of rock dust**," provides that:

Where rock dust is required to be applied, it shall be distributed upon the top floor, and sides of all underground areas of a coal mine and maintained in such quantities that the incombustible content of the combined coal dust, rock dust, and other dust shall not be less than 80 percent. Where methane is present in any ventilating current, the percent of incombustible content of such combined dust shall be increased 0.4 percent for each 0.1 percent of methane.

30 C.F.R. § 75.403.

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

### Contentions of the Parties

The Secretary contends that he has proven a violation of 30 C.F.R. § 75.403 beyond a preponderance of the evidence. Sec'y's Br., 9. The Secretary contends that the alleged violation was Significant and Substantial (S&S) and reasonably likely to cause an injury resulting in Lost

Workdays or Restricted Duty to at least one miner. Sec’y’s Br., 14-20. The Secretary further argues that the violation was the product of the operator’s moderate negligence. Sec’y’s Br., 20.

The Respondent contends that there was no violation of 30 C.F.R. § 75.403 as Consol was not required to rock dust where the sample was collected. Resp’t’s Br., 8-19. The Respondent contends in the alternative that even if the sample was collected more than 40 feet from the working face, the Secretary failed to demonstrate the sample was representative of the No. 3 entry. Resp’t’s Br., 19-21. The Respondent further argues that the Significant and Substantial (S&S) designation and the gravity determination made by the Secretary were improper. Resp’t’s Br., 21- 28. The Respondent finally contends that the negligence determination made by the Secretary was improper. Resp’t’s Br., 28-30.

### The Secretary Failed to Carry His Burden of Proving a Violation by a Preponderance of the Evidence

MSHA’s website for “Most Frequently Cited Standards of 2015; Underground – Coal” ranks 30 C.F.R. § 75.403 as the fourth most cited mandatory safety standard that year; in 2015 alone the Secretary alleged over 1,683 violations of the 30 C.F.R. § 75.403 in underground coal mines, comprising 4.34% of all alleged violations within the set.<sup>15</sup>

In order to show that 30 C.F.R. § 75.403 has been violated, the Secretary must present persuasive evidence that the operator failed to apply a sufficient amount of incombustible material in a mine. In other words, the Secretary must present persuasive evidence that the operator failed to rock dust an area adequately. Thus, the relevant element to be determined in this matter is whether sufficient evidence has been presented to prove that the sample was taken more than 40 feet from the working face. The Court finds that the Secretary failed to present sufficient evidence for the proposition, and therefore vacates the citation.

#### **A. The Secretary Failed to Present Sufficient Evidence that the Sample Was Taken More Than Forty Feet from the Working Face**

In presenting his case, the Secretary asks the Court to disregard the plain language of the citation, as well as contemporaneous documentation, by arguing that the sample was not taken at spad 87 + 34.09, and, that the sample was not taken forty feet from the working face. Instead, the Secretary’s witnesses alleged at hearing the sample was taken significantly more than forty feet from the working face (the witnesses differed on how much further it was), and that spad 87 + 34.09 was written as a marker for abatement of a future, hypothetical citation. Tr. 13, 41, 58, 101.

The Commission has held that an inspector’s testimony, standing alone, if found credible and reliable, may constitute sufficient evidence to prove the existence of a safety violation and support an S&S finding. *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

---

<sup>15</sup> This information is publicly available on MSHA’s website. MSHA, *Most Frequently Cited Standards of 2015; Underground – Coal*, <http://arlweb.msha.gov/stats/top20viols/top20viols.asp> (last visited Dec. 28, 2016).

weight); *Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 135-136, (7th Cir. 1995) (ALJ did not abuse discretion in 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).

Determining the credibility and reliability of any witness's testimony is the province of this Court. *Hall v. Clinchfield Coal Co.*, 8 FMSHRC 1624, 1629 (Nov. 1986) (holding that a judge's credibility resolutions cannot be overturned lightly). The Commission is reluctant to disturb credibility determinations, but will, if it finds they are self-contradictory or if there is no evidence, or dubious evidence, to support them. *Austin Powder Co. and Bruce Eaton*, 21 FMSHRC 18, 22 (Jan. 1999).

The Secretary asks that the Court privilege the testimony of two inspectors over the contemporaneous documentation accompanying the citation, as well as the citation itself, in arguing for the fact of the violation. However, the testimony presented by the Secretary's witnesses lacked sufficient indicia of reliability to be deemed credible enough for the Court to overlook the plain language of the citation, as well as contemporaneous documentation.

The Secretary's witnesses in this matter differed from one another on basic facts regarding the violation. Most critically, they disagreed on where the sample was taken. *Compare* Tr. 41 *with* Tr. 101. But these disagreements in testimony extended to other areas as well. For instance, Inspectors Detrick and Bochna appeared to disagree on where the working face began for rock-dusting purposes. *Compare* Tr. 75-76 *with* Tr. 100-101, 107-109, 111. Inspector Detrick testified at hearing that the face for rock-dusting purposes began at the last row of bolts, or the last row of straps. Tr. 75-76. Inspector Bochna testified that the working face did not begin at the last row of bolts. Tr. 100-101, 107-109, 111.

In another instance, the inspectors' testimony was inconsistent and at times self-contradictory when it came to the condition of the No. 3 Entry. Inspector Detrick appeared to be of two minds regarding the condition of the No. 3 Entry. At one point Inspector Detrick testified that the Entry was obviously in violation, black, dark, and dry, with float coal dust everywhere. Tr. 52, 37, 41. Later, under questioning by the Respondent's attorney, Inspector Detrick testified that it appeared there was a violation, but he was not sure. Tr. 82. Detrick's supervisor Inspector Bochna testified that he was unsure if the Entry was improperly rockdusted, and seemed to suggest that it wasn't possible to determine visually if there was a rock-dusting violation. Tr. 114-115.

The inspectors did not corroborate one another's account on the method of measurement. Inspector Detrick agreed with the Respondent's attorney at hearing that a 25 foot tape measure was used to measure the distance from the working face. Tr. 73. But Inspector Bochna could not recall what length tape measure was used. Tr. 109, Tr. 123. Inspector Bochna could not recall if the inspectors had to move to measure forty feet (as would be necessary with a 25 foot tape measure). Tr. 109-110. Inspector Bochna also failed to see the sample collected, as he was possibly walking back to check the return of the No. 3 Entry, and therefore could not recall precisely how and where the sample was taken. Tr. 113, Tr. 126.

The Court considers the most important factual issue to be whether the sample was taken more than forty feet from the working face, because the regulation itself describes this requirement. 30 C.F.R. §§ 75.402-403. Given the Secretary's evidence, the Court has multiple measurements to choose from. First, there is the citation itself, which lists the sample's location as taken at either spad 87 + 34.09 or forty feet from the working face. GX-1. Then there is the testimony of the issuing inspector, who testified that the rock dust sample was taken 62 to 64 feet from the working face. Tr. 38. Later, at the same hearing, the issuing inspector testified that the sample was taken 64 to 65 feet from the working face. Tr. 41. Finally, supervising Inspector Bochna testified that the sample was taken 50 feet from the working face. Tr. 101.

Moreover, the location of where the sample was taken was challenged by a witness of the Respondent's.

Stein testified that the sample was taken roughly fifteen feet from the working face at spad 87 + 34.09.<sup>16</sup> Tr. 140-141. The Respondent also presented evidence in the form of transcribed notes, describing the sample as "taken at spad 87 + 34.09 less than 40' outby the face of #3." RX-1. Stein testified at hearing that these transcribed notes are a faithful representation of contemporaneous notes he took while accompanying the inspectors on the inspection. Tr. 134-135. Stein further testified at hearing that the original contemporaneous notes were part of a notepad that has since been discarded as the notepad became full. Tr. 135. The Secretary stated in his brief that these handwritten notes were never produced during discovery and were discarded following the Respondent's receipt of the citation, possibly constituting destruction of evidence. Sec'y's Br., 11. The Court assigns little weight to the exhibit itself, given the difficulties regarding its provenance, and assesses the credibility of Stein's testimony separately.

The Respondent has demonstrated through testimony and visual aids that spad 87 + 34.09 was close to, if not exactly, fifteen feet from the working face at the time the sample was taken. Tr. 148, 173, 185; RX-3; RX-6. The spad was installed on December 15, 2015, and there is persuasive evidence to suggest that the spad remained fifteen feet from the working face for

---

<sup>16</sup> In his post-hearing brief, the Solicitor argues that one would expect Stein to voice an objection to the sample's location at the time of its taking "rather than remaining silent and challenging the location after the Mine had incurred the costs of litigation." Sec'y's Br., 13. Stein's failure to challenge the inspector's sampling location and/or technique could have arisen out of a fear of retaliation or a hope that the inspector would not issue a citation at all. Stein did say during questioning that if he thought an inspector was doing something improper, he would point it out to him, but then quickly noted that the inspector had a right to take samples wherever he liked, suggesting that is why he didn't object. Tr. 162-163. Regardless, it is not the Respondent's duty to object to a sample's validity at its taking in order to preserve such an objection at the hearing stage.

some time after the sample was taken.<sup>17</sup> Tr. 187-188; RX-3; RX-5; RX-6. Thus, if the sample was taken at spad 87 + 34.09, it is not evidence of a violation.

It is not clear to the Court upon review of the citation and the inspector's contemporaneous notes that spad 87 + 34.09 was identified as a marker for future termination of a hypothetical citation, as alleged by the Inspector at hearing. Tr. 58. Instead the citation, the notes drafted to accompany the citation on December 30, 2015, and the inspector's contemporaneous notes of December 22, 2015 all appear to identify spad 87 + 34.09 as the location where the sample was taken, with no mention of the spad as a future locus for abatement. GX-1; GX-2; GX-3. Inspector Detrick's December 30, 2015, notes state the sample was "collected on 12/22/15 in the #3 entry 40' outby the face @ **spad # 87 + 34.09.**" GX-2, (emphasis added).

The inspector's assertion that he wrote in the body of the citation and accompanying notes "40 feet outby the working face" to "mirror" the language of 30 C.F.R. § 75.403 does not inspire confidence in the Court. Tr. 37, 40. This assertion creates, essentially, a second and undefined measurement point, to be defined later by the Secretary's witnesses at hearing, raising questions of reliability. If the sample was taken more than twenty feet from where the Respondent was required to begin rock-dusting, as the issuing Inspector alleged at hearing, including that information in the citation would better support a finding of violation. Similarly, if spad 87 + 34.09 was meant solely as a location for future inspectors to use to terminate a citation, including the spad number without a reference to how far the sample was taken from the spad could confuse a future inspector, especially if mining took place in the interim.

The Court is aware that, in the past, the Commission has held that it does not demand inspectors write citations with the legal precision of attorneys sitting in comfortable offices. *Sunbelt Rentals, Inc.*; *LVR, Inc.*; and *Roanoke Cement Co. LLC*, 38 FMSHRC 1619, n. 10 (July 2016). This citation's imprecision, however, arises from a deliberate decision made by the issuing inspector. Tr. 37, 40. This imprecision in drafting could be overcome if the Secretary's witnesses presented a credible account of the inspection's events, but they failed to do so.

Not only do the Secretary's witnesses differ from the stated language of the citation, they differ with one another. These discrepancies in the Secretary's evidence create a contradictory narrative that the Court cannot credit. Accordingly, the Court cannot find there was sufficient evidence presented to prove that the sample was taken more than forty feet from the working face, as required by the regulation.

---

<sup>17</sup> The Solicitor objected at hearing to the inclusion of Reamer and Bell's testimony because the two lacked personal knowledge of the conditions that led to the violation. Tr. 166-167. After considering the testimony of both witnesses and the Respondent's accompanying exhibits, the Court notes that the salient facts raised by all concern the location of spad 87 + 34.09. The Court credits the testimony and evidence as having established that no mining occurred between the taking of the sample and the issuance of the citation, and that the location of spad 87 + 34.09 remained unchanged at 15 feet from the working face.

## **B. The Citation Met the Requirements of Section 104(a)**

In a separate argument for vacating Citation No. 9073907, the Respondent's attorney contends that the citation as issued failed to satisfy the requirements of Section 104(a) of the Mine Act.

Section 104(a) states that:

If, upon inspection or investigation, the Secretary or his authorized representative believes that an operator of a coal or other mine subject to this chapter has violated this chapter, or any mandatory health or safety standard, rule, order, or regulation promulgated pursuant to this chapter, 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 chapter, 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 chapter.

30 U.S.C. § 814(a).

Citation 9073907's "**condition or practice**" reads:

According to lab analysis results of rockdust bag sample 0155450AA collected on 12/22/2015 in the #3 Entry (40 ft outby the face) of the 3A Section Return Spad#87+34.09 the sample is non compliant. The rockdust sample is 66.2% incombustible content instead of the required 82.0% due to the presence of 0.5% of methane. The results of the rockdust analysis are attached to the citation. Standard 75.403 was cited 7 times in two years at mine 3610045 (7 to the operator, 0 to a contractor). Supporting rock dust sample bag numbers: 0155450AA.

GX-1.

The Respondent contends that the citation fails to satisfy Section 104(a)'s requirements because "Mr. Detrick testified that he failed [to describe with particularity the condition in the Citation and to accurately capture the facts in his notes to substantiate a violation]." Resp't's Br., 14. The Respondent's attorney appears to be referring, primarily, to this line of questioning at hearing:

Q: Would you agree with me today, based on your testimony, you didn't accurately describe with particularity the violation?

A: That's correct, and as you said, yes, I was a new inspector at the time, and I'm not using that as a crutch by any means.

Tr. 60.

The requirements of 104(a) are not so restrictive as the Respondent contends. Section 104(a) merely requires that a particular set of facts, and a particular safety standard, be identified in the body of the citation. The purpose for this is two-fold: firstly, to enable a Respondent to defend against the citation in a hearing, and secondly, to enable a Respondent to abate the citation in order to terminate it. The citation as issued in the present litigation satisfies both requirements, and therefore, is valid under Section 104(a). *See, e.g., Pocahontas Coal Co., LLC*, 38 FMSHRC 176, 182, (Feb. 2016); *Summit, Inc. v. Secretary of Labor*, 19 FMSHRC 429, 431 (Feb. 1997) (ALJ Manning); *Asarco Mining Co.*, 15 FMSHRC 1303, 1306 (July 1993); *Cyprus Tonopah Mining Corp.*, 15 FMSHRC 367, 379 (Mar. 1993).

Recently, the Commission addressed a very similar argument in the matter of *Mill Branch Coal Corporation*. *Mill Branch Coal Corporation v. Secretary of Labor*, 37 FMSHRC 1383 (Jul. 2015). In that case the Commission reasoned that:

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

*Mill Branch Coal Corporation*, 37 FMSHRC 1383, n. 17.

This Court finds that, as in *Mill Branch*, the Respondent in this case clearly knew what safety standard was at issue, and how to properly defend against the Secretary's allegation of a violation. Moreover, the Respondent's attorney's extensive examination of witnesses and cross-examination of the inspectors concerning the cited condition demonstrates that the Respondent was able to prepare for trial, and knew what conditions would have required abatement. Therefore, this Court rejects the Respondent's 104(a) argument, and instead vacates the citation on evidentiary grounds.

Conclusion

The Secretary has not carried his burden by the preponderance of the evidence that a violation of 30 C.F.R. § 75.403 occurred. Therefore, the Court finds that the citation at issue should be vacated. For this reason the Court makes no finding regarding the significant and substantial (S&S), negligence, and gravity determinations made by Inspector Detrick.

**ORDER**

Accordingly, it is hereby **ORDERED** that Citation No. 9073907 is **VACATED**.

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

Distribution:

Anthony Fassano, Esq., U.S. Department of Labor, Office of the Solicitor, 170 S. Independence Mall West, Suite 630 E, The Curtis Center, Philadelphia, PA 19106

Patrick W. Dennison, Esq., Jackson Kelly, PLLC, Three Gateway Center, 401 Liberty Ave., Suite 1500, Pittsburgh, PA 15222

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

OFFICE OF ADMINISTRATIVE LAW JUDGES  
1331 PENNSYLVANIA AVE., N.W., SUITE 520N  
WASHINGTON, DC 20004-1710  
TELEPHONE: 202-434-9933 / FAX: 202-434-9949

March 7, 2017

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

v.

ORIGINAL SIXTEEN TO ONE MINE,  
INC.,  
Respondent

CIVIL PENALTY PROCEEDING

Docket No. WEST 2015-850-M  
A.C. No. 04-01299-383413

Docket No. WEST 2015-851-M  
A.C. No. 04-03065-383417  
(Plumbago Mine)

Docket No. WEST 2016-70  
A.C. No. 04-01299-393844

Docket No. WEST 2016-71  
A.C. No. 04-03065-393850  
(Plumbago Mine)

Docket No. WEST 2016-0149-M  
A.C. No. 04-01299-396253

Docket No. WEST 2016-183  
A.C. No. 04-01299-398656

Docket No. WEST 2016-243  
A.C. No. 04-01299-400615

Mine: Sixteen To One Mine

**DECISION**

Appearances: Laura Ilardi Pearson, Esq., Office of the Solicitor, U.S. Department of Labor,  
Denver, Colorado, for Petitioner

Michael Miller, President, and Director, Original Sixteen To One Mine, Inc.,  
Alleghany, California, for Respondent

Before: Judge Moran

## Introduction

**This case involves seven dockets encompassing a total of 22 citations.** A hearing was held in the above docketed matters in Truckee, California commencing on September 20, 2016. Two of the citations were vacated by the Secretary. The Secretary's discretion to vacate a citation or order is not subject to review. *RBK Contr. Inc.*, 15 FMSHRC 2099 (Oct. 1993).

**Because the Court determines that the Secretary did not meet its burden of proof, nine of the citations are dismissed. Based on the Court's evidentiary conclusions, the Court imposes penalties for a number of other citations that are lower than the amounts sought by the Secretary.**

## Preliminary Matters Applicable to All Alleged Violations

### Jurisdiction challenge for the Plumbago Mine

Regarding Mr. Miller's claim that Plumbago is not a mine: Miller stated about the activity at the site that "they were in there, they were -- they were -- they were doing kind of an exploration development. They were mucking out old ground fall that was in their primary haulage. They were running a slusher. They were putting in steel sets and lagging. They were doing a good job with that." Tr. 101. Miller added, "Number one, there has never been any gold production at the Plumbago Mine. I have never seen any production, there is no product that's ever been produced." Tr. 103-104. Also, Plumbago "never asked for an I.D. number for that mine because it never felt it needed one." Tr. 104.

The Court added that, based on the hearing testimony alone, "this inspector has testified sufficiently to me that there was activity going on at this Plumbago Mine that would constitute mining as construed by dozens and dozens of Federal Courts in reviewing the jurisdiction of the Mine Act." Tr. 110. While Miller asserted that no gold had been found there, the Court explained, by way of a hypothetical, the following:

Even if you never realized a penny in terms of any ore, whether it be gold or copper or lead or silver, you name it. If nothing came out of it and you went through all these efforts, all of that past activity, though it bore no fruit, would still be mining.

Tr. 111-12.

As discussed below, the Respondent also admitted that the Plumbago Mine is a mine within the meaning of the Mine Act in its submissions to the Court.

## The Statutory Penalty Criteria

A number of the statutory penalty factors apply uniformly to each alleged violation. Therefore they are dealt with here, leaving individual discussion for negligence and the gravity of the violation, and the related factors, where applicable, of unwarrantability and significant and substantial findings.

### The operator's ability to continue in business

At hearing, Mr. Miller raised an issue concerning the statutory penalty criterion of the effect of civil monetary penalties on the operator's ability to continue in business. The Court then identified problems with the assertion of that defense, beginning with its late assertion, coming only at the start of the hearing. In that regard, it stated,

this information should have been provided well before today. In other words, it was incumbent upon the Respondent prior to the hearing to provide documentation to show that a penalty, and let's work from the pre-vacated standard, the responsibility was upon Sixteen To One Mine to provide information to show that a penalty of \$3,900 would have an effect on the operator's ability to continue in business.

Tr. 464-465.

Nevertheless, the Court extended extra fairness to Miller by providing him the opportunity to submit within 30 days from the close of the hearing such information as he may be able to muster in order to establish that the civil penalties sought would affect its ability to continue in business. Tr. 465. The Court emphasized that Miller would need to show how a penalty of \$3,000 could affect the operator's ability to continue in business, adding that "a company that could not withstand a civil penalty of less than \$3,000 is in a precarious position to begin with." Tr. 465-466.

Post-hearing the Respondent submitted information designed to show that the penalties sought by MSHA impacted its ability to continue in business. The Secretary then responded to that submission. Respondent sent the Secretary "10-Ks" the week prior to the hearing. Tr. 53.

In its post-hearing submission on this issue, dated October 20, 2016, Miller stated that the "Original Sixteen to One Mine, Inc. (operator) is insolvent." R's post-hearing letter at 1. Miller added that "MSHA is significantly responsible for creating this situation." *Id.* Inadvertently, the letter effectively conceded that it is a mine, stating that MSHA "has a significant impact on our ability to carry out the necessary work *in order to produce gold*. Unlike a mid-size or large mining operation, the very small ones are working against the odds to survive the rigorous issuance of citations by MSHA." *Id.* Miller elaborated that, when miners have to deal with MSHA inspectors, that is time away from "the work necessary to produce gold." *Id.* at 2. Miller also states that significant expenses to correct *alleged* violations are incurred and as a result it has had to reduce the size of its workforce. In the past year its workforce has dropped from 11 to four miners. *Id.* at 3. Miller concludes by pointing to the three past annual financial reports, which it

concedes are not audited reports. However, it contends that those reports are accurate and sufficient for the Court to consider, asserting that it is “reasonable for [the Court] to reduce or eliminate [the] penalties sought by MSHA ... [and to] protect California underground gold miners’ jobs.” *Id.* at 4.

The Secretary filed a response to Miller’s submission. In that Response, the Secretary noted the Court’s statement that the information the Respondent intended to submit would need to demonstrate “that information would have to show [the Court] that a penalty in the neighborhood of \$3,000 would [a]ffect the Sixteen To One’s ability to continue in business.” Sec. Response at 2, quoting transcript at 464-65. As the Secretary also observes, the burden of proof to establish inability to pay is upon the mine operator and that specific evidence must be presented to show such an effect. The specific evidence requirement is not satisfied by introducing items such as “unaudited tax returns, balance sheets [ ] tax liens and judgments.” *Id.* at 3, citing *Spurlock Mining Co, Inc.*, 16 FMSHRC 697, 700 (1994).

The Court agrees with the Secretary that the mine did not present the required evidence to establish that a civil penalty in the neighborhood of \$2,562 would impact the operator’s ability to continue in business.<sup>1</sup>

#### **The operator’s history of previous violations**

Gov. Ex. GX -1 is the Certified Assessed Violation History for the Original Sixteen to One Mine. Tr. 15. That exhibit reflects 21 paid violations over the period covered, 6 of which were “S&S.” There was no violation history for the Plumbago Mine at the time of the hearing. Tr. 16-17. The Court concludes that the mines’ violation history is negligible.

#### **The appropriateness of any penalties to the size of the business**

There was no formal statement regarding evidence on this factor. However, uncontradicted testimony supports the finding that the Sixteen to One Mine and the Plumbago Mine are small operations.

#### **The demonstrated good faith in attempting to achieve rapid compliance after notification of a violation**

There was no formal statement regarding evidence offered on this factor. However,

---

<sup>1</sup> Without upsetting the Court’s finding that the Respondent did not provide the type of evidence to demonstrate that the penalties sought in this litigation could have an effect on its ability to continue in business, the Court does agree with Miller’s point that when an operator is faced with a citation and is unwilling to challenge the validity of it by absorbing the issuance of a withdrawal order being issued, the process of abating the citation may involve expenses. If, later, it turns out that the citation was improvidently issued, those unwarranted abatement expenses do not evaporate. That said, even if such circumstances arise, the operator would still need to establish that such unjustified associated abatement expenses when coupled with other civil penalties affect the mine’s ability to continue in business.

uncontradicted testimony supports the finding that the Sixteen to One Mine and the Plumbago Mine demonstrated such good faith in attempting to achieve compliance after issuance of alleged violations.

**Docket No. WEST 2015-0850<sup>2</sup> Original Sixteen to One Mine, Inc.**

Inspector Stephen Rogers is an MSHA safety specialist, with some 20 years' employment with that agency. Tr. 20. Inspector Rogers also had many years of employment as a miner. His family owned mines and he began working as a miner in 1973. Then, at age 17, he began work as an underground miner for Union Carbide. Tr. 22.

**Citation No. 8793844**

On May 6, 2015, Inspector Rogers issued Citation No. 8793844. Tr. 27, Ex. GX 2, citing 30 C.F.R. § 57.6102(b).<sup>3</sup> That standard, titled, "Explosive material storage practices," provides "Explosives and detonators shall be stored in closed nonconductive containers except that nonelectric detonating devices may be stored on nonconductive racks provided the case-insert instructions and the date-plant-shift code are maintained with the product." 30 C.F.R. § 57.6102(b).

Rogers related that during the course of his inspection, when traveling in the 800 haulage, at the 848 split, he observed some explosives along a rib. Tr. 28. He determined that there were two different types of explosives present, both were nitroglycerine-based dynamite sticks of powder, which he identified by their color. Tr. 31-32. Under the inspector's evaluation of the gravity, he marked the injury as unlikely to occur, since the area was not used for travel and there were no overhang issues that could cause a sympathetic (i.e. unplanned) detonation through material falling on the explosives. Tr. 34. However, though unlikely to occur, he marked the injury that could be reasonably expected as "fatal," as the two sticks, if they were detonated, could result in an injury of that degree. *Id.* At the time he issued the citation there were only two miners working in the mine. Tr. 35. For negligence, Rogers marked that as "moderate," because Mr. Miller's son, Reid Miller, didn't appear to know of the powder's presence. *Id.* However, Rogers identified the powder "pretty quickly," so it was not difficult to detect its presence. Tr. 36. The condition was abated by "washing" the powder in a bucket of water, rendering it harmless. *Id.* **MSHA's proposed penalty was \$150.00.** Ex. A (referencing WEST 2015-0850).

Upon cross-examination, Mr. Miller acknowledged that Inspector Rogers was well qualified. Tr. 38. For the purpose of showing that the old powder presented no real hazard, Miller suggested that one could simply burn the dynamite. Rogers did not agree, stating that one doesn't

---

<sup>2</sup> The entire testimony was reviewed and considered by the Court. However, some aspects of the testimony received were considered to be either irrelevant and/or immaterial and accordingly discussion of such matters is omitted from this decision. *See*, as one example, Tr. 38-39.

<sup>3</sup> Throughout the hearing, the Secretary's exhibits were referred to as "GX 1" and so on. Hereinafter, this decision cites the Secretary's exhibits as "GX 1," etc. to mirror the transcript and exhibits.

“just burn powder,” as there “is a very specific way of doing it.” Tr. 42. The Court noted that the violation did not claim that there was an improper disposal of the powder. Tr. 43. Miller took issue with the inspector marking the violation as “fatal.” *Id.* The inspector elaborated on his reasoning for the “fatal” designation, stating,

[i]f [the powder] received energy from an outside unplanned source and that energy can be impact, friction, variety of issues that could cause detonation of the explosives, and if someone was in the close proximity walking through that area when that detonated, [he] believe[d] that that would be a -- cause a fatal. [sic]

Tr. 44.

Rogers expressed that if a detonation occurred, anyone within 20 to 25 feet of it could be killed. Tr. 44. The inspector was not claiming that one merely walking by the powder would cause an explosion, but rather if there was a ground fall at the time a miner happened to be walking by, within 25 feet of a detonation, “the concussion of the -- that type of powder, because it's fairly high strength, you know, gelatin, one of them was a gelatin-based, but they are both nitroglycerine-based, would probably cause enough concussion to collapse a lung.” Tr. 45.

Rogers agreed with the Court’s summary that two events would have to occur at the same time: a sympathetic action and one walking within 20 to 25 feet of the material at the moment of detonation. *Id.* Diminishing the likelihood of a sympathetic event, Rogers added that there was no evidence of rock movement that could land on the explosives. *Id.* Had that been the case, that material could easily fall down, he would have marked the gravity as “reasonably likely.” Tr. 46. In support of the “moderate negligence” designation, Rogers explained, “somebody put the powder there somehow. Some miner at some point somehow the powder ended up there, which is always concerning, and it didn't take me long to observe it.” *Id.* Rogers acknowledged that there was yellow ribbon at the cited area, and that he went beyond that ribbon barrier and discovered the powder. Tr. 47.

Mr. Miller testified regarding this citation. Stating that he is 74 years old, Miller added that he has significant knowledge about explosives. Tr. 49. He stated he did not know of the explosive’s presence, estimating that the cited powder “must have been there for 20 years or more.” Tr. 50. In his opinion, there was *no* sympathetic event capable of causing detonation. Tr. 51. Thus, Miller contended that,

there is no chance of a fatality to those two guys or probably to even 10 or 20 guys if they were there working, but they weren't. . . . I can accept the citation easily as darn it, we missed something. Glad you found it. But it wouldn't have been fatal, and it should have been low or no negligence. We were not negligent in going to an area that was off limits with two guys walking a main travelway at that particular point in time in the mine.

Tr. 51.

He added that the area has very little ambient light. *Id.*

## Conclusion

Upon consideration, the Court finds that the violation was established. It also finds, in line with the inspector's evaluation, that the gravity was properly marked as unlikely, that it was not significant and substantial ("S&S"), that if the hazard occurred, it would be fatal, although, as the testimony showed, it would require a *very* unlikely confluence of events.

However, the Court also finds the negligence to be low, as the material had been there for a long period of time without being cited, and because it was in an out of the way location, which required that the inspector go beyond a ribboned-off area. In consideration of these factors, and the previously discussed factor of the effect of the penalties on the operator's ability to continue in business for all of the citations, together with the across-the-board determinations for the Sixteen to One Mine of the operator's history of previous violations, size of business, and good faith in attempting to achieve rapid compliance,<sup>4</sup> **a penalty of \$50.00 (fifty dollars) is imposed as appropriate.**

### **Citation No. 8793845**

This citation invoked 30 C.F.R. § 57.9300(b). That standard, titled, "Berms or guardrails", provides, at subsection (b) "Berms or guardrails shall be at least mid-axle height of the largest self-propelled mobile equipment which usually travels the roadway." 30 C.F.R. § 57.9300(b).

Rogers issued this citation on May 6, 2015. It alleges "a 40-foot section of roadway landings area that -- that had from zero percent berm to 0.8, which is about ten inches." Tr. 55, GX 5. Associated with that exhibit are Exhibit GX 6, the inspector's notes, and Exhibit GX 7, photographs he took of the condition. Tr. 55. The area was located in "the lower landing area down by the 800 portal where . . . they drive down there they tag in and go to work and go through the portal, and this is that lower landing area where they tend to park." Tr. 56. The largest piece of equipment using that road is a 966 loader, which has a mid-axle height of 2.3 feet. Tr. 58. Exhibit GX 7, photo 2 of 4, shows an area with zero to ten inches of berm. Tr. 59. Exhibit GX 6 complements the photos with a drawing the inspector created of the roadway and its berm deficiencies. Tr. 60.

Rogers marked the citation as "unlikely" to result in an injury because the road was a large, open, area, meaning that vehicles did not have to drive close to the roadway's edge. Tr. 61. He marked the likely injury as lost work days or restricted duty based upon his conclusion that if one of the smaller vehicles went over the road edge, it would roll down to the second bench. Tr. 62. Moderate negligence was marked on the basis that Reid Miller stated he had not observed the condition. A snow bank in that area had made it less obvious. Still, he could not consider it low negligence, as it was still "pretty obvious." Tr. 63. While the deficient area was not large, the

---

<sup>4</sup> The Court will not tire the reader by repeating each of the other statutory penalty factors for every citation. Suffice it to say that, as they are uniform considerations for each citation, the Court considered the operator's ability to continue in business, the operator's history of previous violations, the size of its business, and its good faith in attempting to achieve rapid compliance.

road was used every time miners go to the mine. Tr. 64. Exhibit GX 7 shows the berm that was installed to abate the citation. *Id.*

Mr. Miller believed that the citation should be vacated. His reasoning was that there had been a lot of rain, requiring annual replenishment of berms from those events. He asserted that such water run off created the gap for the small area cited. Thus, he contended that the mine does maintain its berms. Tr. 67-68. He believed that because the loader referenced by the inspector was at the shop, it was not available for use. Tr. 68. That left only a pickup truck using the road. *Id.* Miller reasoned, “We cannot fix things if they are not needed to be fixed. We need to fix the things that are -- might be a problem or a safety issue right now.” Tr. 69. On that basis, he considered it unreasonable to interpret the standard as requiring a berm under the circumstances presented. *Id.*

The Court then inquired if the inspector still would have issued the citation if it were assumed that the loader was not being used and that only privately owned vehicles or pickup trucks were using the road. Rogers stated he still would have issued the citation because vehicles still were using the cited road. Tr. 70. The largest berm in the cited area was .8 inches (i.e. approximately 10 inches) and, in some of the cited area, it was zero. By comparison the mid-axle height of the pickup truck was 1.3 inches. *Id.* Thus, even where some berm was present within the cited area, at best it was still some 7 to 8 inches too short. *Id.* The mid-axle height for the pickup was about 12 to 14 inches. Tr. 72. Nor, the inspector stated, if it were assumed only a pickup used the road, would he have changed his gravity or negligence designations, as there still was road use by such vehicles. Tr. 71.

Mr. Miller then posited whether, under the circumstances presented, one could have essentially a technical violation, but with no hazard created. Tr. 73. Rogers did not see it that way. Mr. Miller then added that, as the posted speed is five miles per hour on the road, the likelihood of an occurrence was zero. Tr. 75. The Court inquired if Miller believed that no berm was ever required for the cited area, and he explained that affirmed that no berm should have been required *under the specific circumstances cited*. Tr. 76. He elaborated that the berm should have been reestablished the next time the loader used the road. As for the pickup truck usage, he believed that under the conditions then present, there was *no* danger at all. Tr. 78. The Secretary did not cross-examine Miller. Tr. 80.

### Conclusion

Upon consideration of the record evidence, the violation was established. **MSHA’s proposed penalty was \$100.00.** Again, the Court notes that the gravity was assessed as unlikely and the likely injury as lost workdays. However as the deficient area was relatively small and the roadway area itself was wide and taking into account that only the pickup truck was then using the roadway, that a snow bank had made it less obvious and that recent rains had contributed to the creation of the berm gap, the Court finds it to be more accurately to say that an injury was *very* unlikely. The citation form does not recognize a category below unlikely and “no likelihood,” but that does not restrict the Court from such a characterization.

Further, under all the attendant the circumstances, as presented by Miller, whose testimony was not challenged through any cross-examination, the negligence should be deemed low, not moderate. Given these findings, **a penalty of \$25.00 (twenty-five dollars) is imposed.**

**WEST 2015-0851<sup>5</sup> Plumbago Mine**

**Citation No. 8793846**

Inspector Rogers also issued this citation, alleging a violation of 30 C.F.R. §57.20032. That standard, titled, “Two-way communication equipment for underground operations,” provides, “Telephones or other two-way communication equipment *with instructions for their use* shall be provided for communication from underground operations to the surface.” 30 C.F.R. §57.20032 (emphasis added).

On May 7, 2015, Inspector Rogers was at the Plumbago Mine to conduct an inspection. Tr. 82; GX 8; GX 9; GX 10. He stated that, like the Sixteen to One Mine, the Plumbago is also a gold mine, run by Mr. Miller. *Id.* The Plumbago has an MSHA mine ID. Tr. 84. Further, in preparation for his visit, Rogers reviewed past inspection files for the mine, as prior MSHA inspections had occurred at the mine. Tr. 86. When he first arrived, no one was at the mine. However, not long after his arrival, a vehicle arrived with three miners. Tr. 84. It appeared to Rogers both that work had been conducted at the site and that the persons who arrived there were present to work. Tr. 85.

As noted, Rogers cited 30 C.F.R. §57.20032, which requires an underground telephone or some other type of two-way communication device *along with instructions for its use*. Tr. 91. There was, as the citation states, such a phone present, which was described as a “new mine phone.” *Id.* The essence of the violation was the phone lacked an instruction manual for the phone’s use and operation and Miller stipulated that Rogers found that the phone lacked instructions. Tr. 88. The Court then expressed that it seemed that this was a “rather miniscule violation,” unless the Secretary could establish that a person of normal intelligence could not figure out how to use the phone. Tr. 89. The Secretary contended that this phone was atypical and did not operate like a normal household phone. Tr. 91. The Court opined that if the evidence is that use of the phone was intuitive, that would bear upon the gravity involved. Tr. 92.

Rogers described use of the phone as follows:

Well, depends on what you want to achieve. . . . in the handset there is a -- a mic system that you depress in the center of the phone. The phone handle looks like your standard old, not that anybody has them anymore, but the old phones. And so you don't just pick it up, you have to depress the inner section of one of the mics and then you have to, if you are trying to call out, there is speakers [sic] on those. And then you have to also, at the same time, depress a toggle and then you can speak. . . . Once you have contacted the person that you want to talk to, you no longer depress the toggle, but you depress the inner mic system that's

---

<sup>5</sup> Docket No. WEST 2015-0851 was not listed in the Secretary’s opening statement, but the docket and the alleged violations contained within it, were considered at the hearing. Tr. 9.

connected to the handle and you can have a two-way conversation, but any other phone can still pick that up. It's not a private line at that point, and so it requires a number of steps in order to make it activated.

Tr. 94.

Accordingly, Rogers did not think that use of the phone was intuitive, noting that if one had never used a mine phone of any sort, while in time one could figure out how to use it, in his experience, miners had to train on how to use a mine phone. *Id.* Further, use of the phone was for practical needs: “if there is accident, injury, things like that or you are needing advice, information, a condition that you have run into. It was very common to get on the phone, call the surface.” Tr. 94-95.

Rogers affirmed that there were no instructions on the phone itself, and “no manual that was presented to [him] or instructions at that location.” Tr. 95. However, he then conceded that “[t]he operation of this phone was extremely similar to standard Phemco phones.” *Id.* Further, and of importance, Rogers had the miners *show him* how they would operate it, stating, “[t]hese were experienced hands and they didn't have any problem operating the phone.” Tr. 96 (emphasis added). His issue was, aside from the lack of a manual, that he “had just never seen a mine phone ever made that didn't have, by the manufacturer, instructions on it.” *Id.* Rogers' notes reflect that there were three miners at the Plumbago, but that he didn't know about their experience level, either at that mine or at the Sixteen to One Mine for that matter. Tr. 97.

In marking lost work days or restricted duty as the type of injury, Rogers' conclusion was based on “Confusion . . . confusion, lack of information can slow down rescue efforts, injury, et cetera.” Tr. 98. He marked the negligence as low, because most miners would be unaware of the requirement for an instruction manual and because the phone itself was labeled as “MSHA approved.” Tr. 99.

Upon cross-examination, Rogers agreed that miners are to be task-trained and that he found no violation with regard to training on any piece of equipment at the mine. Tr. 101-02. Rogers was not definitive in answering whether the phone was equipment for which task-training was required. Tr. 102.

Miller then testified about this citation, asserting that each miner had been task trained on every piece of equipment, including the cited phone. Tr. 104. He added, establishing the importance of the phones, that they “are so critical out there that we have a very expensive radio phone in the trucks and a station in our office.” *Id.* In the Court's view, this reinforces, rather than detracts from the importance of the cited standard. However, Miller also pointed out that the miners showed the inspector how the phone works. Tr. 105.

It was Miller's position that the standard should be vacated, as everyone was trained on its use and the phone itself was MSHA approved. Tr. 106. He added that the inspector's claim of possible confusion, and therefore the need for the instructions, was hollow as everyone knew how to use the phones. Tr. 107. Miller did admit however, that there were no instructions, as the citation alleged. Tr. 107-08. The Court then commented that the points made by Miller go to

gravity and negligence, but not fact of violation. Tr. 108. Miller countered that “instructions” can be established, as here, if the miners can give oral instructions on the use of the phone, as happened here when they told the inspector how the phone was used. The Court rejects that interpretation of the standard. Tr. 109.

### Conclusion

**The proposed penalty amount was \$100.00.** Upon consideration, the Court imposes a penalty of **\$25.00 (twenty-five dollars)**. This amount is derived upon consideration that the phone was fully operational, that the miners knew how to use it (indeed they had to show the inspector how it operated), and that the negligence was low. Therefore, while there were no instructions for its use, the violation was under the circumstances, of a technical, and non-safety threatening nature.

### **WEST 2016-0070<sup>6</sup> Sixteen to One Mine**

#### **Citation No. 8873829**

Citation No. 8873829, dated August 18, 2015, was issued at the Sixteen to One Mine by MSHA inspector Steven Hagedorn. GX-11; GX 13. The cited standard, Section 56.12002, titled “Controls and switches,” provides “Electric equipment and circuits shall be provided with switches or other controls. Such switches or controls shall be of approved design and construction and shall be properly installed.” 30 C.F.R. § 56.12002.

Inspector Hagedorn offered the following basis for his issuance of this citation,

after plugging in a circuit tester [ ] it gave [him] the indications of improperly installed circuit or possibly other conditions. But the circuit tester gave [him] the indication that it had a[n] open ground.<sup>7</sup> So with that said, open ground is not something that you would want in a wet environment using an appliance that has a metal -- a metal housing. You have the chance of electrocution.

Tr. 187.

The inspector discovered this in the course of checking electrical outlets at the mine. Tr. 188. The outlet location “was in the transformer room ... on [the] 800 level.” Tr. 190. The

---

<sup>6</sup> Testimony from this docket actually followed testimony for WEST 2016-71. Out of sense of numerical order, it is presented here.

<sup>7</sup> The inspector explained that an “open ground in the circuitry of today, you have a dedicated path to ground back to the source. That dedicated path to ground is designed to take a path faster than the body can react to its actually becoming electrocuted. So electricity typically takes the least path of resistance back to the source. And this is saying that that path of resistance back to the source is no longer there.” Tr. 189.

testing device illuminated, indicating an open ground. Tr. 189-90. Asked if miners used the area in which the issue was detected, Hagedorn stated,

it is an area that can be used, and it's in the path coming into the mine. It's probably 200 or so feet into the mine where there is a -- a -- stepdown transformer that's continuously illuminated. And at times it's been used -- that area is used for a laydown area for maybe hand tools, power tools or -- but miners can and do access it possibly on day-to-day basis.

Tr. 190-91.

The inspector is knowledgeable about electrical matters. *Id.* For matters involving 110 volts, which was the voltage here, one may receive only a shock, but death is possible too. Tr. 192. Because death can be a result, he marked it as fatal. However, the inspector learned that the miners preferred to use battery powered tools, thus reducing the exposure to 110 outlets. Tr. 193. Consequently, the inspector then modified his citation to non-S&S and “unlikely.” *Id.* The negligence was marked down from high to moderate, in consideration of what the inspector deemed a mitigating factor: that another entity installed the circuit. Tr. 195. The inspector accepted Miller’s representation that the work had been done by another entity, although no documentation was provided to support the claim. *Id.* The condition at the outlet was abated by installing a cover plate over it, making it somewhat less accessible. Tr. 196.

Miller challenged the assertion that there was an open ground. Tr. 191. Although Miller agreed that the miners often use battery powered tools, the reason for that is that most of the mine doesn’t have electrical outlets. Tr. 198. Miller, in his testimony, affirmed that the electrical work was done by another entity, prior to his operation taking over the mine, in June 1991. *Id.* Miller stated that multiple prior inspections found no issue with the cited outlet. He disputed that the outlet was cross-wired, contending instead that “there was some corrosion which affected the Greenlee meter reading, which is possible.” *Id.* Further, Miller asserted that the cited location has a lock and key on part of it and that only the mine’s two electricians enter that room. Miller then reasserted that there was no open ground; that the problem was the corrosion. Tr. 199. Thus, while he agreed with the inspector that there was an *indication* of an open ground, in fact there was none. In fact, Miller stated that, after the cover plate was installed to abate the citation, one of his electricians returned to the outlet, removed the cover plate and discovered the corrosion. With that solved, the plug was reactivated. Tr. 200. Thus, Miller stated that the troubleshooting, required after the tester light indicated an issue, revealed that there was no cross wiring and no open ground after all. Tr. 200-01. Miller offered two declarations in support of his claim regarding this citation. Tr. 201; Ex. R 8. The Secretary did not cross-examine Miller.

### Conclusion

**MSHA proposed a penalty of \$150.00.**<sup>8</sup> Accepting the testimony of Miller, and with the Secretary offering no rebuttal testimony from the inspector on redirect, the Court concludes that

---

<sup>8</sup> Although the testimony was initially unclear, Counsel for the Secretary subsequently advised that the \$150 proposed assessment was based on a non-S&S and unlikely findings. Tr. 313.

the Secretary did not meet the burden of proof in this instance to establish that there was, in fact, an open ground. That claim was the fundamental assertion in the citation. **Accordingly, upon consideration of the evidence of record, the citation is DISMISSED.** This conclusion is not dependent upon either of the two declarations offered by Miller in support of his claim regarding this citation.

### **Citation No. 8873830**

Citation No. 8873830, cited standard 30 C.F.R. § 57.11001. GX 14; GX 16. That standard, titled, “Safe access,” provides: “Safe means of access shall be provided and maintained to all working places.” 30 C.F.R. § 57.11001.

The issue for this citation was whether certain steps used to access the controls for the hoist were being maintained to provide safe access. Inspector Hagedorn stated that upon arriving at the Tightner Trail level,<sup>9</sup> “there was a tugger or hoist set up, and in order to get to it to operate, it -- it had a series of cut-in or semi cut-in steps which were irregular. And there was also some timbering that was in the travelway.” Tr. 207-08. The inspector stated that the hazard was the

footing, as [one goes] from one tread [i.e. step] to the next tread to the next tread to get up to where [one is] going. It is ingress and egress has two different hazard exposures. It's easier to climb up it than it is to come down in the absence of an irregularity of each step.

Tr. 210.

Simplified, the inspector was concerned about the steps, which were created of dirt. Wood steps and a railing were constructed at the location to abate the citation. Tr. 210-11; 214. Initially, the inspector put the risk of slips, trips and falls as “reasonably likely,” as he stated that such mishaps are one of the top ten causes of lost time injuries, but he then marked it “unlikely,” although his reasoning for the modification was that a “reasonably likely” designation would “hamper mining in general.” Tr. 211. Exposure to the hazard, the inspector stated, would be any time one had to operate the tugger to pull the ore cart. Tr. 212. He marked the negligence as moderate, because there had been some effort to establish access to the tugger, with the dirt steps they had cut, instead of leaving the access via what he described, figuratively, as a “goat trail.” Tr. 213.

Upon cross-examination, the inspector was asked how long the cited condition had existed. Hagedorn could not recall if he asked about that. Tr. 215. Pressed, he stated it had been there for at least a year. The inspector added that the step-up was 15 to 20 inches. Tr. 216. He considered that distance to be steep, therefore increasing the risk of a fall. *Id.* He acknowledged that, at least for the past two years, the mine had no violation history of slips or trips. Tr. 217.

Testifying about the citation, Miller stated that the tugger and skip were infrequently used, on the order of once a month, and at most three times a month. Tr. 218. He asserted the

---

<sup>9</sup> The Tightner area is “a location of the mine [where] ... the ore is harvested from the 1100 level pulled up to the Tightner, which, in turn, is carried on out of the mine.” Tr. 208.

mine has no history of trips, slips or falls in 15 or 20 years. *Id.* He also asserted that it presented no hazard and that he has walked the cited area. Noting his age (74), he stated that he has walked that area, simply to check things. *Id.* Thus, he maintained that the access was not unsafe, because, “of the ... conditions ... it didn't have any steep slopes, didn't have anything to fall down on. ... it was a very, very short distance. ... It's not more than eight feet up above it ... might even only be six feet above it.” Tr. 219.

When the Court inquired, “one has to ascend eight feet?” Miller explained that it was up an incline and that one can walk it. *Id.* Further, Miller stated that the access that was present was rock, not dirt. Tr. 220. Thus, he contended that the steps were created by the mine by cutting into the rock, creating steps “of a fashion.” *Id.* He asserted that the steps had been that way for “at least ten years.” Tr. 221. In fact, Miller contended that the wooden steps were more dangerous than the cited condition. *Id.* He added, that if an inspector wants something fixed, the mine has no choice but to do it in order to abate the citation, safe or not. *Id.* Further, expressing that it was not a formidable ascent, he stated that the miners could “scamper” up the slope. *Id.* Thus, Miller concluded, there was no hazard and consequently no negligence either. *Id.* The citation was assessed at \$100.00.

### Conclusion

There was no cross-examination, nor additional testimony on direct, by the Secretary. Tr. 221. Given Miller's unrebutted testimony, the Secretary did not meet its burden of proof. It was not established that the means of access was unsafe. **Therefore this citation is DISMISSED.**

### **Citation No. 8873831**

This citation alleged a violation of 30 C.F.R. §57.11008. GX 17. That standard, titled, “Restricted clearance,” provides, “Where restricted clearance creates a hazard to persons, the restricted clearance shall be conspicuously marked.” 30 C.F.R. § 57.11008.

Hagedorn stated that this citation was issued for “restricted clearance.” He explained that in traveling throughout the mine he “made contact with the roof or back multiple times.” Tr. 222. He added that the miners remarked having the same experience. *Id.* Thus, he contended that, as one is focusing on the ground while walking in the mine, one will “run into the roof.” Tr. 223. Put simply, he bumped his head on the roof several times. GX 19, a photograph the inspector took, shows the mine's use of paint, a caution strip, to indicate a restricted clearance. Tr. 224. He indicated that illumination paint was applied after the citation was issued. Tr. 225-26. It was his understanding that the citation was terminated on September 29th. Tr. 228.

In support of his reasonably likely finding, the inspector stated that he hit his own head, and that he witnessed miners, and Miller, strike their head while he was inspecting. Tr. 226. Some of the areas were traveled frequently. He often had to duck. In terms of marking lost work days or restricted duty, Hagedorn asserted that he experienced that injury himself stating, he “personally experienced restricted duty [ ] from the events.” Tr. 227. Marking the negligence as moderate, the inspector stated that there was some signage alerting miners to some low clearances, adding that one sign is not sufficient. Tr. 228.

Miller then testified, first offering a declaration from Reid Miller. Ex. R 6; Tr. 230. He stated that no one enters the mine unless approved by the operator and they are then accompanied by an experienced miner. In addition, all of the miners carry a secondary light in their pocket. Regarding the inspector's statement that Miller himself hit his head on the roof, Miller stated that his hard hat merely scraped the roof. Further, in all his years he has never had a neck injury, and has he never fallen. Nor, he added, to his knowledge has any of his miners sustained any neck or head problems or any problem associated with hitting their heads. Tr. 232.

Miller acknowledged that, following the issuance of the citation, the mine installed some signs "where it appeared that there could possibly be the potential of a problem." Tr. 233. However he described these as a "potential speculative problem that may or may not exist." *Id.* He added that the mine has some 35 miles of tunnels, with roofs ranging from three to four feet high and some stopes likely 20 feet high. *Id.* However, all his miners are lead miners with many years of experience and all have been task trained. *Id.* In fact, Miller maintained that the only danger was with the MSHA trainee inspector accompanying Hagedorn as she was not properly dressed, nor adequately trained. *Id.* He also noted that, by wearing hard hats, a mere scrape causes no injury. Further, given the scope of the mine, "it is physically impossible to go around and spend the time and money to mark every place in the mine where you might have to duck." Tr. 235. As to the S&S marking, Miller noted that in "years and years" of inspections, this condition has never been cited. *Id.*

The Court then inquired of the inspector about the breadth of travel involved with the citation, asking, "Are we talking about a football field? Miles? I am not sure what the extent of your citation covers?" Tr. 236. The inspector confirmed that his citation alleging restricted clearance covered about a half-mile of the mine. Tr. 237. When the Court asked if the inspector pointed out each location of restricted clearance, the response was that he spoke only generally, with the onus then on the mine to go through the half mile and look for any areas of restricted clearance. Tr. 237-38. The Secretary again conducted no cross-examination of Miller, nor did it seek additional testimony from the inspector upon re-direct. Tr. 241. The proposed assessment was \$224.

## Conclusion

The standard applies where restricted clearance creates a hazard to persons. This citation must be **DISMISSED** for two reasons. First, the Secretary did not establish a genuine hazard existed, given that the miners wear hardhats and in light of Miller's testimony. Accordingly, the Court concludes that, in the absence of any cross-examination, the Secretary failed to meet its burden of proof. The Court also concludes that the citation presents a problem of vagueness. The inspector merely advised the Respondent that there were unspecified low spots along the half-mile distance, but left it to the operator to find and mark them. This placed the operator in the position of traveling the half-mile distance and attempting to determine if the standard applied to each area. This would place the operator in the position of potentially guessing incorrectly, and therefore being subject to the next inspector's view of areas deemed to present restricted clearance. As Miller expressed it, the mine is then "in a treadmill," under such circumstances. Tr. 240. Without contradiction, Miller stated that, in years and years of inspections, this condition had never been cited as a hazard.

### **Citation 8873832.**

This citation, No. 8873832, cited 30 C.F.R. § 57.11051(a). GX 20. Titled, “Escape routes,” it provides that escape routes shall be “(a) Inspected at regular intervals and maintained in safe, travelable condition.” 30 C.F.R. § 57.11051(a).

The inspector issued this citation for the secondary escapeway, 21 tunnel, where he found “numerous areas that had water that was in excess of 12 to -- 12 inches in depth, and it was very irregular footing.” Tr. 242. The 21 tunnel is used primarily as a secondary escapeway, but also it is used as part of the de-watering process of the mine.<sup>10</sup> *Id.* Hagedorn assumed that in using an escapeway, one may be on stretcher, unable to walk on their own. *Id.* As to the water depth, the inspector stated that it was some 16 to 17 inches. Tr. 243. The inspector stated that the cited standard requires “that the secondary escapeway be travelable in respect to exiting the mine in a[n] emergency situation.” Tr. 244. Upon the Court’s noting that the standard refers to escape routes, not simply secondary escapeways, the inspector agreed that he misspoke. In any event, he affirmed that the citation was issued because of his view that the escapeway was not in safe, travelable, condition. *Id.* Exhibit GX 22 consists of photos of the conditions cited by the inspector. Hagedorn added that it was not only the water, but also the presence of some four to five inches of mud or muck at the bottom. He stated that the mud adversely affected one’s footing. Tr. 246. This tunnel was approximately a quarter mile, and he added that the water and mud issue was present along its entire length. Tr. 247. He marked it as “reasonably likely” to cause an injury, such as strains, sprains, twists and falls. Hagedorn could not specify how often miners used this escapeway. The negligence was marked as moderate because the mine had been cited for this condition in the past and abated it. Tr. 249.

Miller testified that the tunnel, created in 1868, is the oldest one in the mine. It is not used for anything, but it is the lowest discharge point for water to exit the mine. Tr. 252. Miller noted that the issue of water removal at that location is not simple, as the state of California has water purity requirements to reduce silt before discharge reaches the nearby creek. He acknowledged that the mine has “probably been cited for this ten times or more. 20 times, since 1990 . . . from probably around 2012 on, there seems to be a great excitement about trying to [c]ite this particular escapeway.” Tr. 252-53. More significantly, Miller asserted that “[t]he escapeway is adequate. It has been adequate for 30 years in case of an emergency. . . . there's never been an issue. . . with unsafe travel for any reasons, including mud, silt, water or anything reported to the operator about this particular area or on record.” Tr. 253. Miller therefore contended that the escapeway was both safe and travelable. *Id.* Again, he contended that, when faced with a citation, the mine really has no choice but to abate the condition, even if it disagrees with it, believing there is no violation. *Id.* In contrast to Hagedorn’s testimony, Miller disputed the depth of the water, noting that his boots are 12 inches high and that he has never had any “slop” go over his boots, nor have any miners told him that the water was high or that water got in their boots. Tr. 254. As to the S&S claim, Miller maintained the condition did not create any remote possibility for hindering the removal of a miner in a dangerous situation. *Id.* He also challenged

---

<sup>10</sup> De-watering refers to “pumps that are piped from a lower level of the mine that, in turn, water is ditched out to exit the mine.” Tr. 243. Over the course of a year, hundreds of gallons of water come into the mine, creating the need to pump that water out. *Id.*

the inspector's statement about the water's depth. Tr. 255. **MSHA's proposed penalty was \$190.00.**

### Conclusion

The Secretary did not cross-examine Miller, nor offer additional testimony from the inspector through re-direct. The violation was established. However, given the disputed testimony about the water's depth and the amount of mud under foot, the Court concludes that it was not established that there was a reasonable likelihood that the hazard contributed to will result in an injury. Therefore the S&S designation was incorrect.<sup>11</sup> The Court finds that, given these determinations, a civil penalty of **\$100.00 (one hundred dollars)** is appropriate.

### **WEST 2016-0071 Plumbago Mine**

#### **Citation No. 8873835**

Citation No. 8873835 alleged a violation of **30 C.F.R. §57.5037(a)(2)**. In relevant part the cited section provides:

- (a) In all mines at least one sample shall be taken in exhaust mine air by a competent person to determine if concentrations of radon daughters are present. ... (2) Where uranium is not mined - when radon daughter concentrations between 0.1 and 0.3 WL are found in an active working area, radon daughter concentration measurements representative of worker's breathing zone shall be determined at least every 3 months at random times until such time as the radon daughter concentrations in that area are below 0.1 WL, and annually thereafter. If concentrations of radon daughters are found in excess of 0.3 WL in an active working area radon daughter concentrations thereafter shall be determined at least

---

<sup>11</sup> A violation of the Act is significant and substantial ("S&S") if it is of "such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." 30 U.S.C. § 814(d). It is proper to apply this designation when the facts surrounding the violation demonstrate a reasonable likelihood that the hazard contributed to by the violation "will result in an illness or injury of a reasonably serious nature." *Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822,815 (Apr. 1981). In *Mathies Coal Co.*, the Commission has explained that, "In order to establish that a violation of a mandatory safety standard is significant and substantial under *National Gypsum*, the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard – that is, a measure of danger to safety – contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature." *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984) (footnote omitted); accord *Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power, Inc. v. Secretary of Labor*, 861 F.2d 99, 103 (5th Cir. 1988) (approving *Mathies* criteria).

weekly in that working area until such time as the weekly determinations in that area have been 0.3 WL or less for 5 consecutive weeks.

30 C.F.R. § 57.5037(a)(2).

Inspector Rogers first testified about Citation No. 8873835, which was issued on August 26, 2015. GX 23. However, that citation was not issued by Rogers, but rather by Inspector Steven Hagedorn. Tr. 113. Rogers' testimony was to lay a foundation for subsequent testimony on that citation. Rogers stated that, while at the Plumbago mine in May 2015, he did radon gas and other sampling, such as for dust and noise. Tr. 114. MSHA does radon sampling at every underground mine once a year. *Id.* Though MSHA has a protocol to follow when performing radon sampling, Rogers did not follow it at that time. Tr. 117. Anticipating that there would be no radon hazard issue, he simply did a random sample. That evening, upon doing the necessary calculations from the results, he found a radon level which was much higher than he anticipated. Tr. 117-18. Consequently, he informed the miners at Plumbago of those results and he returned less than a week later, this time taking six samples. His highest sample reading was 0.275. Tr. 119. Such a reading is too high a radon level and it triggers certain actions under the standard. Tr. 121. Rogers stated that such a reading requires a mine to take quarterly samples until the reading is below 0.1. *Id.* Next, because of the readings he found, Rogers issued a compliance assistance visit notice, ("CAV"), dated May 7, 2015. Exhibit GX 25 is the CAV notice Rogers issued. Tr. 122. At that point in time, no citations were issued. *Id.* However, the radon findings *did* trigger certain obligations on the part of the mine. *Id.* Exhibit GX 25 also reflects the sample results that concerned Rogers. Tr. 125.

Rogers made suggestions as to how the mine could come into compliance regarding the radon levels. Tr. 128-29. It was his impression that, after speaking with Miller and his administrative assistant, Ms. Bell, that they understood what had to be done to address the elevated results. Tr. 129.

Upon cross-examination, Miller acknowledged that the inspector was trying to help the mine deal with the issue. Tr. 131. Rogers' additional testing occurred on May 12th. Tr. 136. Those subsequent tests confirmed the first tests he had done, in that the radon levels were too high. The Court discerned that Miller incorrectly thought that Rogers' initial tests, on May 7th, were the trigger date for his action. That is incorrect. Rogers, concerned about the reliability of his first tests, asked for permission from his office to return to the mine and conduct the tests anew. Tr. 139.

Miller challenged the accuracy of the readings. Tr. 151. He also maintained that he was never notified of the May 12th results, and consequently not informed that the mine needed to take further action. Tr. 140. The Court acknowledged this concern, stating, "All right. Well, the government will have to show at some point that [MSHA] notified Plumbago Mine about these results and that [those results] triggered subsequent action by Inspector Hagedorn." Tr. 140. The Secretary acknowledged it had to show that. *Id.*

Regrettably, MSHA backdated, to May 7th, instead of the operative date of May 12th, its notice that the Plumbago mine had elevated levels of Radon 222 and that the mine would then be

required to take quarterly radon sampling. Tr. 142. As Rogers conceded, MSHA's determination that radon levels were elevated was based *only* on his second testing for radon, which occurred on May 12th. *Id.* Rogers confirmed that he first told Miller and Ms. Bell about the need for quarterly testing *after* he conducted his second set of tests. Tr. 142-43. That conversation by Rogers with Bell occurred on May 12th. At that time he explained that he had a sample level for radon at 0.275 working level ("WL"). Tr. 148. Following that, Rogers spoke with the miners, exploring with them methods to increase the ventilation, as that is the best way to reduce the radon levels. Tr. 148. Rogers also affirmed that on May 12th, he did deliver to Bell the highest radon level result he found. Tr. 149. In terms of informing the mine of all the radon results, Rogers stated he "held a closeout at the mine on [May 28, 2015] with Mr. Miller, where [he] explained [his] sampling, and sampling procedures." Tr. 150. He stated that Miller believed the inspector's conclusion was based on only one sample, but Rogers advised that he returned to the mine and took more samples on May 12th and he explained those results to Miller. *Id.* It was after that explanation that Rogers then issued his CAV notice, which was misleadingly dated May 7th, but actually stemmed from Rogers' May 12th testing results. *Id.* However, Rogers could not recall if he gave the mine his May 12th testing results when he held his May 28th closeout conference. Tr. 151. Shortly after that remark, Rogers stated "we are not allowed to give that information out anymore." *Id.*

MSHA inspector Steven Hagedorn then testified for the Secretary. Tr. 152. Hagedorn has been an MSHA inspector since December 1998. Tr. 154; GX 23. On August 26, 2015 Hagedorn, though technically inspecting the Plumbago Mine, was physically at the Sixteen to One's office. Tr. 160. On that date he issued Citation No. 8873835, citing 30 C.F.R. § 57.5037(a)(2). Tr. 162. He stated that the citation's issuance occurred because "there had been some previous enforcement activity that radon was determined to require additional sampling by the mine operator. And when it came to this -- this particular date and time [August 26, 2015], they had not done any." Tr. 160. On that August 26th date Hagedorn inquired if the mine had done any radon sampling and was informed by Ms. Bell that they had not. Tr. 161. Bell explained that the mine was trying to do this while facing a financial hardship over the expense of such sampling. Tr. 162. As noted, this exchange occurred at the Sixteen to One mine, not the Plumbago mine, because the Sixteen to One serves as an "umbrella" for the two mines. Tr. 161.

Hagedorn stated that the standard he cited, 30 C.F.R. § 57.5037(a)(2), requires "[t]hat the mine operator conduct his independent sampling per at least once a year, or until he can determine the proper ventilation to exhaust out the --the radon daughters themselves." Tr. 162. Hagedorn then refined his answer, stating that the mine had to determine "whether they needed to sample, at least come to a conclusion of what the -- the contaminant was. Or what the -- the elevation of the contaminant. How serious it was." Tr. 163. Further, it was his understanding that this required quarterly testing. *Id.* As he expressed it, the citation was issued because it was his "understanding they were supposed to do sampling to determine whether they needed to establish a schedule, and they hadn't done it. And by not doing it, that's what triggered the issuance of the citation." Tr. 163-64. He listed the gravity as unlikely because the miners had been primarily working at the Sixteen to One mine, not at the Plumbago mine. Tr. 164. Another consideration was that the mine has considerable natural ventilation. *Id.* However, he marked the injury or illness as fatal, because of the inherent dangers of exposure to radon. Tr. 165. Negligence was marked as low because to the inspector, "it sounded like there was a lot of

confusion between MSHA and Mr. Miller and the people involved of coordinating, and they did have -- they had considerable mitigating circumstances on the amount of effort that they put into acquiring somebody to do the testing.” Tr. 166.

Hagedorn also stated that there was “some confusion, actually, between the agency, and . . . Mr. Miller, that he -- the requirement -- was he required or was he not required?” Tr. 166-67. The inspector supported the idea that MSHA could assist and do some testing, “because we do it for other people for dust and noise.” Tr. 167. To make sure it understood the inspector’s view, that MSHA could have helped the mine with the issue, the Court inquired, “But you are telling me that based on your experience as an MSHA inspector, that you have seen MSHA cooperate and go out and do this testing that . . . that Plumbago requested, but didn't get?” The inspector affirmed that was his statement, qualifying it only by noting that previous assistance had been for dust and noise. Tr. 167-68.

Miller was of the view that MSHA didn’t have to issue the citation when it did; that it had other options. The Court noted that the citation’s abatement was extended twice. Tr. 172. The Secretary stated that, to the best of its knowledge, the citation was abated and, following that, a civil penalty of \$100.00 (one hundred dollars) was proposed. Tr. 173. The Secretary stipulated that the violation was properly terminated and that no 104(b) order was issued. *Id.* In terms of the “fatal” designation, the inspector maintained his earlier testimony, analogizing the gravity to radon in basement homes in New York. Tr. 174. The inspector has never actually been *inside* the Plumbago Mine, at least underground. However, he did measure the air velocity emanating from the mine, at a portal, with that velocity recorded at 21 miles per hour. Tr. 175.

When Mr. Miller testified about this citation in response to the Court’s inquiry as to how it was abated, Miller stated,

On July 16th the notification came for this need to do it, on – something on CAV approximately May 28th. It was presented to Rae Bell. Rae Bell is corporate secretary and also does handle the paperwork. . . . [Miller] turned this whole issue over to Rae Bell, who is competent to do -- to handle these types of situations. She had numerous conversations with [MSHA] . . . asking for help.

Tr. 178-79.

Miller’s point was that there was communication confusion about the whole matter and what the mine was obligated to do, stating, “we were in serious communications about how to resolve a problem.” Tr. 179. However, Miller ultimately did not know how the violation was abated. Tr. 180. According to Miller, they were unable to find a company that could do the testing and it then “[s]ent a letter asking, begging, for some help from MSHA.” Tr. 180. However, the mine subsequently did find a company to do the testing, at a cost of \$1,720.00. Miller’s version of the events continued, as he then asserted that Rogers informed him that the mine was “*within the threshold of not needing to continue this.*” Tr. 181 (emphasis added). As noted, ultimately Respondent paid to have the testing performed and from those results it was determined that the mine was within the threshold, meaning by that description that the radon levels were within the permissible limits. *Id.* Inspector Hagedorn confirmed Miller’s recounting.

That is, upon receiving the test results, MSHA accepted them and terminated the citation. Tr. 182. Upon learning of these events, the Court inquired if the Secretary wished to vacate the citation, but Counsel responded that she was without authority to do that. Tr. 183. With regard to this suggestion, the Court also commented, “there are some issues here that make for troublesome resolution of this case, including testimony from your own witness, that MSHA has acted inconsistently. Cooperated, and helped other mines, but for some reason didn't want to help this mine.” Tr. 183-84.

Testimony on this citation concluded with Miller’s statement that he did not feel “fatal” was an accurate designation, as the dosage and duration were insufficient and the inspector’s New York analogy was not apt. His view was that even lost work days was an incorrect designation. Tr. 184-85. **MSHA’s proposed penalty for this citation was \$100.00.**

### Conclusion

It must be kept in mind that the mine was cited for an alleged violation of subsection (a)(2) of standard 30 C.F.R. §57.5037. Accordingly, such a violation is based upon an alleged failure to perform a *procedure*, not on the radon results themselves. One does not arrive at the requirements of (a)(2) until, per subsection (a), there has been “at least one sample . . . taken in exhaust mine air by a competent person to determine if concentrations of radon daughters are present. After that, the standard differentiates between mines where uranium is being mined and those mines, such as the Plumbago Mine, where uranium is not mined.”<sup>12</sup>

However, there was testimony from the inspector that MSHA is to assist in conducting such testing. That assistance didn’t happen here and no reason for that failure to assist was presented. Upon consideration, the Court concludes that this Citation must be **DISMISSED**. This determination is based on the questionable results of the radon testing, the inadequate communication to the mine about the results MSHA was relying upon, and most importantly, MSHA’s failure to assist the mine in conducting the testing required under subsection (a)(2). In addition, while technically not part of the analysis in determining whether a violation occurred, it cannot be ignored, as an equitable consideration, that the citation was abated, and that it was achieved without the mine having to make changes to its ventilation. Instead, on this record, the mine came into compliance by doing nothing, other than expending funds for an outside contractor to perform testing, the results of which apparently showed that the radon levels fell outside of the requirements of 30 C.F.R. §57.5037(a)(2).

---

<sup>12</sup> Standard 30 C.F.R. §57.5037(a)(2) provides, in relevant part, that “[w]here uranium is not mined - when radon daughter concentrations between 0.1 and 0.3 WL are found in an active working area, radon daughter concentration measurements representative of worker's breathing zone shall be determined at least every 3 months at random times until such time as the radon daughter concentrations in that area are below 0.1 WL, and annually thereafter.”

**Citation No. 8873833 Sixteen to One Mine**

Citation No. 8873833 cited 30 C.F.R. § 57.3360. That standard, titled, “Ground support use,” provides:

Ground support shall be used where ground conditions, or mining experience in similar ground conditions in the mine, indicate that it is necessary. When ground support is necessary, the support system shall be designed, installed, and maintained to control the ground in places where persons work or travel in performing their assigned tasks. Damaged, loosened, or dislodged timber use[d] for ground support which creates a hazard to persons shall be repaired or replaced prior to any work or travel in the affected area.

30 C.F.R. § 57.3360.

The testimony for this citation began discordantly, with the inspector vaguely referring to the alleged violation,<sup>13</sup> as if the condition and violation had already been discussed, referring to a photograph and a “cross-member that had been put in place to ... substantiate ground [sic].” Tr. 256-58; GX 26. Agreeing with the remark of an MSHA trainee who was accompanying him, that the member looked like it was breaking, Hagedorn added that they then went through the mine, observing numerous timbers that were buckling. Tr. 258. The inspector’s worry was that during blasting, the tremors produced could cause the timbers to fail. *Id.* In his view, any little event could cause the timbers to fail and thereby not supporting the integrity of the roof. Tr. 259.

Finally, the inspector was directed to the essence of his claim – decayed timbers. Tr. 260. In the area cited, throughout the 800 level, he stated observing about 40 decayed timbers. *Id.* The cited standard addresses ground support and hazards created by a failure of such support. *Id.* Hagedorn could not predict when the hazard, failure of the timbers, would occur, but stated that at some point they would fail. Tr. 261. What will ensue from a failure cannot be stated with certainty either, as it could involve only splintering of a timber but there could also be a slab coming out. *Id.* For there to be an injury, such a failure would also have to accompany the misfortune of a miner traveling the location when the event occurred.

In terms of negligence, which the inspector designated as moderate, Hagedorn admitted that the mine had areas where additional timbering or stays had been installed. He also conceded

---

<sup>13</sup> Asked why he issued the citation, Hagedorn stated, “Well, it was one of them [sic] moments where my [MSHA] trainee, Julie Hooker, goes, ‘Are these really supposed to look like this?’” Tr. 257. He responded that they were not, and then added that they “started seeing that it's not just one, that it was multiples.” *Id.* Adding to his introductory statements about the reason for issuing the citation, Hagedorn continued that Miller informed him “that he was trying to preserve the historical portion of the mine and maintain the historical look.” *Id.* Hagedorn responded that the standard doesn’t allow for such an exception, advising “[y]ou need to, when they fail, you remove them and/or replace or re -- re-establish a competent support mechanism.” *Id.*

that leaving in the original timbers was consistent with the mine's attempt to maintain the historical appearance of the mine. Tr. 263. The Court then noted that the citation was issued on August 18th, with four extensions issued thereafter, and an acknowledgement that "[t]here has been a great deal of effort by the mine operator to correct the conditions." Tr. 264.

Upon cross-examination, Miller inquired about the inspector's knowledge of rock mechanics and blasting and other questions, aimed at learning about the extent of his knowledge on those issues. Tr. 265-70. In the Court's view, the inspector demonstrated adequate general background knowledge as well as sufficient particular knowledge about the support issues for the photos he took.

Mr. Miller testified about this citation as well, asserting first that there was no danger to miners. Tr. 271. He then acknowledged the intent to preserve, for historical purposes, as much of the mine's historical appearance as possible. Tr. 272-73. More importantly, Miller asserted that if any of these older timbers needed additional support, such support has been and continues to be, installed. Tr. 273. He challenged the inspector's assertion that the timbers could collapse from the weight on them, as inaccurate observations and conclusions. *Id.* To begin, he asserted there was no weight of any ore, as any ore would have been removed. Tr. 273-74. As an example, referring to a photograph in Exhibit GX 28, he agreed there was a bow depicted, but that the bow was not due to ground support issues, but rather because it was holding up electrical wires. In that instance, the timber was removed, but nothing was installed in its place. Tr. 274. Several other timbers, he asserted, were for the purpose of holding up utilities. *Id.* Further, at the cited level, the 800, there is no blasting, no ore, nor headings that they are working. *Id.* However, seemingly contradicting himself, Miller added that the old timbers "are the evidence to the miners and to our entire operation of if there is any more stress that's coming on those areas, if they are already bowed, every person that works in that mine is very, very well aware of when they walk through and they see things." Tr. 275.

Challenging the breadth of the inspector's knowledge about timbering, Miller stated,

A timber man can look at the wedges and see whether they are under compression. They can look to see if a wedge that goes in the top of one of these, as long as that wedge is still in there like that, it's not under any type of compression. Because if the compression is continuing, especially when they are rotten, the other part of the wedge will fall out and the existing wedge will still be there. If we saw something like that, we'd know that that particular timber is still under compression.

Tr. 276.

In addition, regarding the inspector's statement that some 40 places needed ground support, Miller stated that another MSHA official, when advised why some timbers remained, told him to "just take some of them out," inferring that, while unnecessary, removing some would placate the inspector. Tr. 277. As to the inspector's claim that some tremor elsewhere in the mine could cause such timbers to fall, Miller asserted that none of the timbers fell out, even after earthquakes in the area. *Id.*

With these counter-contentions in mind, Miller challenged the inspector's S&S designation, especially considering how long those timbers have been present and the many preceding inspections when no support issue had been claimed by MSHA. Miller characterized the inspector's knowledge as an example of the gulf between book learning and real world experience. Tr. 277. He noted that the mine has plenty of timber and installs it, when needed. Essentially, Miller was contending that his experience and expertise, along with that of his seasoned miner employees, ensures that, per the cited standard, in fact ground support is used where ground conditions or mining experience in similar ground conditions in the mines indicates it is necessary. Tr. 280. Given that, Miller maintained, "That there is no place on the 800 level where it would be necessary to put a timber in that there is not a timber, a steel set, or rock bolts in there." Tr. 280-81.

Accordingly, Miller summed up that,

[t]his is not a valid citation in the eyes of a person that would truly be qualified to come in and do ground support evaluation. If that were true, we would have had 40 citations, or we would have been doing this five years ago, eight years, or 10 years ago, when finally MSHA brought somebody from Kentucky or someplace that had had some ground support experience. ... It does not create a hazard to anybody in the mine, and there was no liability, there was no negligence. No one could have been hurt.

Tr. 282.

The Secretary had no cross-examination of Miller, nor further questions of Hagedorn. Tr. 283. The Court then asked some questions of the inspector, inquiring if it was his opinion that any of the timbers that are depicted in Exhibit GX 28, photo 2 of 16, were damaged, loosened, or dislodged. Tr. 283. The inspector responded that he saw damaged timber. Tr. 284. However, when asked if believed that the timber depicted in 2 of 16 *was used for ground support*, the inspector answered, "[i]t was not." *Id.* He said instead, that it was used to support a wall, until what was on the back side of the wall was stabilized. Tr. 285. Asked if consider such a condition as ground support, Hagedorn answered he "would consider it for support of the wall that's supporting the ground behind it." *Id.* Noting that the standard talks about timber used for ground support, the inspector seemed to equivocate, stating,

They had did some ground support at the other -- at the other end of this, and this was in place to support the ground that they had -- they did backfill, and if it wasn't for this supporting the wall to support the backfill, it would just ooze out into the travelway.

Tr. 285-86.

Regarding photo 3 of 16, the inspector stated that, for that one, there definitely was timber used for ground support, stating that the "peeled log" was "specifically a roof back support." Tr. 286. He affirmed that it was damaged and used for roof support. Tr. 287. Next, addressing photo 4 of 16, the inspector stated that timber was damaged, through decay and rot

and that its integrity was gone. *Id.* He added that for solid timber one could drive a screwdriver only an eighth (1/8th) of an inch into it, whereas for this timber the screwdriver would penetrate 2 inches. *Id.* When asked *how* he knew that it was actually serving as a support, as opposed to just being there, the inspector's response was again, in the Court's estimation, vague.<sup>14</sup>

When asked by the Court whether there was "other timber there that was, apart from this timber taking weight, that was providing adequate ground support apart from the one [the inspector] took a picture of . . . [that is to say] [w]as there other nearby timber that was supporting the ground, irrespective of the condition of this," the inspector responded, "Yes." Tr. 289. The inspector did not know, if that timber were removed, whether the remaining timbers would support the roof. Tr. 290.

As for photo 6 of 16, the inspector stated that he considered that timber to be damaged and that it provided ground support in that area. *Id.* In support of that view, he stated that the timber was wedged at the top. Tr. 291.

Addressing photo 7 of 16, the Court noted that the timber appeared to be kicking out, presenting a V shape. The inspector asserted that the timber was damaged and that it was used for ground support. *Id.* Nevertheless, the Court noted that it looked like,

on either side of that, that there is steel or some other support. . . . [prompting the question whether] that timber kicking out [was] superfluous? In other words, was there adequate ground support by what appears to be on either side of it . . . [as it] appears to be some sort of ground support which is there besides this timber that's kicking out.

Tr. 291-92.

Hagedorn responded that the Court was correct and on point. He then informed about the use of arch sets to maintain ground stability and prevent a failure from occurring. Tr. 292. Clearing up a miscommunication between the Court and the witness, the Court asked again whether, given the presence of the arch supports, the timber kicking out did not matter. The inspector agreed with the Court's description, prompting it to ask how there could be a violation, given the arch sets.

The explanation offered by the inspector was that,

the condition of the timber is what's creating a hazard to the person that would be in the -- as it becomes a projectile. That's the arch supports are put in to support because the timber has failed. The timber -- the timber has little to -- it's

---

<sup>14</sup> The inspector stated, "The -- it was -- there was another stope where they had angled the stope and there was a different strata there where you could see one -- a contact. Where the -- where the contact occurs, typically that's where the gold is defined or where it's deposited. So once they peel that away, that back is -- now needs to be maintained. So you don't have it come down. . . . And by it bowing, gives me the indication that it's either upheaval or it's being compressed from either top or bottom. For some -- some reason, it's being compressed." Tr. 288.

completely lost its competency. So by the timber remaining there, a person traveling through there, should that fail at the time that they are traveling by having it come out into the travelway would expose a person to the impact of it buckling.

Tr. 294.

In short, the inspector's concern was not directly with ground support but with the claim that the timber could splinter and become a projectile. *Id.* The response perplexed the Court, as the inspector testified that the timber was no longer used for ground support and the concern raised by the inspector was quite different, namely if this timber were to collapse, then someone walking by might be injured if that happened. The Court commented that the concern the inspector raised is not what the standard addresses, because damaged timber has to also be used for ground support. Tr. 294-95. The inspector responded "that's entirely accurate." Tr. 295. The Court then expressed its doubts whether, in that instance, there was an established violation. *Id.*

Next was photo 8 of 16. The inspector informed that the vertically-placed wood, that appears to be spread out at the top, are wedges. Tr. 296. Hagedorn stated that he considered that timber to be damaged, based on its "discoloration of its separating." Tr. 296. He added that it had lost its competency and was failing. *Id.* He determined that the timber was used for ground support based on the two different strata. Where that exists, he asserted, one should support that as "there is usually a strata on the other side of it." Tr. 297.

The Court concluded its questions about the citation and the Secretary advised that it had no further questions to ask. Mr. Miller then testified additionally about the matters. He began with photo eight of 16, stating that the wedges were critical to understanding the situation of the ground in this particular location, asserting that they had no effect on the ground control. As to the strata, as mentioned by the inspector, Miller asserted that that came in more than 120 million years ago and that the strata has done a lot of moving over the years. Tr. 298. Miller agreed that the timber was damaged, but that it was not used for ground support. Tr. 299. At one time, Miller stated, it was used for ground support, and many old mines simply leave the support there after they are done working the area. *Id.* . Miller added that the support was likely installed there as a safety measure when miners were actually working in that area. He maintained that one could remove the old timber and nothing would happen. Tr. 300.

Photo 2 of 16 was next discussed. Miller stated that the photo showed damaged timber, but that the damage was not sufficiently damaged to require its removal, because it was not cracking but instead had a bend. Tr. 302. However, Miller added that the timber was not then used for ground support. *Id.*

Photo 3 of 16, Miller asserted, was similarly not used for ground support. Tr. 303. As for photo 4 of 16, Miller agreed that the timber in that photo was rotten and damaged. *Id.* However, critically to the issue of the citation, he stated that it also was not used for ground support. Tr. 304. Miller added that sometimes timbers may be installed during the construction phase of a mine, but never intended for ground support. As one example, a timber may appear to be near a stope but that doesn't mean it was used for ground support. Instead the timber may be used to

hold up a chute. Tr. 304-05. He added that photo 6 of 16 is the same situation. While he conceded that the timber was damaged, it is not taking any weight and accordingly not used for ground support. Tr. 305. As for photo 7 of 16, Miller stated that the inspector's observations were incorrect because it had no effect on safety and that it was more akin to what one might find in a Disneyland display. *Id.* Accordingly, Miller agreed that it was his position that *none* of cited timbers were used for ground support at the time of the inspection. *Id.*

### Conclusion

Upon consideration of the record testimony for this citation and taking into account that the Secretary neither cross-examined Miller, nor sought additional testimony from the inspector, following Miller's testimony and the Court's questions of the inspector, the Court concludes that the Secretary failed to meet its burden of proof on the critical question of whether the cited locations were in fact used for ground support. **Accordingly, this citation, for which a \$224.00 penalty was proposed, is DISMISSED.**

### **WEST 2016 183**

#### **Citation No. 8873843**

Citation No. 8873843, invokes 30 C.F.R. § 56.4402, titled, "Safety can use." It provides, "Small quantities of flammable liquids drawn from storage shall be kept in safety cans labeled to indicate the contents." 30 C.F.R. § 56.4402.

At the start of the second day of the hearing, Miller stated that he stipulated to the fact of violation for this citation as well as to unlikely designation for gravity, the high negligence and to the permanently disabling designations. Tr. 314; GX 29. Except for Miller's across the board assertion concerning the proposed penalties' impact on the mine's ability to stay in business, he accepted the proposed assessment of \$138.00 (one hundred and thirty-eight dollars). Tr. 314-15.

#### **Citation No. 8873844**

Citation No. 8873844 alleges a violation of 30 C.F.R. §56.12002. GX 32. That standard, titled, "Controls and switches," provides "Electric equipment and circuits shall be provided with switches or other controls. Such switches or controls shall be of approved design and construction and shall be properly installed." 30 C.F.R. § 56.12002.

The Court noted for the record that this involved a 104(a) citation, which alleged a table saw with a 7.5 horsepower electric motor that it is being energized with a blade type safety switch and which is out of compliance with the national electrical code. Tr. 315. Before any testimony on the citation, Miller stated that he accepted the inspector's observations, but still challenged his conclusions. Tr. 316. Miller contended that the inspector missed that the saw was grounded, making the condition not a violation. *Id.*

Inspector Hagedorn then testified, stating,

after interviewing the people that were in the area [he] came up to the conclusion that they were starting and stopping the saw by using the disconnect, and anything over 1 horsepower is to be gone through a motor starter because these specific disconnects aren't designed to open under load or close under load.

Tr. 317

He added that “the arcing that takes place during the starting and stopping is one of the reasons why [one] horsepower or less is allowed to be done in this manner [but] [a]nything over [one] horsepower has to have what is called a magnetic motor starter.” Tr. 317. The inspector agreed that the disconnecting method he observed was “basically” pulling the plug out. Tr. 318.

The inspector described the method an employee would use to disconnect the table saw, by referring to a cover which, when closed, has an accessible lever. If one pulls the lever down that action opens the disconnect and thereby de-energizes the circuit. If one pushes the lever up, to the closed position, the circuit is energized. The inspector agreed that the problem with using that method is that the motor is too powerful. Tr. 319-20. Instead, the inspector stated, the mine should've used a motor starter that incorporated a magnetic push button process. As an example, Hagedorn stated that a nearby air compressor had such an arrangement. Tr. 320. He marked the gravity of the condition as unlikely to cause an injury, but employed odd reasoning to support that conclusion, stating that he knew it “could be an expensive citation.” Tr. 322 That inappropriate consideration caused him to be “generous” in his evaluation. *Id.* In fact, he then agreed that he could have marked it as “reasonably likely.” *Id.* Hagedorn contended that the saw was an entirely metallic structure which therefore could become an energized appliance as it didn't have a dedicated path to ground. Tr. 322-23. The result, he asserted, was that the whole appliance can be energized. Body contact in that situation exposes one to possible electrocution. Tr. 323. For negligence, he marked the citation as moderate because, though antiquated, such an arrangement was once common. Tr. 324-25. The proposed penalty was \$100.00. Tr. 326.

On cross-examination, the inspector stated that he had conversations with mine employees as well as with Miller, on the issue of whether disconnects can be a means of starting and stopping such a device. *Id.* While the inspector referred to what he believed was evidence of an arc flash, he could not state when it occurred. Tr. 327. Although the standard itself does not state that a 7.5 horsepower engine requires a magnetic or a push button starter, the inspector maintained that the national electric code provides guidelines as to the proper installation of such a circuit. *Id.* The saw was located above ground. Tr. 328.

Miller began his testimony for this citation by introducing Ex. R-7, which was another declaration. Tr. 328. The Secretary objected to the exhibit, on the same grounds as its objections to other exhibits (R 6 and R 8) offered at the hearing, on the basis of timeliness and a lack of foundation. Tr. 329. While this and the other exhibits of the Respondent were admitted, the Court reserved judgment on the issue of the weight it would afford them. Tr. 328-29. Miller stated that the saw had been on the mine property for over 20 years, yet it had never been cited before. Tr. 329. Miller added that a 7.5 horsepower motor is “not a big deal” and asserted that the

saw was grounded. Tr. 330-31. Pointing to Exhibit GX 34, photo 4 of 4, he maintained that it shows it was grounded. Tr. 330. Essentially, Miller asserted that the inspector's claim about the harm that could ensue amounted to "speculations" and "fabrications." *Id.* He agreed that the equipment is dangerous, because one must handle wedges properly, *but it does not present* a hazard of electrocution. *Id.* Again, the Secretary elected not to cross-examine Mr. Miller. Tr. 333.

The Court then asked the inspector, if it were assumed that the saw was in fact grounded, whether he would still have issued this citation, he responded, a different standard would need to be cited. Tr. 333. Apparently, in that circumstance, he would have cited 30 C.F.R. 56.12028, pertaining to the requirement for grounding continuity testing. Of course, that standard was not cited and the key part of his answer was "no" he would not have issued the citation if the saw was grounded. The Court inquired further, in an attempt for a clearer response, asking, "was it an essential finding of yours that this table saw was not properly grounded?" Tr. 332. The inspector then seemed to recant his previous answer, this time stating that he wasn't "going by it wasn't properly installed." Tr. 334. He added that he did not conduct the specific test to determine grounding, and therefore that his citation was based on the saw not being properly installed. *Id.* Asked the basis for the "not properly installed" assertion, he responded, it was because "[t]hey were using the disconnects as a means of starting and stopping the saw." *Id.*

As noted, the cited standard requires that "electric equipment and circuits shall be provided with switches or other controls." 30 C.F.R. § 56.12002. The inspector's comments to the citation, as reflected in the photographs which were introduced in support of it, show that the inspector's concern was a "[p]ower source without any dedicated grounding conductor." GX 34 (photo 2 of 4). Instead, as per Exhibit GX 34, Photo 3 of 4, a separate safety switch was being used to energize the table saw. The final photo for this citation records that "[t]he table saws [sic] safety switch has been tagged out." GX 34-4.

## Conclusion

The problem with the Secretary's evidence for this citation is that it did not demonstrate that the switch that was present ran afoul of the standard. The standard only requires that electric equipment be provided with switches. Here, per Photo 4 of 4, the table saw *had* a switch, as the inspector noted in the text accompanying the photo. That photo is informative because it shows the cover the inspector referenced in his testimony and the switch which one uses when the cover is closed. However, the inspector did not explain, other than a vague reference that the national electric code provides guidelines as to the proper installation of such a circuit and the assertion that the mine should've used a motor starter that incorporated a magnetic push button process, to (one will pardon the expression) "connect" the standard to such a requirement. The Court concluded that, per the wording employed in his citation, the inspector's true concern was a lack of grounding. Faced with Miller's claim that the saw was grounded, the Secretary did not challenge his testimony, nor recall the inspector to refute that claim. Further, the Secretary did not establish that the switch which was associated with the table saw violated the standard.

This is not to say that a violation could not have been established, but only that, in this instance, due to insufficient proof or perhaps invoking the wrong standard, no violation was demonstrated. Accordingly, the Court has no choice but to **DISMISS** this citation.

### **Citation No. 8873845**

Citation No. 8873845 cited 30 C.F.R. § 56.20003(a). GX 35. That standard, titled, “Housekeeping,” provides “[a]t all mining operations - (a) Workplaces, passageways, storerooms, and service rooms shall be kept clean and orderly.” 30 C.F.R. § 56.20003(a).

Photos of the cited condition were taken. GX 37. The alleged violation was at the upper shop behind a steel storage container. Tr. 337. The inspector stated that “the main structure which had accumulated battery chargers, rheostat switch gear, and passageways was -- to meander through there you would have to negotiate all the different trip and stumble conditions. . . it was just haphazardly stored. Wherever it hit the ground that’s where it stayed.” Tr. 337-38. Exhibit GX 37, Photo 5 of 7 shows

inside a shipping container that typically you would see the oversea shipping container sort of scenario that had a steel rack in it and there was a considerable amount of material out in front of the steel rack itself and going on in there it didn’t have a clear passageway if you were carrying anything in your hands and it was obstructing your view to where your footing was, which also creates a poor footing or trip, slip and fall hazard.

Tr. 338.

In contrast, Exhibit GX 37, photo 6 of 7 reflects a scene after some of the clean-up was done. GX 37-6.

The inspector stated that each photo, from Photo 2 of 7 through 5 of 7 are all separate areas up around the upper shop but that he grouped them, so that multiple citations were not issued for the area. Tr. 339. Miners access these areas if they need supplies. *Id.* Among his findings, the inspector listed the negligence as moderate because there had been some “slight clean-up” from when he was last there. Tr. 342. He toyed with marking the negligence as high, because the condition should be corrected immediately, not with a “when we get to it” approach. Still, he recognized the mine “had a turnover of personnel, there was a limitation of miners availability, and they do have to do their job to make their living and that is gold mining and not housekeeping, but it is part of the mining process.” Tr. 342. Two examples of the cited conditions are the before and after photos in Exhibit GX 37, photo 2 of 7 (before) and photo 4 of 7 (after) and with photo 3 of 7 (before) and photo 7 of 7 (after). Tr. 345.

Mr. Miller testified that the upper shop, referenced by the inspector, “had basically been abandoned for years” but around August they moved to the upper shop. Tr. 348. However, Miller contended that these areas were storing junk and none of the areas were places where miners would go to get things. *Id.* He contended that, when enough junk is stored in these areas, it is taken to the dump for its scrap value. Tr. 349. Thus, he asserted, “[i]t’s not a place where a miner

is going to go in and trip and fall and have a slipping hazard,” adding that the inspector did not appreciate its purpose. *Id.* In sum, Miller contended that none of the cited areas are “that place[s] where goods are being stored so the miners can go in there and get them. That is absolutely one hundred percent not true.” Tr. 350. Miller advised that to abate the citation they simply,

moved the junk out to a different place. We had to get equipment to do it. We had to put it into trucks and we moved it someplace obviously where our other junk piles were that were sitting out there with metal that could get rained on. I guess the positive thing is we made more space to store things, but we didn't need it.

*Id.*

### Conclusion

In the Court's estimation, the problem with this citation, as with numerous other citations which were the subject of this hearing, was the Secretary's failure to meet its burden of proof. The standard invoked pertains to “[w]orkplaces, passageways, storerooms, and service rooms,” but the Secretary did not establish, following Miller's testimony, that the cited areas fell into any of the standard's categories. 30 C.F.R. § 56.20003(a). Perhaps the applicability could have been demonstrated, but in light of the Secretary's failure to recall the inspector and the decision not to cross-examine Miller, the Court has no choice but to **DISMISS** this citation.

### **Citation No. 8873846**

For Citation No. 8873846, GX 38, the inspector again cited standard 30 C.F.R. §57.11001, “Safe access,” which, as noted above, provides that a safe means of access shall be provided and maintained to all working places.

The condition was observed on the 1076 level, and involved a ladder where the inspector observed persons walking down the ladder, which he noted was not a safe way to descend it. As he viewed the practice, there was a risk in coming down it, as if it were as set of stairs, which created the possibility of “slipping off and coming between the rungs.” Tr. 353. Thus, the essence of the violation was employees were using the ladder as stairs. Tr. 356. The Court then inquired how the inspector would want this abated in order to achieve a safe means of access; changing the ladder itself or changing *the method* used to descend it. The inspector answered that his concern was “the culture” of the way the ladder was used when descending. Tr. 357. The inspector admitted there was nothing wrong with the ladder itself. Tr. 358. In fact, the inspector admitted that if the miners were ascending and descending the ladder facing towards the rungs, he would not have issued the citation. *Id.*

Attempting to resuscitate the citation, Counsel for the Secretary pointed to language in the citation itself that stated the ladder was twisted, bent and distorted. Tr. 359. The inspector tried to explain the contradiction with his earlier testimony, stating, “This was one section of the access. At the footing that doesn't show in this photo, and then where it transitioned to another -- transition point is where the twisting, bending and distorted description comes into play.” *Id.*

The inspector then stated his

understanding of [the court's] question was to the -- facing the ladder or not facing it coming down. I didn't take into consideration further up the entryway, how they were actually accessing the compromised area. Then when the miner elaborated that well, now we have handrails was another issue in which the handrails is plural and that's not part of the -- what we were talking about as safe means of access. It was interactions of different --

Tr. 360.

The Court interrupted the prolix answer, informing that it was dismissing the citation. *Id.* In taking that step, the Court notes that, moments before, the inspector was asked, "So what specifically about this did you believe was unsafe?" The response was "[t]he possibility of coming down it as you would a set of stairs and stepping or slipping off and coming between the rungs. So it was a practice and the culture of the workforce on how I observed them traveling that area." Tr. 353.

### Conclusion

Because the inspector clearing stated the basis for the alleged violation in his direct testimony, and then attempted to contradict his own testimony, returning to the text of his citation, to revise his answer, the Court must dismiss the citation as internally conflicted. It is true that the citation does mention other issues, but it also notes "that miners shall have both hands free when climbing and descending," and it expresses that the ladder "was not improved upon after active mining was started." GX 38. These remarks in the citation support the inspector's initial remarks expressing his concern and there is no explanation as to how the safe access requirement changed when the ladder was initially being used for exploration and development and then to an "active mining area." *Id.*

The initial basis for the citation's issuance -- the *manner* in which miners were using the ladder -- not the safety of the ladder itself, was an inapplicable reason to establish a violation of the standard's requirements. **The citation is therefore DISMISSED.**

### **Citation No. 8873848**

Citation No. 8873848 cited 30 C.F.R. § 57.11002. That standard, titled, "Handrails and toeboards," provides: "Crossovers, elevated walkways, elevated ramps, and stairways shall be of substantial construction, provided with handrails, and maintained in good condition. Where necessary, toeboards shall be provided." 30 C.F.R. § 57.11002.

This matter involved a set of stairs with no handrail. Tr. 362; GX 41. The stairs are depicted in photo 2 of 3. GX 43. As noted, the standard requires handrails be provided on stairs. The Citation added that "the construction of the steps are not equal in the tread and rise" and that the first step has a 15 inch drop down, as opposed to an industry standard of 7 ½ inches. GX 41.

In this instance, the stairs, which were made of concrete, had been present for “years and years” with no report of an accident. Tr. 362-63. Because of that, the inspector marked the citation as “unlikely” and the negligence as moderate. *Id.* The stairs consisted of three steps; the next step brings one to the entrance door level. As the stairs had been that way for many years, the inspector conceded that many previous inspections had not found it to be a violative condition. Tr. 365. The Court, reading from the standard cited, asked if the sole issue was the lack of handrails. The inspector agreed. Tr. 366. Thus, the 15 inch drop down was withdrawn as part of the violation.

This makes sense, as the closest the standard comes to that issue would be the “substantial construction” language, which on its face does not apply to tread and rise issues. Upon hearing the inspector’s testimony and reviewing the photo of the stairs, the Court then informed the parties that, given the long history of no prior inspector finding an issue with the stairs, it could not justify a penalty of more than \$10 (ten dollars). As the Court noted, “there’s a history here.” Tr. 367.

Consistent with the Court’s remarks, Mr. Miller then testified, stating that, following the citation, another inspector arrived for the abatement issue, telling Miller, “just do something.” Tr. 368. Miller advised that they “welded a pole that goes down [so that] . . . the door acted as a handrail. *Id.* Miller believed that adding handrails made it more dangerous, because,

on those narrow stairs you're eliminating the box theory, so to speak, or whatever you have to take in and out of there. If we are allowed to operate our own mines it was in management and the miner's best interest . . . that there wasn't a handrail . . . you're talking about something where it's a dangerous situation where someone could fall off.

Tr. 370.

### Conclusion

Accordingly, for the foregoing reasons, **the citation is upheld and a civil penalty of \$10.00 (ten dollars) is imposed.**

### **Citation No. 8873851**

**Citing 30 C.F.R. 57.4131(a)**, that standard is titled, “Surface fan installations and mine openings.” It provides at subsection (a) “On the surface, no more than one day's supply of combustible materials shall be stored within 100 feet of mine openings or within 100 feet of fan installations used for underground ventilation.” 30 C.F.R. § 57.4131(a).

The inspector stated that “[a]t the upper shop there is [sic] openings that go into the mine and the standard requires that anything that has combustibility or grease that be moved back at least a hundred feet away and they were all still parked there when I went back the second time.” Tr. 371; Ex. GX 44. He maintained that when he made his second visit he realized that remains of fan housing were within 100 feet of the opening. *Id.* Exhibit GX 46, Photo 4 of 6, shows the

opening in a “before” state, while Photo 5 of 6 shows the ‘after’ condition. Tr. 372. The opening was for ventilation purposes. Tr. 373. The inspector measured the distance of the materials to be around 80 feet of the mine opening, not the required 100 feet. Tr. 376. The inspector asserted that Miller refused to move the items to area beyond 100 feet without first receiving a citation. Tr. 377. Reiterating that both Miller and his son, Reid Miller, refused to move the materials until a citation was issued, that stance prompted the inspector to mark the negligence as moderate. Tr. 378.

In any event, the inspector stated that he observed,

lumber clearly, the dozer had fuel onboard and also just part of it. The dump truck itself, the white dump truck had -- it had rubber-tired dozer tracks or possibly for an excavator. They had a similar excavator on the site that had rubberized tracks, and then there was -- So each one of those vehicles, tires, oil, oil containers all could fall under the definition of combustible.

Tr. 379.

It must be said that the inspector’s view of combustible materials is seriously at odds with the definition for Part 57. 30 C.F.R. Section 57.2, “Definitions,” provides that “Combustible material means a material that, in the form in which it is used and under the conditions anticipated, will ignite, burn, support combustion or release flammable vapors when subjected to fire or heat. Wood, paper, rubber, and plastics are examples of combustible materials.” Therefore, given the definition, it is dubious that the standard encompasses several of the items the inspector named: the dozer, the dump truck, and the excavator.

The inspector marked an injury or illness as unlikely because he found little air movement at the fan opening and that such air was exhaust, not intake, air. In addition he conceded that most of the items he named have a high flash point and therefore are not easily started on fire. Tr. 379. However, later, he contradicted himself, asserting that the air was entering the mine. Tr. 380.

The Court noted that the cited standard allows not more than a one day’s supply of combustible materials within the 100 feet limit. The inspector acknowledged that the standard “gives the mine the latitude if they -- for instance, the wood on the trailer. If they are bringing supplies to the mine opening that gives the mine operator the ability to have it for easy accessibility to take it underground.” Tr. 381. The Court inquired how the inspector determined that the material was more than a day’s supply. The inspector answered, “[t]he accumulation of junk wasn't -- hadn't moved for days, and *the only one day of supply that you would put under that category of being a supply would be the lumber on the trailer.*” Tr. 382 (emphasis added). The Court then inquired if the inspector was “there on November 4th, the day before you issued the citation and observed this condition?” *Id.* The inspector responded that he would have to review his field notes. The Court then remarked, “there is nothing in your citation which supports a conclusion ... that there was more than one day's supply of combustible materials there. You haven't articulated how you have reached a conclusion that there was more than one day's supply.” Tr. 382.

During cross-examination, Miller asked for the basis behind the inspector's conclusion that the opening affected the mine's ventilation. The inspector answered, "throughout [his] travels throughout the mine [the mine wasn't] using any kind of [stoppings] or [brattices] or any curtains that would seal off the mine. So the air is going to go where it's going to go. I've never seen a seal that was airtight." Tr. 384.

The Court then noted that the,

standard doesn't restrict -- is not restricted to any mechanized ventilation. It simply says that if you have a mine opening that you can't have more than one day's supply of combustible materials within a hundred feet of a mine opening and this is a mine opening. It doesn't matter whether there is a fan there or not. It's a mine opening.

Tr. 384.

Noting that the standard allows no more than a day's supply of combustible materials may be stored, Miller then testified about the conditions,

There were no supplies being stored there. None of the stuff that he mentioned were supplies. Those were two -- another area of storing junk, which he basically said. They were -- they had -- there were no supplies. This was not a place to put supplies next to an opening or whatever you want to say about what that hole was, which was sealed in the inside. You couldn't get passage into it. . . . [therefore Miller contended] this standard does not meet the conditions of that particular situation. Those were two areas of immobile trucks that were tagged out where junk was being put onto them for a later time to haul to the dump or haul away. So it's such a reach to try to say, number one, this was a storage of supplies, whether it's one day or not.

Tr. 385.

While Miller agreed with the Court's remark that there was an opening, he asserted that it was an area they later opened up, called the zero level. He added that MSHA, through another inspector<sup>15</sup> recognized that it was, "like [a] totally separate part of an area that had been abandoned. . . . since 1966." Tr. 386. Thus, Miller contended that what the inspector observed was the work of some loggers who had installed an electrical box there and it remained there when Miller took over the mine in 1983. Accordingly, it was his assertion that the cited area "was never any part of a connection to the existing Sixteen To One." *Id.* Miller continued that the trucks were both inoperable, and been present for some eight to ten years. As he summed up his testimony, Miller repeated that the area "was abandoned. It had no effect on ventilation. . . .

---

<sup>15</sup> In this instance, Miller only referred to the inspector as "Jerry," in this instance, but throughout the transcript, the name Jerry only arose in reference to Inspector Jerry Hulsey. *See* Tr. 325; 330; 357; 368-69; 400; and 41. Therefore, it seems reasonable to conclude that Miller was referring to Inspector Jerry Hulsey.

That truck could have caught on fire and burnt like hell all the rubber and it wouldn't have affected anybody in the mine at all. It was not connected. They weren't supplies.” Tr. 387.

The Court noted there are two key elements to the standard – combustibility and a one day’s supply. *Id.* The term mine opening is not among the defined terms for this Part. The inspector confirmed that he identified certain combustible materials, including wood, and that these were within 100 feet of an opening. *Id.*

The Secretary, referencing Exhibit GX 67, the inspector’s field notes, inquired when those notes indicate he first spoke with Miller. He answered November 3rd, which would be two days before the citation was issued. Tr. 389. It was the inspector’s contention that the material he cited was also present when he was at the mine in August or July. Tr. 390.

Miller then commented on his view of the “one day supply” phrase used in the cited standard, expressing it

means you can have one day supply of anything, combustible or not combustible, that you would use up in one day. It doesn't mean that you have to use it up the next day. We have one day supplies of lumber stored within a hundred feet of the portal, which we do during the winter, during the summer, during any time so that's just the way the miners operate. The concern addressed by the standard is not to have a “thousand board feet stored right next to the portal.

Tr. 391-92.

Miller added that his view was based upon what other mine inspectors have told him. Tr. 392. He added that Inspector Hagedorn’s interpretations, for several of the citations in this litigation, are different from those of previous inspectors. Tr. 393. Again, the Secretary opted to forego additional direct testimony from the inspector and did not elect to cross-examine Miller. Tr. 392.

### Conclusion

The problem with this matter is one that arose in many of these challenged citations – the Secretary declining to cross-examine Miller’s testimony, coupled with the decision to not recall the inspectors after Miller testified. Miller asserted that the “opening” the inspector observed was the work of some loggers who had installed an electrical box there and it remained there when Miller took over the mine in 1983. Given that claim, he maintained that the area was never connected to the mine. Thus, the state of the evidence was in conflict as to whether the mine opening was of any function and merely preceded Miller’s mining activity there. The inspector’s photo, Exhibit GX 46, 3 of 4, acknowledges that there was no power to a fan which was there, but there is no mention of a fan in the citation itself. The inspector’s notes reflect that the operator claimed that the opening was sealed off.

Accordingly, this citation must be **DISMISSED**, for the failure of the Secretary to meet its evidentiary burden of proof.

## Citation 8873847

For this citation, No. 8873847, Exhibit GX 47, 30 C.F.R. § 57.5005,<sup>16</sup> was initially cited as the standard violated. However, the inspector then modified the citation to cite 30 C.F.R. § 57.8528. The latter standard, titled, “Unventilated areas,” provides simply: “Unventilated areas shall be sealed, or barricaded and posted against entry.” 30 C.F.R. § 57.8528. The inspector asserted that the modification was made because he “was elaborating on the respirable dust” and the latter standard was more appropriate to the conditions as that standard addresses ventilation itself. Tr. 396.

The inspector stated that he issued this citation in reference to providing adequate ventilation. He was then at the 1076 level, and to reach that location one must travel nearly a mile. Tr. 395. The citation alleges that there was not adequate ventilation at that location. GX 47. The issue was the absence of mechanical ventilation. Only natural ventilation was present. Tr. 394-95. Explaining further, the inspector added “there was no discernible ventilation from exhaling and the miner, we were both blowing out our breath with our camp lights looking as it levitates in the air. It wasn't going in any noticeable direction.” Tr. 395. He described the mine’s natural ventilation as coming “from all the different openings of the mine as it goes into a convection from ambient temperature and different temperature ranges of the interior of the mine to the exterior of the mine will cause a Venturi or Venturi principle or it creates a suction or a draft.” Tr. 395-96. The inspector stated that miners had been working in the cited area, performing blasting, and drilling, all part of the prep work to recover ore. Tr. 396.

The Court inquired about the standard cited, noting that it provides, “unventilated areas shall be sealed or barricaded and posted against entry.” Tr. 397. Asked if the inspector considered the violation to be “that this area should have been sealed or barricaded and posted against entry,” the inspector responded that sealing or barricading was required “[u]ntil they could get mechanical ventilation.” Tr. 397. However, he added “[t]hat’s what was determined as management reviewed the allegations.” *Id.* The Court then advised the Secretary’s Counsel that, per Section 57.8528, the cited standard, it seemed there was a problem with establishing a prima facie case. Tr. 397. The Court stated that, to start, the Secretary would need to establish that the cited area was unventilated. *Id.*

---

<sup>16</sup> § 57.5005, titled, “Control of exposure to airborne contaminants,” provides in part, “Control of employee exposure to harmful airborne contaminants shall be, insofar as feasible, by prevention of contamination, removal by exhaust ventilation, or by dilution with uncontaminated air. However, where accepted engineering control measures have not been developed or when necessary by the nature of work involved (for example, while establishing controls or occasional entry into hazardous atmospheres to perform maintenance or investigation), employees may work for reasonable periods of time in concentrations of airborne contaminants exceeding permissible levels if they are protected by appropriate respiratory protective equipment. Whenever respiratory protective equipment is used a program for selection, maintenance, training, fitting, supervision, cleaning, and use shall meet the following minimum requirements ...”

Asked the basis for concluding that the area was unventilated, the inspector stated that he used a smoke tube, that smoke lingered in the area, and was not carried away. Tr. 397-98. Thus, he asserted that the smoke tube provided more reliable information than simply observing one's breath. The inspector wrote that the mine was not providing "adequate" ventilation, but the standard cited refers to "unventilated" areas. In support of the unventilated element, the inspector stated that "location was a good litmus test, ... [air] wasn't exiting. It was a closed area." Tr. 400. However, he admitted that his recollection was imperfect and that he was relying on his notes. *Id.* He did not abate the citation, but then recollected that a fan was brought in to abate it. *Id.* The inspector reaffirmed that the mine uses natural ventilation, brought about through various mine openings and ambient temperature versus mine temperature. These act to cause a differential in airflow for the natural ventilation to occur. Tr. 401. The inspector asserted that, at least for the cited area, there was no natural ventilation. *Id.* Again, he stated that upon using the smoke tube there was no indication of ventilation; all he observed was the smoke rising and staying. Tr. 402.

Hagedorn marked the injury or illness as "reasonably likely" because he saw no respiratory protection and such exposure can create COPD and emphysema. Tr. 403. However, he marked the negligence as "moderate" because the mine relied upon natural ventilation. *Id.* The inspector also contended that any air coming from the jack leg would create some ventilation but that it was not an acceptable air ventilation source because such air lines have contaminated air. Tr. 404.

Upon cross-examination, Miller first inquired if the inspector knew of the type of oil that was coming through the jack leg air lines. The inspector noted that he saw oil cans at the compressor but that, to be acceptable, such air would need to go through a scrubbing system. *Id.* In terms of whether the mine was employing "common sense" regarding ventilation, the inspector responded that a miner who was with him admitted that it didn't look like they had ventilation at that location. Tr. 405. The inspector also stated that he did his smoke test in the 1076, asserting that he went to various locations in that area. *Id.*; GX 49 (photos 2 of 3 and 3 of 3). He ran an oxygen test too. The result was about 20 and his sensor, set to alarm at 19.5, never went off. Tr. 406.

Miller then testified, first challenging the claim that there was inadequate ventilation. He asserted that claim was false. *Id.* He then asserted that there was mechanical ventilation, through use what they call a "bazooka." *Id.* As for the oil used in its jackleg drill, Miller asserted it uses a vegetable oil and that it's perfectly safe to breathe. Tr. 406-07. He acknowledged that there might be times when there is no discernable air, but that miners moving in that environment creates air movement. Tr. 407. Miller felt that isolating a small area of no air movement is misleading, given that, through natural convection, there is "probably ten million cubic feet of air that is breathable underground in that particular mine." *Id.* Beyond that, Miller asserted that his miners will advise him of "every tool to use when they feel the need to do it. ... [and he has] had no complaints about breathing bad air." Tr. 408.

The Court would note that such a process is an odd way to determine that area is adequately ventilated. Miller further explained about the use of a "bazooka" which he seemed to equate with a fan which is run off of compressed air. Tr. 408. Thus, he asserted that the bazooka

provides ventilation. Tr. 409. Miller maintained that another MSHA inspector terminated the citation, but did not require that the area be sealed off. Tr. 411. The abatement was accomplished by showing the inspector the mine's bazooka and a fan that could be used if the miners wanted it. *Id.*

### Conclusion

This violation was established and Miller offered no evidence to challenge the Secretary's evidence. The inspector's gravity and negligence findings were supported by his testimony, as was his S&S finding. **The proposed assessment was \$162.00 (one hundred and sixty-two dollars), an amount which the Court finds to be appropriate and imposes.**

### **Citation No. 8873850**

Citation No. 8873850 was assessed a penalty of \$100, and cites Section 57.12002. GX 50; 52. The cited standard, titled "controls and switches," provides, "Electric equipment and circuits shall be provided with switches or other controls. Such switches or controls shall be of approved design and construction and shall be properly installed." 30 C.F.R. 57.12002.

The inspector, referring to Exhibit GX 52, 2 of 3, stated that the photo reflects "disconnect that is laying on the ground or on -- being supported by the cabling coming in or out of it." Tr. 413. This was observed at the 800 level. *Id.* The inspector asserted that it was a main disconnect which was not properly installed. "That [m]ain disconnect would be supplying power to whatever is downstream from this power source." *Id.* The voltage was three phase 480, and it was not properly installed in that "the way it was supported had deteriorated, rotted away and that's what allowed it to be ... [as depicted] in the picture 2 of 3." Tr. 414. The inspector asserted that it created a shock or electrocution hazard. This could occur "if someone was needing to have it turned off downstream you would have to be grabbing onto the cabling or the box to actually open it." *Id.*

The Court then inquired of Miller if he agreed that, per Exhibit GX 52 photo 2 of 3, the safety switch, which was on the floor, was not properly installed. *Id.* Miller did not agree. Tr. 415. The inspector expressed that someone could be injured "if you're grabbing on to it trying to de-energize it in a moment of chaos it exposes persons to take actions without taking safety first." *Id.* He added that one would grab it in "a turn off situation where it had to be turned off because of possible fire or some moment that is happening to what it actually supplies." *Id.* He agreed that, as the Secretary's counsel suggested, that because of it not being mounted, one would need to grab it to turn it off. He added that, "because of the amount of resistance in the lever turning it off, turning it on, it takes a considerable amount of strength to get it to turn off." *Id.* However, upon learning more about the circumstances, he marked the violation down from reasonably likely to "unlikely." Tr. 414.

This was based on his,

noticing that the cables after it was de-energized and after they had remounted ... [that there was no] noticeable damage to the cabling and the insulation and there wasn't anything that was obvious and all the connections were tight and sealed, which in turn takes away the disconnecting of the internal wires.

Tr. 416.

Negligence was marked as moderate because “they had attempted to mount it. It was mounted at one point. It's just over the course of time the wood rotted away and then ... [the] corrections needed to be done.” Tr. 417.

Miller elected not to cross-examine the inspector, but testified about the matter. He contended that the box was properly installed and properly hanging on November 5th, prior to the inspector arriving for his inspection. Tr. 418. When the miners went to work that morning, they passed the box and it was properly hanging at that time. Some 5 to 6 hours after the mine went to work, the inspector observed the condition. *Id.* In fact, Miller went further, alleging that the inspector “went in and tried to do something and adjust that or take a measurement and touched that box and somehow knocked it down unintentionally. That's what I'm saying.”

However, Miller advised that he was not with the inspector at the time of the alleged incident. Tr. 419-20. Further, while no one was with the inspector at the time of the alleged incident, Miller stated, “Not at this box, but ... someone told [him] that they have seen him and he even testified that he got in to help doing something on a box.” Tr. 420. He added that he had “two reports that [the inspector] was working with electrical areas of the mine by himself on his own ...” *Id.* The Court then noted that Miller had “no direct evidence apart from these other stories, you have no evidence that you or from any employee who told you that they observed [inspector] Hagedorn as the MSHA inspector do something which caused this control switch to fall to the ground.” Tr. 420. Miller agreed with the Court's statement. Tr. 421. The Court then stated that this was speculation on Miller's part and that it could not place any weight on the claim. *Id.* It summed up the claim as follows “What we're talking about is speculation as to whether this inspector took some affirmative action which caused this control switch to flop to the ground. You [i.e. Miller] have no evidence to demonstrate that that happened regarding this citation 8873850, you've just said that; correct?” *Id.* Miller agreed, stating he had “no eyewitnesses that saw [the inspector] touch [the switch box] and caused it to fall to the ground, because he was by himself.” *Id.* Miller then continued that the box was a very important piece of equipment and if any of his miners had observed that it had fallen down, they would have fixed it. Accordingly, he reiterated that “this was something that had to have happened extremely recent to the inspector issuing the citation because no one observed it that morning.” Tr. 422.

Miller then added more information about the cited area. Looking at picture 3 of 3 of Exhibit GX 52, he expressed that photo shows the “backs of the ceiling are confirmed.” Tr. 423. From this photo he contended that “there is no rock fall that could take place in there [and that it showed the] the existing pole that was used before.” Tr. 423. It was terminated immediately, he

asserted, and concluded that it was “highly unlikely that anything of the nature of this particular location caused that to fall down.” *Id.*

Given the nature of Miller’s testimony, Counsel for the Secretary recalled the inspector. Asked directly if he knocked the box down, the inspector stated he did not and that it was reestablished on a different pole, a conclusion he supported by “the location of the cabling coming into the top of the box.” Tr. 424.

### Conclusion

Wisely, the Secretary did recall the inspector who, credibly, in the Court’s assessment, denied knocking the box off its support. As noted, Miller conceded that he was not present at the time the citation was noted. Miller did not even offer hearsay to support his claim that the inspector caused the main disconnect safety switch to fall. The Court concludes that the inspector’s version is more credible and finds that **the proposed penalty of \$100.00 (one hundred dollars) is appropriate.**

### **WEST 2016-0243**

#### **Citation No. 8873849**

Citation No. 887384930 invoked C.F.R. § 56.14207, which is titled, “Parking procedures for unattended equipment,” and provides, “Mobile equipment shall not be left unattended unless the controls are placed in the park position and the parking brake, if provided, is set. When parked on a grade, the wheels or tracks of mobile equipment shall be either chocked or turned into a bank.” 30 C.F.R. § 56.14207.

The inspector described the condition that led him to issue this citation. It involved his observing a vehicle parked on a hill, the steepness of which he estimated to be greater than 22 degrees. Ex. GX 53. No chocks were in place for the vehicle, nor was it turned into a bank or rib, and if it were put in neutral and the parking brake released, it would roll away. Tr. 426; GX 55 (photo 3 of 3). He marked the violation as “unlikely” to cause an injury, because the vehicle did have the parking brake on and, as it had an automatic transmission, it was in the park position. Tr. 427. If it were to roll, he marked the injury as lost work days, if it rolled into a person or if one were injured trying to escape the rolling vehicle. *Id.* He classified the negligence as moderate because,

all the other vehicles on the mine site they are very good at trying to find a place, a pothole or some kind of a rock or a bank to park the vehicles and everything within the vicinity had rocks or chocks underneath the tires on the downhill side to prevent it from rolling.

*Id.*

The violation was abated by relocating the vehicle. The violation was created by a contractor performing a job at the mine site. The Respondent was cited because it bears the

responsibility to give such contractors mine site specifics and thus the contractor should have been advised of the parking procedure as part of the introduction to the mine. Tr. 428. The inspector interviewed the four workers associated with the vehicle and they advised the mine had not told them to park a certain way. *Id.*

Upon cross-examination Miller, who stated that he never observed the situation, asked if the standard identifies the degree of a grade that requires turning into a bank or rib. The inspector responded that if the parking brake is released and the vehicle is in neutral and the vehicle can free roll, there is a violation. Tr. 429.

The Court inquired why the inspector did not mark the negligence as low, and he responded that low negligence would not be unreasonable. Tr. 430. However, he marked it as moderate because the mine did not advise the contractor through site specific hazard awareness. Tr. 431.

Miller then testified that the contractor was PG & E and that it was at the mine site addressing their power transmission line, which they maintain. They come to the property each year. Miller stated when they arrive, "they are informed by our office before they come to the property and they are informed about our gate issues, our hazard issues when they go on the property and how to park." Tr. 432. Although he couldn't state whether anybody from the mine spoke to the particular PG & E visitor on this occasion, he asserted that he has no control as to whether PG&E advises its subcontractors about the mine site specifics. *Id.*

Seeking clarification, the Court inquired of Miller if it was the mine's practice of informing people who come to the property of items such a parking procedures. Tr. 433. Miller stated that when contractors arrive they are advised of the mine's procedures but that it may speak to *one* of the several individuals who arrive. *Id.* As noted, in this instance, PG & E had four individuals performing the subcontractor work. The practice employed, Miller clarified, is that a contractor will approach the mine and advise the operator of their plan to arrive at the mine at a certain date. It is at that time that the mine goes over all the rules. Tr. 434.

The Court, wanting to be sure it understood Miller's testimony, inquired if the mine gets some sort of notice that a contractor is coming out and at that point in time it informs the contractor about the procedures and that this information includes the parking procedures. Miller affirmed that was the mine's policy and practice. *Id.* Miller added the point that PG & E is not a contractor hired by the mine. In other words, the electric company has the right to come onto the property to service its lines.

Miller had more to say about the standard's enforcement, asserting that other inspectors have been satisfied if the parking brake is set. *Id.* In reaction, the Court noted that the standard speaks to vehicles parked on a grade. It summed up the standard and the testimony as follows:

The testimony here is that this vehicle was parked on a grade. You have no testimony to contradict that it was parked on a grade. If you're in a situation where a vehicle is parked on a grade, then you have to do one of two things. You have to chock it, the wheels, or turn into a bank or rib. It's very simple.

Tr. 435.

Miller replied by noting that the citation alleged that “the mining company failed to review parking procedures with the tree cutting service when on the property, mine property,” contending that assertion was false. *Id.* Miller repeated that he was not asserting that the mine spoke to the particular individuals in the vehicle that day, and that such a practice would be impractical. Instead, the mine employs the procedure he previously testified about. Miller then noted that there was a conflict about how the citation was abated, with the citation stating that the vehicle was turned into a bank, but with testimony stating that abatement was accomplished by the vehicle leaving the location. The inspector then stated that he “misremember[ed]” and that the vehicle was in fact moved to a level location. Tr. 437.

### Conclusion

The violation was established but as the vehicle's transmission was in park mode, and the parking brake was also set, the only violation was the failure to also chock or turn the vehicle into a bank. **MSHA proposed a penalty of \$100.00**, but the Court, upon considering the attendant and un rebutted circumstances reaches a different conclusion. It notes that the infraction was created by a contractor, and that the contractor was there, not at the mine's invitation, but rather to carry out its utility maintenance duties. In addition, with the vehicle in “park” and the parking brake set, there was no reasonable likelihood that the hazard would occur. Further, it was not contested that Miller advised a representative of the parking policy, as no cross-examination occurred. Given these findings, the negligence was *very* low, and the gravity was *very* unlikely to occur. Consequently, the violation was not S&S. **A penalty of \$25.00 (twenty-five dollars) is imposed.**

### **Citation No. 8873855**<sup>17</sup>

Citation No. 8873855 invoked **30 C.F.R. § 57.11003**, which is titled, “Construction and maintenance of ladders.” The standard provides, “Ladders shall be of substantial construction and maintained in good condition.” 30 C.F.R. § 57.11003.

The inspector, referring to Exhibits GX 59 and GX 61, photograph 2 of 3, stated that as he was descending the ladder a portion broke off in his hand. Tr. 440. This occurred when they were traveling through the secondary escapeway, from the 600 level down to the 800 level. *Id.*

---

<sup>17</sup> The Secretary reminded the Court that Citation No. 8873853 was vacated, and consequently, GX 56 through GX 58 were no longer exhibits in the record. Tr. 438.

This access was a “defined location to travel.” *Id.* He asserted that the wooden ladder failed under his weight due to rot. As to likelihood of injury, the inspector noted that he was almost injured himself when the rung broke. Therefore he marked it as “reasonably likely” to cause an injury. Tr. 441. He added that this secondary escapeway will be traveled by new miners as part of their site specific training. Tr. 441-42. In terms of the injury expected, it would be sprains, strains and bruising resulting in lost workdays or restricted duty. The violation was marked as S&S. Moderate negligence was listed by the inspector on the basis that there was no report during the workplace examinations of the need to replace the ladder. Tr. 442-43. The abatement was done in what seemed like an unusual manner,

by excavating out the travel way to the point that the ladder wasn't needed and then they left a rope there to further assist a person should -- because of the grade of the ground. It was relatively steep, 40 degrees or so in the area. So a rope was there to supply additional handhold and also for [rappelling] down to the 800 level.

Tr. 443.

Upon cross-examination, the inspector stated that he weighs about 210 pounds. Describing the event, he stated that a miner went down ahead of him. Tr. 444. In Miller’s direct testimony he stated that the designated secondary exit is not the only way to travel through this area. Also, he asserted that it is infrequently used. There is a monthly inspection of the exit. Tr. 445. The mine was not aware of any issue with the ladder until the inspector broke it. Further, all wood begins rotting when it is installed. That said, it is difficult to know when the wood has weakened to the point that it might break. Tr. 446. Miller viewed these as mitigating circumstances and that it certainly was not S&S. *Id.*

### Conclusion

The violation was established with a **proposed penalty assessed at \$108.00**. Miller did not offer any evidence to rebut the findings made by the inspector, and each of them is upheld, the record evidence supporting those findings. The Court finds a penalty assessment of **\$108.00 (one hundred and eight dollars)** to be appropriate.

### **Citation 8873856**

Citation 8873856 invokes 30 C.F.R. § 57.11006. That section, titled, “Fixed ladder landings,” provides that fixed ladders shall project at least 3 feet above landings, or substantial handholds shall be provided above the landings.” 30 C.F.R. § 57.11006.

The inspector stated this citation also involved a ladder way,

that went down to another level and it's pretty specific in the standard that as you come to a landing the ladder shall extend approximately three feet or three feet above the landing so it will give you something to assist yourself off the ladder and/or handholds or some other apparatus will be in the area for getting off the ladder, and it also assists you getting onto the ladder because you're coming down.

Tr. 448.

In this instance the ladder did not extend above the landing; rather it was flush with it and there were no handholds provided. GX 62; Tr. 449. The inspector believed that it was reasonably likely to cause an accident based on “[j]ust historical events that have happened from not having the ... assistance of the ladder extending past the three feet and/or having handholds and there wasn't no rope there either...” Tr. 449-50. By not extending three feet out, the inspector asserted that one could be injured: typically, it would be “a moment of falling ... from the exit point or the time of getting on, slipping off the rungs.” Tr. 450. He marked the injury as lost workdays or restricted duty, but added that it is difficult to predict exactly what would happen. One might only need to brush oneself off, but an injury could be more significant too. The fall, if it occurred, would be about 10 feet. *Id.* He also marked it as S&S. Negligence was marked as moderate because there was a ladder present. Tr. 451.

The violation was abated in what seemed to be an unusual manner, as the,

miners had taken shovels and thin hose and they literally excavated out the knobs. So essentially there was no landing left because they pulled it all down and just basically made a run down this secondary escape way with the assistance of a rope to give you stabilization. Basically you're [rappelling].

Tr. 452.

For a secondary escapeway, the inspector considered the abatement to be satisfactory. *Id.*

The Court then inquired of the Secretary's counsel whether, following the abatement, there was no longer any fixed ladder landing. *Id.* Both Counsel and the Secretary agreed with the Court's comment. Tr. 453. Mr. Miller did not cross-examine the Secretary's witness but did testify, asserting first that, in numerous previous inspections, no one had any issues with the ladder. It is also a very restricted area. He added that at about eight feet, “it's really not a landing going from a landing down to another level.” Tr. 453. Instead he characterized it as “walking down a stope.” *Id.* Miller disagreed with the inspector's description and asserted there was no violation.

As for the issue of a handhold, Miller stated that it is something that you can help support yourself, while moving up or down. Having used the ladder personally on many occasions, Miller contended that there are many natural places that act as handholds for him to use his

hands to help support use of the ladder. In fact, he asserted that extending the ladder would be more hazardous. Consequently, their abatement consisted of removing the landing itself. He also asserted that the cited place had been present since the early 2000s and never had been cited. Tr. 455.

The Court inquired further about Miller's assertion that there were natural handholds, asking if there were any handholds other than natural ones. Miller stated there were – he has grabbed water discharge lines. With Miller conceding that the ladder did not extend three feet above the opening, the remaining question was whether there were substantial handholds. Tr. 456. Miller reiterated that he considered the water lines acted as handholds and that they met the standard. Tr. 457. The Court does not agree with Miller's view; there were no substantial handholds provided.

### Conclusion

The violation was established, and the method of abatement does not impact the penalty assessment. Based on the uncontradicted evidence, the Court adopts the inspector's view as to gravity, negligence and the S&S finding. The S&S finding is supported by the inspector's testimony, as described above. **The Court imposes the \$108.00 (one hundred and eight dollar) penalty proposed by the Secretary.**

### **Closing Remarks**

The Court notes that many of the citations litigated in this matter could have been sustained were it not for the absence of cross-examination of Respondent Miller and/or the lack of redirect testimony of MSHA's witnesses. The Court suggests that Mr. Miller may be able to avert some future litigation by additional taking proactive steps. As one example, by painting low spots, this could prevent subsequent citations on that subject.

### **Summary of determinations and applicable civil penalties imposed by the Court**

#### **Docket No. WEST 2015-0850 Sixteen to One Mine**

**Citation No. 8793844: \$50.00**

**Citation No. 8793845: \$25.00**

#### **Docket No. WEST 2015-0851 Plumbago Mine**

**Citation No. 8793846: \$25.00**

#### **Docket No. WEST 2016-0070 Sixteen to One Mine**

**Citation No. 8873829: DISMISSED**

**Citation No. 8873830: DISMISSED**

**Citation No. 8873831: DISMISSED**

**Citation No. 8873832: \$100.00**

**Docket No. WEST 2016-0071 Sixteen to One Mine**

**Citation No. 8873835: DISMISSED**

**Docket No. WEST 2016-0149 Sixteen to One Mine**

**Citation No. 8873833: DISMISSED**

**Docket No. WEST 2016-0183 Sixteen to One Mine**

**Citation No. 8873843: \$138.00**

**Citation No. 8873844: DISMISSED**

**Citation No. 8873845: DISMISSED**

**Citation No. 8873846: DISMISSED**

**Citation No. 8873848: \$10.00**

**Citation No. 8873851: DISMISSED**

**Citation No. 8873847: \$162.00**

**Citation No. 8873850: \$100.00**

**Docket No. WEST 2016 0243 Sixteen to One Mine**

**Citation No. 8873849: \$25.00**

**Citation No. 8873853: vacated by the Secretary**

**Citation No. 8873854: vacated by the Secretary**

**Citation No. 8873855: \$108.00**

**Citation No. 8873856: \$108.00**

**ORDER**

It is hereby **ORDERED** that Respondent Original Sixteen to One Mine and Plumbago Mine pay the Secretary of Labor a total civil penalty in the sum of **\$851.00 (eight hundred and fifty-one dollars)** within thirty (30) days of this decision.<sup>18</sup>

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

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

Laura Ilardi Pearson, Esq., Office of the Solicitor, U.S. Department of Labor, Cesar E. Chavez Memorial Building, 1244 Speer Boulevard, Suite 216, Denver, CO 80204

D. Scott Horn, CLR, U.S. Department of Labor, MSHA, 991 Nut Tree Rd, Vacaville, CA 95687

Michael Miller, President, Original Sixteen To One Mine, Inc., P.O. Box 909, Alleghany, CA 95910

---

<sup>18</sup> Payment should be sent to: MINE SAFETY AND HEALTH ADMINISTRATION, U.S. DEPARTMENT OF LABOR, PAYMENT OFFICE, P.O. BOX 790390, ST. LOUIS, MO 63179-0390

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

OFFICE OF ADMINISTRATIVE LAW JUDGES  
721 19<sup>th</sup> STREET, SUITE 443  
DENVER, CO 80202-2536  
TELEPHONE: 303-844-5266 / FAX: 303-844-5268

March 7, 2017

SIGNAL PEAK ENERGY LLC,  
Contestant,

v.

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

CONTEST PROCEEDING

Docket No. WEST 2016-0624-R  
Citation No. 9021220; 7/21/2016

Bull Mountains Mine No. 1  
Mine ID: 24-01950

**DECISION AND ORDER**

Appearances: Ryan L. Pardue, Michelle A. Horn, U.S. Department of Labor, Office of the Solicitor, Denver, Colorado, for Petitioner;

R. Henry Moore, Christopher G. Peterson, Jackson Kelly, PLLC, Pittsburgh, Pennsylvania, for Respondent.

Before: Judge Miller

This case is before me upon a notice of contest filed by Signal Peak Energy, LLC, pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d) (“the Act”). This docket involves one citation issued pursuant to Section 104(a) of the Act for a violation of the mine’s ventilation plan. The citation is a technical citation issued for the purpose of bringing the matter of the ventilation plan before the Court. The parties presented testimony and evidence regarding the mine’s proposed changes to the ventilation plan beginning on October 19, 2016, in Billings, Montana. Due to a lost transcript, the first portion of the hearing was redone in December 2016, and briefs were submitted in February 2017. Based upon the parties’ stipulations, my review of the entire record, my observation of the demeanor of the witnesses, and consideration of the parties’ legal arguments, I uphold the citation as amended at hearing.<sup>1</sup>

---

<sup>1</sup> The original citation includes a reference to deficiencies in the mine’s current ventilation plan discovered during the fan stoppage tests. The Secretary at hearing moved to amend the citation to remove that portion, and the motion was granted. The parties agreed to continue discussions on the fan stoppage issue with regard to the mine’s current dual-entry plan.

## I. STIPULATIONS

The parties have submitted the following stipulations which have been accepted into the record:

1. The Bull Mountains Mine No. 1 is a “mine” as that term is defined in Section 3(h) of the Mine Act.
2. Signal Peak primarily mines its coal by the longwall method. This includes development of three entries on either side of a block of coal approximately 22,000 [feet] long and 1,250 [feet] wide. The length of the panel may vary from panel to panel.
3. The mine operates currently under approximately 200-800 feet of cover. No methane has been detected by handheld detectors. The mine does not receive more frequent inspections under Section 103(i) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §813(i), because of methane liberation.
4. The coal that Signal Peak mines is prone to spontaneous combustion.
5. Signal Peak operates a “bleederless” longwall mining system. Signal Peak chose this system because it believes that the system reduces the potential for spontaneous combustion by limiting the oxygen that is available in the longwall gob. This system includes the progressive installation of ventilation controls that become seals when the panel is complete. Signal Peak is currently mining in the 5R panel. A map of the mine is marked as Signal Peak’s Exhibit A and may be admitted into evidence.
6. Signal Peak had a significant thermal event in its mine as a result of spontaneous combustion in December 2011. The heating occurred near the inby end of the headgate on the 2 Right panel in a rider seam above the main seam that was being mined. That event resulted in the loss of approximately 20 production days. As a result of the event, Signal Peak, with the approval of MSHA, instituted additional measures on subsequent longwall panels, including injection of nitrogen into the longwall gob area to lower the oxygen concentration and use of a blowing ventilation system rather than the previous exhausting system. Oxygen is necessary for combustion and lowering the oxygen concentration in the gob reduces the potential for spontaneous combustion.
7. Since January 2013, Signal Peak has utilized “blowing” ventilation, in which air is forced into the mine by a fan.
8. One alternative to a blowing ventilation system is an exhausting system where a fan or fans pull air through a mine.

9. For over one and a half years, Signal Peak and MSHA District 9 have been negotiating a change in Signal Peak's longwall ventilation plan. Signal Peak is proposing to change its current ventilation plan from a dual-entry return to a single-entry return in the tailgate. Signal Peak's Exhibit EEE illustrates the different configurations at the end of the longwall face in the tailgate and may be admitted into evidence.
10. On January 12, 2015, Signal Peak first submitted a revised ventilation plan that proposed a change from dual-entry return to single-entry return in the longwall tailgate. A copy of such plan is marked as Secretary's Exhibit 3 and may be admitted into evidence.
11. On April 3, 2015, MSHA issued a letter disapproving the proposed change and requesting additional information from Signal Peak. A copy of this letter is marked as Secretary's Exhibit 4 and may be admitted into evidence.
12. On April 23, 2015, Signal Peak submitted a revised plan. A copy of such plan is marked as Secretary's Exhibit 5 and may be admitted into evidence.
13. On May 5, 2015, Signal Peak personnel and MSHA personnel had a conference call concerning the April 23, 2015 submittal.
14. On May 6, 2015, Signal Peak submitted a revised plan to MSHA. A copy of such plan is marked as Secretary's Exhibit 6 and may be admitted into evidence.
15. On May 29, 2015, MSHA provided Signal Peak with a deficiency letter. A copy of such letter is marked as Secretary's Exhibit 7 and may be admitted into evidence.
16. On July 9, 2015, MSHA and Signal Peak met at MSHA District 9 in Denver, Colorado, to discuss Signal Peak's proposed changes to its ventilation plan as well as other mine plans.
17. On July 23, 2015, Signal Peak submitted a revised plan. A copy of such plan is marked as Secretary's Exhibit 8 and may be admitted into evidence.
18. On September 29, 2015, MSHA District 9 requested the assistance of Ventilation Division, Pittsburgh Safety and Health Technology Center ("Tech Support") to review Signal Peak's plan. District 9 supplied the following information to Tech Support:
  - a. A letter from Signal Peak dated July 23, 2015 (*see* Signal Peak Exhibit M);
  - b. A letter dated September 25, 2015, from Signal Peak to MSHA District 9 attaching "Signal Peak 5R CO Records." A copy of the

September 25, 2015 letter without attachments is marked as Signal Peak's Exhibit N and may be admitted into evidence.

19. At MSHA's request, Signal Peak submitted the following information to Tech Support personnel on and after October 8, 2015:
  - a. Map of Bull Mountains Mine
  - b. Mine Map with Overburden
  - c. Complete set of SPE submittals to District 9, including:
    - (i) Two/Single Entry System color graphic,
    - (ii) Signal Peak Laboratory Analytical Results of seals 10/8/14-2/20/15
    - (iii) Mine Map/Life Line Signals.
  - d. Revised Ventilation Plan
  - e. Single v. Dual Entry Return Vnet PC Model Summary / Inches Water Gage from Mine to Atmosphere
  - f. Laboratory Analytical Results 2/20/15-6/22/15.
  - g. VNET Drawings
  - h. Weekly Seal Examination Data
  - i. SP Weekly Seal Examination Records 10/31/14-6/26/15
  - j. Mine Map Water Gauge Reading Locations, Single Entry Return Longwall
  - k. Mine Map Water Gauge Reading Locations, Dual Entry Return Longwall
  - l. Graphs and maps for barometric pressure data
  - m. Barometric Pressure Data
  - n. SP Barometric Pressure Records graphic chart
  - o. Barometric Pressure Monitoring Station Location Map
  - p. Barometric Pressure Data 10/1/14-11/23/14.
  - q. Barometric Pressure Data
  - r. Barometric Pressure Data 11/23/14--2/1/15
20. On January 13, 2016, Tech Support issued a report prepared by Dennis Beiter, Senior Mining Engineer with the Ventilation Division, and provided the report to MSHA District 9. A copy of such report, which is sometimes referred to as the "Beiter report," is marked as Secretary's Exhibit 10(a) and may be admitted into evidence.
21. On January 22, 2016, MSHA sent Signal Peak a letter attaching the Beiter report and identifying what it believed were deficiencies in Signal Peak's plan. A copy of such letter is marked as Secretary's Exhibit 10 and may be admitted into evidence.
22. On February 2, 2016, Brad Hansen of Signal Peak sent District 9 Manager Russell Riley a letter requesting a technical citation. Such letter is marked as Secretary's Exhibit 11 and may be admitted into evidence.

23. In March 2016, MSHA District 9 requested that Tech Support perform a fan stoppage test with the dual-entry return and a simulated single-entry return in the tailgate at Signal Peak. The parameters for such tests were proposed by Signal Peak and amended after discussions between MSHA District 9 personnel, Signal Peak personnel, and Tech Support personnel. The final fan stoppage parameters were approved by MSHA. A copy of Mr. Hansen's email requesting Tech Support's assistance and the initial plan are marked as Signal Peak's Exhibits JJ and II and may be admitted into evidence. A copy of the approved plan for the test is marked as Secretary's Exhibit 14 and may be admitted into evidence.
24. Such fan stoppage tests were performed during the period of April 24-28, 2016, by Thomas Morley, Mining Engineer with the Ventilation Section of MSHA Tech Support, and others, including personnel from Signal Peak.
25. On May 3, 2016, Tech Support provided a report drafted by Thomas Morley concerning the results of the fan stoppage tests to MSHA District 9. A copy of such report is marked as Secretary's Exhibit 15(a) and may be admitted into evidence.
26. On May 11, 2016, MSHA District 9 provided Signal Peak a letter, attaching the Morley report, setting forth the deficiencies in its plan related to the results of the fan stoppage test. A copy of such letter is marked as Secretary's Exhibit 15 and may be admitted into evidence.
27. On May 16, 2016, Signal Peak submitted a revised ventilation plan including a single-entry return. A copy of such plan is marked as Secretary's Exhibit 16 and may be admitted into evidence.
28. On May 18, 2016, Signal Peak submitted a revised ventilation plan. A copy of such plan is marked as Secretary's Exhibit 17 and may be admitted into evidence.
29. On May 25, 2016, Signal Peak sent MSHA District 9 Manager Russell Riley a letter signed by Joseph Farinelli requesting that a technical citation be issued. A copy of such letter is marked as Secretary's Exhibit 18 and may be admitted into evidence.
30. On June 15, 2016, MSHA District 9 sent a deficiency letter to Signal Peak outlining deficiencies in Signal Peak's proposed changes to its ventilation plan. This letter is marked as Secretary's Exhibit 19 and may be admitted into evidence.
31. On June 21, 2016, Signal Peak submitted a letter to MSHA District 9 referencing "Third Request for Technical Citation" and attaching both a proposed single-entry return ventilation plan and a dual-entry return ventilation plan. This letter is marked as Secretary's Exhibit 20 and may be admitted into evidence.

32. Citation No. 9021220 was issued on July 21, 2016, by MSHA inspector James Preece pursuant to Section 104(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §814(a), alleging a violation of 30 C.F.R. §75.370(a)(1). Citation No. 9021220 is marked as Secretary's Exhibit 1 and may be admitted into evidence.
33. Under the heading and caption "Condition or Practice," the citation alleges as follows:
- The mine operator submitted a proposal for a single-entry longwall return. The parties' negotiations have reached impasse. The mine operator has notified MSHA that the mine's existing, approved ventilation plan is no longer adopted by the operator. The operator intends to adopt the changes proposed on June 21, 2016, which are not approved.
- Additionally, MSHA has identified deficiencies in the mine's current ventilation plan. The mine operator's proposal to address these deficiencies is rejected by MSHA, and the parties have reached impasse on that dispute as well. The mine operator agreed to and will implement temporary, interim safety provisions to protect miners in the longwall panel in the event of a main fan outage while the Citation is pending.
- Those items, however, must be fully addressed in an approvable Mine Ventilation Plan in order to terminate this Citation.
- This "technical" Citation is being issued to enable the operator to bring this dispute before the Federal Mine Safety and Health Review Commission.
34. The operations of Signal Peak at the aforementioned mine at the time Citation No. 9021220 was issued were, and remain, activities covered under the Mine Act and subject to MSHA's inspection authority.
35. This proceeding is subject to the jurisdiction of the Federal Mine Safety and Health Review Commission and its designated Administrative Law Judge, pursuant to Sections 105 and 113 of the Mine Act.
36. The subject citation was properly served on Signal Peak and/or its agents by a duly authorized representative of the Secretary on the date and place stated in the citation as is required by the Mine Act, and may be admitted into evidence for the purposes of establishing its issuance, but not for the truthfulness or relevancy of any statements asserted therein. It is marked as Secretary's Exhibit 1.

## II. FINDINGS OF FACT

As set forth in the stipulations above, Signal Peak Energy LLC (“Signal Peak”) submitted a number of proposed ventilation plans to the Mine Safety and Health Administration (MSHA) beginning on January 12, 2015. Since that time, Signal Peak and MSHA Coal District 9 have engaged in plan negotiations and discussed various plan provisions. On June 21, 2016, after more than a year of discussion, Signal Peak made its third request that a “technical citation” be issued indicating an impasse in the negotiation. MSHA Inspector James Preece issued Citation No. 9021220 on July 21, 2016, pursuant to Section 104(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §814(a), alleging a violation of 30 C.F.R. §75.370(a)(1). The citation states that Signal Peak submitted a proposal for a single-entry longwall return which was rejected by MSHA. *See* Jt. Stips. ¶ 33. The citation also references changes to the current plan to address hazards in the event of a fan shut-down, but the parties have agreed to remove that portion from the citation and continue working to resolve that matter. The issue remaining in dispute is the mine’s request for a single-entry return air system in the longwall tailgate. I incorporate all facts listed in the stipulations above in these findings.

### *Background*

Signal Peak’s Bull Mountain Mine is a large underground coal mine that operates using a 20,000 foot longwall system. The mine has very low methane levels, but there is a risk of spontaneous combustion, also referred to in the testimony as a heating event. Because of these factors, the mine uses a bleederless system in which the mined-out area, or gob, is sealed as mining progresses. In a bleeder system, in contrast, air sweeps the gob in order to move gases out through a system of bleeders.

In December 2011, the mine experienced a spontaneous combustion incident in the seam above the one that was being mined, resulting in an extended closure of the mine. The mine was using an exhausting ventilation system at that time, in which a fan pulls air through the mine. In response to the spontaneous combustion incident, the company switched to a blowing ventilation system, in which the fan forces air into the mine. In the blowing system, air enters the mine at headgate entries one and two and puts pressure on the longwall face. Some air may still enter the mined-out area through leaks in the longwall and in the seals surrounding the mined-out area. To minimize the effect of air that gets into the gob, the company injects nitrogen into the mined-out area to keep oxygen levels low to prevent combustion. The company also takes weekly bag samples along the headgate and tailgate to monitor gases in the mined-out area.

The mine’s current ventilation plan, shown in the Secretary’s Exhibit 2, is a dual-entry return system at the tailgate. *See also* Sec’y Ex. 24. Air is blown into the mine on the headgate side through entries one and two. At the longwall, a portion of the air is directed out headgate entry three, which houses the belt, and some air also continues inby the longwall face in headgate entries one and two. The remaining air is directed across the longwall face from headgate to tailgate. When the air reaches the end of the longwall shields at the tailgate side, there is a “T-split.” A regulator directs part of the air out tailgate entry one. The remaining air is directed inby, where it is sent right at the next crosscut, then directed out tailgate entry two. *See* Sec’y Ex. 24. Several witnesses referred to this portion of the system as the “back-around return.” The mine’s

current ventilation plan has been in place since January 2013 and has successfully limited spontaneous combustion since that time. The plan has also successfully kept the air pressure as required and has diluted the various toxins that result from mining.

The mine seeks to amend the ventilation plan to change the manner in which the air travels after sweeping the face. The mine's amended plan would omit the T-split and back-around return from the dual-entry system, and instead have the air leave the mine in just one entry, tailgate entry one. The Secretary's Exhibit 26 illustrates the proposed single-entry plan. Like the current plan, the amended plan would be a bleederless blowing air system.

Signal Peak argues that a single-entry return in the tailgate has several advantages over the current dual-entry system. It argues that the new system will reduce material-handling hazards because miners will not have to install roof support in the second tailgate entry. Exposure to roof hazards will also be reduced because miners will be able to build crosscut seals on the headgate side in advance of the longwall face instead of inby where there are greater roof hazards, as is required under the dual-entry plan. Additionally, the company believes that a single-entry system will reduce the oxygen content in the mined-out area, thus lessening the risk of spontaneous combustion.

The Secretary argues that the dual-entry plan is safer for miners because it better protects miners from noxious air on the tailgate side of the longwall and allows for earlier detection of spontaneous combustion. Thus, the Secretary argues that the district manager was not arbitrary and capricious in rejecting Signal Peak's proposed single-entry plan.

### *Plan Negotiations*

Signal Peak submitted its proposal to change its ventilation system on January 12, 2015. Sec'y Ex. 3. In addition to the specifications of the plan, the mine submitted a summary of the potential advantages of a single-entry plan. The mine received a letter on April 3, 2015, indicating that the plan was not approved and requesting further information. Sec'y Ex. 4. The rejection cited concerns over relocation of several seals, monitoring of contaminants, and buildup of contaminants at the longwall tail. *Id.* The company submitted a revised plan on April 23, 2015, addressing those concerns, as well as an issue regarding carbon monoxide alarms that had been raised in discussions with MSHA. Sec'y Ex. 5. On May 5, 2015, representatives from Signal Peak and MSHA held a conference call to discuss the revised submission. The principal representatives were Sid Hansen, the ventilation supervisor for MSHA Coal District 9, and Robert Ochsner, Chief Engineer at Signal Peak. Following the conference call, the mine submitted a second revised plan on May 6, 2015. Sec'y Ex. 6. This submission provided additional information on issues that had been raised in discussions with MSHA, including carbon monoxide monitoring and alert and alarm levels. MSHA responded with a deficiency letter on May 29, 2015, based on the same issues raised in previous discussions. Sec'y Ex. 7. On July 9, 2015, representatives from Signal Peak, including Ochsner and Joseph Farinelli, Vice President of Engineering, met in Denver to discuss the plan with representatives from MSHA, including Hansen and the district manager, Russell Riley. The company submitted a third revision of the plan on July 23, 2015. Sec'y Ex. 8. The representatives from Signal Peak indicated that the new plan addressed all of the issues discussed at the Denver meeting, and they

believed the plan would be approved. However, after reviewing the submission, the district manager decided to seek assistance from MSHA's technical support division before making a final decision.

On September 29, 2015, District Manager Riley requested assistance from the Ventilation Division, Pittsburgh Safety and Health Technology Center ("Tech Support") to review the plan. Riley sought an in-depth review of the plan from Tech Support to assist him in making a final decision. MSHA submitted the most recent plan to Tech Support with supporting documents. Signal Peak also submitted materials to Tech Support, including maps, testing results, and examination records. Dennis Beiter was assigned as the lead person from Tech Support on the review of the plan. Beiter and his team spoke with the mine and reviewed all of the documents submitted. Beiter considered the information that had been submitted and issued a report on January 13, 2016, recommending against the single-entry system. Sec'y Ex. 10(a). The report was sent to District 9 and subsequently forwarded to Signal Peak.

Ochsner, the Signal Peak Chief Engineer, was disappointed with the result of Beiter's report and felt that Beiter had focused too much on the merits of the dual-entry system, while neglecting the merits of the single-entry system. At this point, Brad Hanson, the superintendent at Signal Peak, sent a letter to the district manager requesting a technical citation so that the matter could be decided outside of MSHA. Sec'y Ex. 11. However, Riley did not feel that the parties had reached an impasse, and continued to review the matter, speak to the mine, and gather more information. In particular, Tech Support had indicated to the district office that the mine's current ventilation plan might need to address hazards in the event of a fan stoppage.

Accordingly, Riley requested that Tech Support work with the mine to test the effects of a fan stoppage in both the dual-entry system and a simulation of the single-entry system. Tech Support, District 9, and Signal Peak collaborated to design the test, and it was performed in April 2016. Sec'y Ex. 14. The results were addressed in a May 3, 2016 report to District 9 from Thomas Morley, an engineer with MSHA Tech Support who worked on the tests. Sec'y Ex. 15(a). Morley concluded that changes should be made to the dual-entry plan to address fan stoppage concerns, and that the changes could also be incorporated into a single-entry plan. Signal Peak submitted a revised plan for a single-entry return on May 16, 2016, addressing issues raised by the fan stoppage test. Sec'y Ex. 16. Shortly thereafter, mine representatives discussed the fan stoppage issues with Hansen, the MSHA ventilation supervisor, and based on that discussion submitted another revised single-entry plan on May 18, 2016. Sec'y Ex. 17. MSHA responded with a deficiency letter on June 15, 2016, explaining that it believed that a dual-entry return was safer than a single-entry and that it still had concerns about a fan stoppage. Sec'y Ex. 19.

The company sent a second request for a technical citation to MSHA on May 25, 2016, and a third request on June 21, 2016, after it received the June 15 deficiency letter. Sec'y Exs. 18, 20. In the June 21 letter, Signal Peak expressed that it was willing to make MSHA's proposed changes regarding fan stoppage, but that it objected to MSHA's continued rejection of a single-entry plan. Sec'y Ex. 20. MSHA eventually agreed that the parties were at an impasse and issued a technical citation on July 21, 2016. Sec'y Ex. 1.

The Commission has determined that plan formulation under the Mine Act requires MSHA and the operator to negotiate in good faith for a reasonable period of time concerning disputed plan provisions. *Carbon Cty. Coal Co.*, 7 FMSHRC 1367, 1371 (Sept. 1985). Good faith negotiation includes “giving notice of a party’s position and adequate discussion of disputed provisions.” *C.W. Mining Co.*, 18 FMSHRC 1740, 1747 (Oct. 1996). In this proceeding, there is ample evidence that MSHA and Signal Peak negotiated in good faith.

### *Evaluation of the Plans*

Russell Riley, the MSHA district manager, testified regarding his understanding of the merits of Signal Peak’s proposed plan. Riley was responsible for making the ultimate decision to reject the single-entry plan. He discussed a number of advantages of a dual-entry plan over a single-entry. First, the dual-entry plan allows for the “back-around return” area, which Riley believes helps prevent noxious air from entering the working areas. He explained that the mine’s blowing ventilation system puts pressure on the gob, and the gob gasses tend to release into the area at the tailgate end of the face because that area is open. Thus, there is a possibility for noxious gasses to accumulate there. However, he believes the T-split in the dual-entry system relieves some of the pressure because it provides a place for noxious air to go when it comes out of the gob and prevents it from building up. Noxious air flows into the inby crosscut at the T-split, away from the shields and the face where miners are working. The T-split with back-around return is not possible in a single-entry mine. *See Sec’y Ex. 26.*

Dennis Beiter, the Tech Support engineer who reviewed the plan for MSHA, also testified as to the merits of the two plans. He was qualified as an expert in underground mine ventilation based on his education, training, and experience as a mining engineer. His original report on the plans for MSHA was also introduced into evidence. *Sec’y Ex. 10(a)*. Beiter based his review of the Signal Peak plan on information provided by MSHA and the mine. He was not told whether District 9 had a preference for one plan over the other, but rather was directed to conduct an independent review of the single-entry and dual-entry plans. His report ultimately endorsed the dual-entry plan. *Sec’y Ex. 10(a)*. He also reviewed the submissions of the mine made after his report was issued and saw nothing to change his opinion.

Beiter’s testimony supports Riley’s explanation of the advantages of the back-around return. He explained that the mined-out area contains empty pockets where gases can accumulate, including nitrogen that the mine injects to prevent combustion. Some of these gases exit the mine through surface cracks, but they can also be released at the face. The air blowing across the face helps to carry the gases away from the active area where miners are working and keep them behind the shields. But at the end of the face, the air and contaminants enter the tailgate. At this point in the dual-entry system, many of the gases are drawn into the back-around return area because that area has low pressure compared to the area outby the face. *See Sec’y Ex. 24.* A regulator between tailgate entries one and two causes most of the contaminated air to go out the number two entry, so that the air in tailgate entry one, where miners are more likely to be, remains cleaner. While miners do not typically work in either tailgate entry and the entries are not escapeways, entry one must be maintained for the purpose of egress off the face in an emergency and may be accessed by ventilation workers and examiners. Beiter explained that in the single-entry system with no back-around return, there would be more contaminants in tailgate

entry one, since contaminants would not be directed into entry two. The concentration would be especially high at the end of the shields at the tailgate area, where miners would exit the face. He believes that the back-around return is the best system for keeping noxious gases out of the working area.

Joseph Farinelli testified as an expert on behalf of Signal Peak. He has worked at the mine for three years, and so was not present during the spontaneous combustion incident in 2011, but is familiar with it. One of Farinelli's duties at the mine is to review and develop the roof control and ventilation plans. He engaged in the discussions with MSHA regarding the proposed changes to the mine's ventilation plan and wrote most of the letters from the mine to the district manager, including the request for a technical citation. Farinelli disagreed with Beiter's prediction that there would be contaminants at the end of the tailgate in a single-entry plan. He explained that because the pressure in a blowing system is higher on the face than in the gob, contaminants are unlikely to move from the mined-out area into the higher-pressure tailgate. Beiter disagreed that the positive ventilation pressure would prevent gob gasses from entering the working area. Robert Ochsner disputed Riley's depiction of the pressurized gob, saying that the nitrogen injections were small compared to the size of the gob and so did not add substantially to the pressure in the gob.

As a second advantage of the dual-entry system, Riley explained that the system allows for early detection of noxious gasses that could be harmful to miners. The dual-entry system allows for placement of a monitoring device in the back-around return behind the face. Riley believes that having the monitor further from the face allows for earlier detection of gasses coming out of the gob before they reach the working face.

Beiter confirmed that the dual-entry system allows for better detection of spontaneous combustion in the gob. In the dual-entry system, contaminants are concentrated in the back-around return as described above. This allows for placement of a monitoring device where the contaminants are most concentrated, which gives clearer readings of changing conditions in the mine. In the single-entry system, the contaminants are mixed into the airflow and never concentrated in one spot, so changes in gases in the air are harder to detect. Thus, the dual system allows for better monitoring of carbon monoxide and other gases coming out of the mined-out area that could indicate spontaneous combustion. Further, Beiter noted that the dual-entry plan allows for installation of a tube-bundle into the mined-out area for additional monitoring.

Farinelli believes that the monitoring advantage of the back-around system described by Beiter is minimal. He explained that the monitoring done in the tailgate is less important than the weekly bag samples from the gob, which are more accurate. Further, of the monitoring devices in the working area, the monitor at the tailgate is not especially important. Farinelli also emphasized that the important number in monitoring for spontaneous combustion is not the concentration of carbon monoxide, but rather the quantity, and that trends are more important than snapshots from a single monitor. Thus he believes that effective monitoring would still be possible in a single-entry system.

Finally, Riley discussed the results of the fan stoppage test, which was meant to determine how quickly gasses would come out of the gob onto the working face in the event of a fan stoppage. The mine performed the test on its current dual-entry system first, and then performed the same test on a simulated single-entry system. In designing the tests, MSHA and Signal Peak had decided that the test of the single-entry system would take place on the second and third day of testing. However, the stopping simulating the single-entry system was installed late, leaving the system in place prior to testing for less time than planned. In the test of the dual-entry system, the oxygen concentration on the tailgate side of the face decreased to 14.7 percent within 15 minutes of the fan stoppage. Gov't Ex. 15(a). In the single-entry test, the oxygen concentration dropped to 16.7 percent within 15 minutes. *Id.* Riley interpreted the results as indicating that both systems were unsatisfactory in terms of the effect of a fan stoppage. Thomas Morley, the MSHA engineer who supervised the test, came to the same conclusion, saying that the concentration of oxygen declined at a similarly fast rate in both systems. Riley explained that the slightly higher oxygen levels in the single-entry test could be explained by the fact that some of the gob air had already been flushed out during the dual-entry test, and the gob had not yet had time to return to its normal levels. Morley agreed. Ochsner disagreed, stating that a bore hole in the gob did not show any change in the gob air between the first and second tests. Farinelli also disagreed, arguing that the gob area would have returned to pre-test conditions quickly, and that the reservoir of noxious air in the gob was much too large to have been drained in the first test, which lasted 90 minutes. He interpreted the tests as showing that the single-entry system performed as well as the dual-entry system, if not slightly better.

In addition to contesting Riley's criticisms of the single-entry plan, Farinelli also explained the advantages the company sees in a single-entry system. In Farinelli's opinion, there would be a lower risk of spontaneous combustion in the proposed single-entry plan because the plan would reduce the amount of oxygen in the gob area. Farinelli believes that the dual-entry system allows more oxygen into the gob because air travels directly into the gob in the back-around return. The company's Exhibit H is a model depicting his predictions for the reduction in oxygen in the gob based on data from air quality measurements in the gob under the dual-entry plan. Farinelli also believes the single-entry system would reduce the amount of air entering the gob on the headgate side, because it would allow for installation of seals in the headgate crosscuts before the longwall face reaches each crosscut. In the dual-entry plan, the crosscut seals cannot be installed until after the longwall passes each crosscut, because they are built between entries two and three, where they would obstruct access to the escapeway in entry two. Before each seal is constructed, there is an opening into the gob through which air could enter. In the single-entry plan, the seals would be between entries two and three and so could be built before the longwall advances without obstructing access to the escapeway.

Riley did not agree with Signal Peak that the single-entry system would better control spontaneous combustion. He acknowledged that in the dual-entry system, some air enters the gob through the tailgate. However, he noted that the mine's closest nitrogen injection point to the face is 15 crosscuts in by the gob. He believes that combustion is not a risk near the face, because if it were, the mine would inject nitrogen closer to the face. Thus he believes the additional air entering the gob near the face does not create a spontaneous combustion risk. Ochsner, the Chief Engineer from Signal Peak, explained that it would be useless to inject nitrogen closer to the face, because it would end up getting blown out the tailgate. Beiter also believed the risk of

spontaneous combustion was low. He noted that there had been no spontaneous combustion events at the mine under the current plan, which he interpreted as an indication that the plan was effective. He believed the company's concerns about air entering the gob on the headgate side could be addressed by installing a curtain.

Another advantage of the single-entry plan discussed by Farinelli was a reduction of material-handling hazards. Specifically, the back-around return in the dual-entry plan requires building a seal inby the longwall face. *See* Sec'y Ex. 24. Farinelli explained that building the seals involves installing a large timber frame and filling the entire entry with grout. He believes installing seals inby the face is dangerous because there is substantial abutment pressure and cracking in that area, and building the seal requires taking down the roof mesh. He also believes the bad roof conditions could compromise the quality of the seal and allow more air to leak into the gob. In the single-entry system, the seal would be constructed outby the face where roof conditions were better. The placement of the seal in the single-entry system would also allow miners to inspect both sides of the seal while it was being constructed. In addition to the seal, the dual-entry system requires installing roof support and a water pumping and drainage system in tailgate entry two inby the longwall face. The water system must also be recovered later when the longwall moves forward. These installations involve bringing equipment including ladders and wheelbarrows into the area and would not be necessary in a single-entry system. A summary of Farinelli's view of the plans is shown in Signal Peak's Exhibit CCC, which was not submitted to MSHA during plan negotiations.

Riley does not believe that material handling poses a significant hazard at the mine. He noted that most of the roof support installation is done in the development phase of mining before the longwall mining begins. This process would not be affected by a single-entry plan. He also does not believe there are increased roof hazards in a dual-entry plan, since most roof hazards arise in the development phase. Beiter stated that it was possible that building seals outby the longwall face could decrease exposure to roof hazards, but noted that the mine had not provided any records showing that safe access issues in fact existed in the dual-entry system. The company also had not shown a history of problems caused by a lack of access to the back of the seals during construction. Bradley Hanson, the mine's CEO, agreed that there have been no roof fall or material-handling accidents at the mine, but he believes there is still a risk.

After observing and listening to the testimony of the two chief expert witnesses, Beiter and Farinelli, I find Beiter to be the more thoughtful and reasoned witness with regard to the two ventilation plans. Beiter conducted his review of the plans independently and reached the same conclusion as the ventilation specialist and district manager in District 9. Farinelli, on the other hand, appeared single-minded, and was unable to consider the opinion of MSHA. He also is heavily invested in the outcome. While Signal Peak argues that its experts had more experience with mines susceptible to spontaneous combustion, whereas MSHA's experts were used to working with eastern gassy mines, I find that Beiter had significant experience with spontaneous combustion to support his credibility.

### III. DISCUSSION

Section 303(o) of the Mine Act requires that “A ventilation system and methane and dust control plan and revisions thereof suitable to the conditions and the mining system of the coal mine and approved by the Secretary shall be adopted by the operator and set out in printed form ....” 30 U.S.C. §863(o). A ventilation plan is typically drafted by the operator, and mine and MSHA personnel then negotiate to agree on a plan, which must be approved by the MSHA district manager. 30 C.F.R. § 75.370(a)(1). The citation issued to Signal Peak here is a so-called “technical citation” for operating without an approved plan, which enables parties who have reached an impasse in plan negotiations to bring the matter before the Commission. *See Mach Mining, LLC v. Sec’y of Labor, Mine Safety & Health Admin.*, 728 F.3d 643, 655-56 (7th Cir. 2013).

In reviewing a district manager’s decision to deny approval of a proposed plan, the Commission has held that judges should evaluate whether the action was arbitrary, capricious, or an abuse of discretion. *Prairie State Generating Co.*, 35 FMSHRC 1985, 1989 (July 2013), *aff’d*, 792 F.3d 82 (D.C. Cir. 2015); *Mach Mining, LLC*, 34 FMSHRC 1784, 1790 (Aug. 2012), *aff’d*, 728 F.3d 643 (7th Cir. 2013). The operator is not entitled to a de novo hearing on the merits of the plan. *Mach Mining, LLC v. Sec’y of Labor, Mine Safety & Health Admin.*, 728 F.3d 643 (7th Cir.).

Signal Peak argues that under this standard of review, the Secretary is required to prove that the operator’s plan is unsuitable for the mine. Resp. Br. 11. However, the Commission has explicitly rejected the approach put forth by the mine. *Prairie State*, 35 FMSHRC at 1989 n.6. It is true that in deciding whether to approve a plan, the district manager must determine whether proposed plan provisions are suitable for the mine. *Id.*; *see also* 30 U.S.C. § 863(o) (“a ventilation system ... suitable to the conditions and the mining system of the coal mine and approved by the Secretary”); 30 C.F.R. § 75.370(a)(1) (“a ventilation plan approved by the district manager”). However, the Secretary is not required to prove suitability by a preponderance of the evidence before the Commission. *Prairie State*, 35 FMSHRC at 1989 n.6. Rather, the judge reviews the district manager’s determination under the arbitrary and capricious standard. *Id.* Under that standard, the Secretary must prove only that the district manager “examined the relevant data and articulated a satisfactory or reasonable explanation for his determination.” *Prairie State*, 35 FMSHRC at 1989.

The district manager’s action may be considered arbitrary and capricious if

the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

*Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). The Commission has emphasized that, while the operator plays an active role in

developing the plan, “MSHA always retain[s] final responsibility for deciding what ha[s] to be included in the plan,” and “absent bad faith or arbitrary action, the Secretary retains discretion to insist upon the inclusion of specific provisions as a condition of the plan’s approval.” *Prairie State*, 35 FMSHRC at 1989 (quoting *UMWA v. Dole*, 870 F.2d 662, 669 n.10 (D.C. Cir. 1989)); *C.W. Mining Co.*, 18 FMSHRC 1740, 1746 (Oct. 1996). The Secretary’s approval of a ventilation plan is akin to the formulation of a standard and “entails the exercise of the Secretary’s independent judgment as to the appropriateness of the plan to ensure the health and safety of the miners.” *Mach*, 728 F.3d at 657; *see also Prairie State*, 792 F.3d at 90.

Applying this legal standard to the case here, I find that the district manager did not abuse his discretion. The record indicates that Riley sought and received advice from experts within his district office and MSHA’s technical support staff, and considered the opinions of Signal Peak’s engineers. He reviewed the multiple plan proposals, discussed them with MSHA and mine personnel, and reviewed the expert reports from the MSHA technical support office. He articulated a reasonable explanation for his findings in letters to the mine denying their proposals.

Riley ultimately concluded that a dual-entry system would protect miners to the greatest degree because it was more effective at removing noxious gases from the tailgate end of the longwall where miners work. He also determined that the dual-entry system enabled better monitoring of conditions in the gob. These conclusions were based on the opinions of highly qualified experts in the MSHA district office and the technical support office and on Riley’s own understanding of mine ventilation. Riley also considered the opinions of Signal Peak’s engineers, specifically their concerns about material-handling hazards and increased air in the gob in a dual-entry system. However, he determined based on the information presented by the mine that material-handling hazards were not a significant problem under the dual-entry system. He also determined that the risk of spontaneous combustion was suitably low under the dual-entry system and that it was not necessary to decrease the amount of air entering the gob beyond the current amount. While Signal Peak argues that Riley ignored the results of the fan stoppage test because they were unfavorable to the dual-entry plan, Riley did consider the results of the test but did not consider them to strongly favor either plan. It was evident at hearing that Riley had examined the relevant data in reaching his conclusions, and he articulated his reasoning clearly in his letters to the mine.

I find that the decision of the district manager was based on careful consideration of all of the relevant factors, and that he did not abuse his discretion in requiring the mine to use a dual-entry plan. I therefore find that the citation was validly issued.

### **V. ORDER**

Accordingly, I conclude that the Secretary has met his burden of proving that the district manager did not abuse his discretion with regard to the plan provisions. Citation No. 9021220 is **AFFIRMED**, and Contest Proceeding Docket No. WEST 2016-0624 is hereby **DISMISSED**.

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

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

Michele A. Horn, Office of the Solicitor, U.S. Department of Labor, 1244 Speer Blvd., Suite 216, Denver, CO 80204

Ryan L. Pardue, Office of the Solicitor, U.S. Department of Labor, 1244 Speer Blvd., Suite 515, Denver, CO 80204

R. Henry Moore, Jackson Kelly PLLC, Gateway Center, 401 Liberty Avenue, Suite 1500, Pittsburgh, PA 15222

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

OFFICE OF ADMINISTRATIVE LAW JUDGES  
1331 PENNSYLVANIA AVENUE, NW, SUITE 520N  
WASHINGTON, DC 20004-1710  
PHONE: (202) 434-9933 | FAX: (202) 434-9949

March 8, 2017

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

CONSOLIDATION COAL CO.,  
Respondent.

CIVIL PENALTY PROCEEDING

Docket No. WEVA 2015-0036  
A.C. No. 46-01318-361663

Mine: Robinson Run No. 95

**DECISION APPROVING SETTLEMENT**

Before: Judge Moran

This case is before the Court upon a petition for assessment of a civil penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977. The Secretary has filed a motion to approve settlement. The originally assessed amount was \$68,550.00, and the proposed settlement is for \$48,000.00. The Secretary has stated that Citation No. 8058726 is vacated. The Secretary's discretion to vacate a citation or order is not subject to review. *RBK Contr. Inc.*, 15 FMSHRC 2099 (Oct. 1993). The Secretary also requests that several citations be modified, as indicated in the table below.

The Court has considered the representations submitted in this case and concludes that the proffered settlement is appropriate under the criteria set forth in section 110(i) of the Act.

The settlement amounts are as follows:

<u>Citation No.</u>	<u>Assessment</u>	<u>Settlement Amount</u>
8056133	\$2,282.00	\$687.00
8056135	\$1,304.00	\$1,031.00
8056136	\$1,944.00	\$1,689.00
8058691	\$5,080.00	\$3,105.00
8058695	\$5,080.00	\$3,105.00
8060023	\$2,282.00	\$2,282.00
8060024	\$2,282.00	\$1,823.00
8056421	\$1,530.00	\$687.00
8058726	\$1,944.00	vacated
8058698	\$2,106.00	\$1,100.00
8058699	\$2,106.00	\$1,100.00
8058700	\$2,106.00	\$1,100.00
8058701	\$1,203.00	\$1,203.00
8058729	\$1,412.00	\$1,412.00
8058703	\$1,412.00	\$1,412.00
8056597	\$2,678.00	\$2,012.00
8058706	\$5,080.00	\$4,105.00
8058707	\$1,795.00	\$1,795.00
8058708	\$1,026.00	\$1,026.00
8058709	\$2,106.00	\$1,100.00
8058743	\$3,405.00	\$1,563.00
8058710	\$2,106.00	\$1,100.00
8058749	\$2,106.00	\$2,106.00
8058750	\$1,026.00	\$1,026.00
8058711	\$1,795.00	\$1,795.00
8058599	\$1,026.00	\$1,026.00
8058600	\$1,412.00	\$1,412.00
8058865	\$3,405.00	\$687.00
8058766	\$2,106.00	\$2,106.00
8058768	\$3,405.00	\$3,405.00
<b>TOTAL:</b>	<b>\$68,550.00</b>	<b>\$48,000.00</b>

The Secretary presents the following bases for the proposed reductions and modifications in this case:

Citation No.	30 C.F.R. §	Gravity & Negligence	Penalty Assessed	Settlement	Rationale
8056133 <sup>1</sup>	75.400  Accumulation of combustible materials.	S&S, Reasonably Likely, Lost Work Days/ Restricted Duty, 4 Affected; Moderate	\$2,282.00	\$687.00	Modify to low negligence, 1 affected  Respondent would present evidence that the cited conditions developed after the most recent pre-shift examination and existed for less than one shift. Additionally, any smoke generated from a fire would ventilate to the return thereby reducing the number of miners affected. Based on this and the risks inherent in proceeding to hearing, the Secretary agreed to the above modifications and reduction in penalty.

---

<sup>1</sup> The citation asserted that, “Coal accumulations in the form of loose coal, coal fines and coal dust exist at the 21- A Longwall Section (084-0 MMU) Tailpiece. 1). Measured coal accumulations on the ‘walk side’ of the Tailpiece range from 10 inches deep, with ‘wear marks’ from the belt making contact with the coal, up to 18 inches deep at the Tail Roller. 2) . [sic] Measured coal accumulations on the ‘offside’ of the Tailpiece range from 6 inches deep to 14 inches deep, with ‘wear marks’ from the belt making contact with the coal. At the Tail roller the measured coal is 36 inches deep, with the Tail Roller grinding up coal into a fine coal and coal dust. This section operated on Day Shift and Afternoon Shift mined 85 Shields. Standard 75.400 was cited 148 times in two years...” In the Secretary’s motion, supporting a 70% proposed penalty reduction, he states in part that the Respondent “would present evidence that the cited conditions developed after the most recent pre-shift examination and existed for less than one shift.”

Citation No.	30 C.F.R. §	Gravity & Negligence	Penalty Assessed	Settlement	Rationale
8056135 <sup>2</sup>	72.630(b)  Drill dust control at underground areas of underground mines.	S&S, Reasonably Likely, Permanently Disabling, 1 Affected; Moderate	\$1,304.00	\$1,031.00	Modify to low negligence  Respondent would present evidence that the cited condition was more difficult to detect than initially considered. Based on this and the risks inherent in proceeding to hearing, the Secretary agreed to the above modifications and reduction in penalty.
8056136 <sup>3</sup>	75.400  Accumulation of combustible materials.	S&S, Reasonably Likely, Lost Work Days/ Restricted Duty, 3 Affected; Moderate	\$1,944.00	\$1,689.00	Modify to 1 affected  Respondent would present evidence that any smoke generated from a fire caused by the cited conditions would ventilate to the return thereby reducing the number of miners affected. Based on this and the

<sup>2</sup> The citation asserted that, “The Dust Collection System for the Fletcher Roof Bolter (Approval # 2G-2674A-5, Serial # 8804/2011315) operating on 21-A Longwall Section (084-0 MMU), is not maintained in a permissible and operating condition. When this Roof Bolter was checked by this Inspector, at #2 Entry to #1 Entry, #29 Block, the following conditions existed: 1). The front dust collection hose (connected to the front drill head) has a measured 1 1/8 inch by 3/4inch hole, covered up by electrical tape. 2). A measured 1 inch of white fine dust is found behind the filter media (dust filter), which has the clean side of the dust collection system contaminated. A sample of this white fine dust is being sent to the MSHA Laboratory in Pittsburgh, Pa. for Quartz Analysis...” The Secretary’s motion stated in part, “Respondent would present evidence that the cited condition was more difficult to detect than initially considered.”

<sup>3</sup> This citation asserted, “Combustible Material in the form of loose coal and fine coal has been allowed to accumulate at the 21-A Longwall (084-0 MMU) Tailpiece. 1). Coal grinded up into small fine coal exists at the Tail roller measuring 78 inches long by 24 inches deep by 18 inches wide, making contact with the Tail roller. 2). At the outby end of the Tail Piece, where the V-Plow is, the coal accumulations measured 7 feet long by 14 inches deep to 24 inches deep by 24 inches wide making contact with the belt. *This is the third time, that this Inspector has cited this condition at the 21-A Longwall Section Tailpiece during this inspection Quarter...*” (emphasis added). The Secretary’s motion stated in part, “Respondent would present evidence that any smoke generated from a fire caused by the cited conditions would ventilate to the return thereby reducing the number of miners affected.” The inspection amended his findings to unlikely and non-S&S, and the initially assessed penalty of \$1,944.00 was derived from those amended findings.

Citation No.	30 C.F.R. §	Gravity & Negligence	Penalty Assessed	Settlement	Rationale
					risks inherent in proceeding to hearing, the Secretary agreed to the above modifications and reduction in penalty.
8058691 <sup>4</sup>	75.517  Power wires and cables; insulation and protection.	S&S, Reasonably Likely, Fatal, 1 Affected; Moderate	\$5,080.00	\$3,105.00	Modify to low negligence  Respondent would present evidence that, due to the location of the cited condition, it was more difficult to observe than initially considered. Based on this and the risks inherent in proceeding to hearing, the Secretary agreed to the above modifications and reduction in penalty.
8058695	75.517  Power wires and cables; insulation and protection.	S&S, Reasonably Likely, Fatal, 1 Affected; Moderate	\$5,080.00	\$3,105.00	Modify to low negligence  Respondent would present evidence that, due to the size and location of the cited condition, it was more difficult to observe than initially considered. Based on this and the risks inherent in proceeding to hearing, the Secretary agreed to the above modifications and reduction in penalty.

<sup>4</sup> The citation asserted, “The trailing cable supplying power to the Co. #6170 Joy 14ED25 (S/N JM6170) continuous miner being operated on the 1E, 040-0 MMU, working section, is not insulated adequately and fully protected. There is a gap between *a taped splice* and the outer jacket measuring 3" by 3/4, exposing the inner energized leads” (emphasis added). In support of the proposed 39% penalty reduction, the Secretary stated in part, “Respondent would present evidence that, due to the location of the cited condition, it was more difficult to observe than initially considered.”

Citation No.	30 C.F.R. §	Gravity & Negligence	Penalty Assessed	Settlement	Rationale
8060024	75.517  Power wires and cables; insulation and protection.	S&S, Reasonably Likely, Permanently Disabling, 1 Affected; Moderate	\$2,282.00	\$1,823.00	Modify to low negligence  Respondent would present evidence that the cited condition developed after the most recent electrical examination and was not readily observable. Based on this and the risks inherent in proceeding to hearing, the Secretary agreed to the above modifications and reduction in penalty. <sup>5</sup>

---

<sup>5</sup> In considering this rationale, the Court assumes that the Secretary considered the inspector's notes.

Citation No.	30 C.F.R. §	Gravity & Negligence	Penalty Assessed	Settlement	Rationale
8056421 <sup>6</sup>	75.202(a)  Protection from falls of roof, face and ribs.	S&S, Reasonably Likely, Lost Work Days/ Restricted Duty, 1 Affected; Moderate	\$1,530.00	\$687.00	Modify to low negligence  Respondent would present evidence that the cited conditions developed after the most recent weekly examination of the area, and that miners rarely travel in this location. Based on this and the risks inherent in proceeding to hearing, the Secretary agreed to the above modifications and reduction in penalty.
8058698	75.403  Maintenance of incombustible content of rock dust.	Non-S&S, Unlikely, Fatal, 8 Affected; Moderate	\$2,106.00	\$1,100.00	Modify to low negligence, lost work/restricted duty, 2 affected  Respondent would present evidence that the cited conditions were not visible to the unaided eye as the incombustible content of the two samples was no more than 0.3% less than the required

<sup>6</sup> This citation alleged violations spanning *several areas*: “The ribs where miners work or travel was not adequately supported or otherwise controlled in the following locations in the #3 entry of the 21-A section: 1) No. 42-44 crosscut, the rib was gapped 1-3 inches from the solid rib. The ribs (36 inches long, 24 inches wide, and 3 inches thick; 32 inches long, 25 inches wide and 3 inches thick and 18 feet long, 25 inches wide and 3-4 inches thick) were pryed down. 2) No. 44-46 crosscut, a piece of rib (43 inches long by 50 inches wide and 2 inches thick) was gapped 2-3 inches from the solid rib. 3) No. 46-48 crosscut, the rib was gapped 3-4 inches from the solid rib. A piece 6 feet long by 31 inches wide and 5 inches thick was pryed down. 4) No. 50 crosscut, a piece of rib 29 inches long by 18 inches wide and 6 inches thick was gapped from the solid rib 1-3 inches. 5) No. 56-58 crosscut, a piece of rib 47 inches long by 50 inches wide and 3 inches thick was gapped from the solid rib 2-3 inches. 6) No. 62-64 crosscut, a piece 72 inches long by 54 inches wide and 3 inches thick was gapped from the solid rib 2-3 inches. 7) No. 74-76 crosscut, a piece of rib 40 inches long by 31 inches wide and up to 4 inches thick was gapped 2-3 inches from the solid rib. 8) No. 76-78 crosscut, a piece of rib 48 inches long by 31 inches wide and 4 inches thick was gapped from the solid rib 1-3 inches. 9) No. 76-78 crosscut, a piece a rib 70 inches long by 28 inches wide and 6 inches thick was gapped 2- 3 inches from the solid rib.” The Secretary’s motion stated in part, “Respondent would present evidence that the cited conditions developed after the most recent weekly examination of the area, and that miners rarely travel in this location.” The Court notes that neither document indicates how much time passed between the most recent examination and the inspection.

Citation No.	30 C.F.R. §	Gravity & Negligence	Penalty Assessed	Settlement	Rationale
					80%. Based on this and the risks inherent in proceeding to hearing, the Secretary agreed to the above modifications and reduction in penalty.
8058699	75.403 Maintenance of incombustible content of rock dust.	Non-S&S, Unlikely, Fatal, 8 Affected; Moderate	\$2,106.00	\$1,100.00	Modify to low negligence, lost work/restricted duty, 2 affected  Respondent would present evidence that the cited conditions were not visible to the unaided eye as the incombustible content of the sample was no more than 0.9% less than the required 80%. Based on this and the risks inherent in proceeding to hearing, the Secretary agreed to the above modifications and reduction in penalty.
8058700	75.403 Maintenance of incombustible content of rock dust.	Non-S&S, Unlikely, Fatal, 8 Affected; Moderate	\$2,106.00	\$1,100.00	Modify to low negligence, lost work/restricted duty, 2 affected Respondent would present evidence that the cited conditions were not visible to the unaided eye as the incombustible content of the sample was no more than 1.2% less than the required 80%. Based on this and the risks inherent in proceeding to hearing, the Secretary agreed to the above modifications and reduction in penalty.
8056597	75.380(d)(7)(vi) Escapeways; bituminous and lignite mines.	Non-S&S, Unlikely, Fatal, 10 Affected; Moderate	\$2,678.00	\$2,012.00	Modify to lost work/restricted duty  Respondent would present evidence that the injuries

Citation No.	30 C.F.R. §	Gravity & Negligence	Penalty Assessed	Settlement	Rationale
					expected would be of the lost work/restricted duty variety from short delays in escaping in an emergency. Based on this and the risks inherent in proceeding to hearing, the Secretary agreed to the above modifications and reduction in penalty.
8058706 <sup>7</sup>	75.517  Power wires and cables; insulation and protection.	S&S, Reasonably Likely, Fatal, 1 Affected; Moderate	\$5,080.00	\$4,105.00	Modify to low negligence  Respondent would present evidence that, due to the size and location of the cited condition, it was more difficult to observe than initially considered. Based on this and the risks inherent in proceeding to hearing, the Secretary agreed to the above modifications and reduction in penalty.
8058709	75.403  Maintenance of incombustible content of rock dust.	Non-S&S, Unlikely, Fatal, 8 Affected; Moderate	\$2,106.00	\$1,100.00	Modify to low negligence, lost work/restricted duty, 2 affected  Respondent would present evidence that the cited conditions were difficult to detect as the incombustible content of the samples were between 0.2% and 7.8% less than the required 80%. Based

<sup>7</sup> The citation alleged, “The trailing cable supplying power to the Co. #84 Joy shuttle car being operated on the Tail Gate E, 088-0 MMU, working section, is not insulated adequately and fully protected, in that [the] tape on the end of a 13” splice is rolled back exposing the energized inner leads. The opening measures 1” by 1/8”. Outer jackets shall be replaced in such manner as to prevent moisture from entering the cable. [Assuming] normal mining were to continue and the condition [were] left unabated, it is reasonably likely a miner would receive fatal injuries due to electrocution.” The Secretary’s motion stated in part, “Respondent would present evidence that, due to the size and location of the cited condition, it was more difficult to observe than initially considered.”

Citation No.	30 C.F.R. §	Gravity & Negligence	Penalty Assessed	Settlement	Rationale
					on this and the risks inherent in proceeding to hearing, the Secretary agreed to the above modifications and reduction in penalty.
8058743	75.1505(a)  Escapeway maps.	S&S, Reasonably Likely, Fatal, 1 Affected; Moderate	\$3,405.00	\$1,563.00	Modify to lost work/restricted duty  Respondent would present evidence that the injuries expected would be of the lost work/restricted duty variety from short delays in escaping in an emergency. Based on this and the risks inherent in proceeding to hearing, the Secretary agreed to the above modifications and reduction in penalty. <sup>8</sup>
8058710	75.403  Maintenance of incombustible content of rock dust.	Non-S&S, Unlikely, Fatal, 8 Affected; Moderate	\$2,106.00	\$1,100.00	Modify to low negligence, lost work/restricted duty, 2 affected  Respondent would present evidence that the cited conditions were difficult to detect as the incombustible content of the samples was only 2.2% less than the required 80%. Based on this and the risks inherent in proceeding to hearing, the Secretary agreed to the above modifications and reduction in penalty.

---

<sup>8</sup> The Court assumes that the Secretary considered the distance between the #6 block and the #4 block when proposing the 54% reduction in penalty amount. No filings submitted contain information on this point.

Citation No.	30 C.F.R. §	Gravity & Negligence	Penalty Assessed	Settlement	Rationale
8058865 <sup>9</sup>	75.360(a)(1)  Preshift examination at fixed intervals.	S&S, Reasonably Likely, Lost Work Days/ Restricted Duty, 1 Affected; High	\$3,405.00	\$687.00	Modify to unlikely, non-S&S  Respondent would present evidence that the most of the underlying conditions leading to the examination violation were unlikely to cause injury. Based on this and the risks inherent in proceeding to hearing, the Secretary agreed to the above modifications and reduction in penalty.

**WHEREFORE**, the motion for approval of settlement is **GRANTED**.

It is **ORDERED** that Citation No. 8056133 be **MODIFIED** to low negligence and to 1 person affected.

It is **ORDERED** that Citation Nos. 8056135, 8058691, 8058695, 8060024, 8056421, and 8058706 be **MODIFIED** to low negligence.

It is **ORDERED** that Citation No. 8056136 be **MODIFIED** to 1 person affected.

It is **ORDERED** that Citation Nos. 8058698, 8058599, 8058700, 8058709, and 8058710 be **MODIFIED** to 2 persons affected, low negligence, and to lost work/restricted duty.

---

<sup>9</sup> The citation alleged, “An inadequate examination has been conducted for the oncoming afternoon shift on the Tailgate E continuous miner section (088-0 mmu). The following conditions existed at the start of the oncoming shift as cited in violation numbers 8058599, 8058600, 8058861. A scoop has been parked under the lifeline at the end of the track limiting the width of the escapeway to 22”. Combustible material in the form of coal fines and lump coal has accumulated under and along side the conveyor belt from 62 block to 66 block. Combustible material is present in the #1 entry inby the feeder, in the #1 to #2 cross-cut at 67 block and in the #1 to #2 cross-cut at 68 block. The accumulations are obvious and extensive. A hole is present in the ventilation control between the belt entry and haulage intake escapeway at 62 block. None of the cited conditions have been listed in the pre-shift record book. There has been no production on the section since afternoon shift on 8/7/2014.” In support of the proposed 80% reduction in the proposed penalty amount, the Secretary’s motion stated in part, “Respondent would present evidence that the *most* of the underlying conditions leading to the examination violation were unlikely to cause injury” (emphasis added). The citation was issued at 6:30 p.m. on August 8, 2014.

It is **ORDERED** that Citation Nos. 8056597 and 8058743 be **MODIFIED** to lost work/restricted duty.

It is **ORDERED** that Citation No. 8058865 be **MODIFIED** to unlikely and non-S&S.

It is further **ORDERED** that Respondent pay a penalty of \$48,000.00 within 30 days of this order.<sup>10</sup> Upon receipt of payment, this case is **DISMISSED**.

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

Distribution:

Ryan M. Kooi, Esq., Office of the Regional Solicitor, The Curtis Center, 170 S. Independence Mall West, Suite 630 E, Philadelphia, PA 19106

Eric T. Frye, Esq., FLAHERTY SENSABAUGH BONASSO PLLC, 200 Capitol Street, Charleston, WV 25338-3843

/KP

---

<sup>10</sup> Payment should be sent to: MINE SAFETY AND HEALTH ADMINISTRATION, U.S. DEPARTMENT OF LABOR, PAYMENT OFFICE, P.O. BOX 790390, ST. LOUIS, MO 63179-0390

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

OFFICE OF ADMINISTRATIVE LAW JUDGES  
1331 PENNSYLVANIA AVENUE, NW, SUITE 520N  
WASHINGTON, DC 20004-1710  
PHONE: (202) 434-9933 | FAX: (202) 434-9949

March 15, 2017

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

CIVIL PENALTY PROCEEDING

DOCKET NO. KENT 2011-434

v.

A.C. NO. 15-19076-240278

NALLY & HAMILTON ENTERPRISES,

Mine Name: Chestnut Flats

Respondent.

**DECISION UPON REMAND**

Appearances: Schean G. Belton, Esq., Office of the Solicitor, U.S. Department of Labor,  
Nashville, Tennessee, for the Petitioner

S. Thomas Hamilton, Jr., Esq., Saltsman & Willett, PSC, Bardstown,  
Kentucky, for the Respondent

Before: Judge Moran

**Procedural Background**

In a decision issued on July 19, 2016, the Federal Mine Safety and Health Review Commission (“Commission”) reversed this Court’s decision, holding that a violation of 30 C.F.R. § 77.1710(i) had been established. *Nally & Hamilton Enterprises*, 38 FMSHRC 1644 (July 2016). As the Commission summarized the incident:

The citation at issue arose out of an accident on April 21, 2010, in which a rock truck overturned at Nally & Hamilton’s Chestnut Flats Mine in Kentucky. ... James Patterson, the driver of the truck, was not wearing a seatbelt at the time of the accident and sustained injuries that resulted in lost work days.

*Id.*, citing the Court’s decision, *Nally & Hamilton Enterprises*, 35 FMSHRC 2198, 2199-200 (July 2013) (ALJ).

The standard in issue provides, in relevant part, that, “[e]ach employee ... shall be required to wear protective ... devices [including, within a list of items] ... (i) Seatbelts in a vehicle where there is a danger of overturning and where roll protection is provided.” 30 C.F.R. § 77.1710(i).

The Commission affirmed this Court's determination that no negligence was involved. It remanded the matter for the Court to make a more complete analysis of whether the violation was significant and substantial and then to assess a civil penalty, stating,

Regarding the issue of whether the violation was significant and substantial, the Judge did not engage in sufficient analysis to permit action by the Commission. Because a finding on the issue of whether the violation was significant and substantial could affect the gravity element of the penalty assessment, we remand the case to the Administrative Law Judge for further consideration of whether the violation was significant and substantial and assessment of a penalty.

38 FMSHRC at 1652.

### **Statement of Law**

A violation of the Act is significant and substantial ("S&S") if it is of "such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." 30 U.S.C. § 814(d). It is proper to apply this designation when the facts surrounding the violation demonstrate a reasonable likelihood that the hazard contributed to by the violation "will result in an illness or injury of a reasonably serious nature." *Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 815 (Apr. 1981). In *Mathies Coal Co.*, the Commission explained that,

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

*Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984) (footnote omitted); *accord Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power, Inc. v. Secretary of Labor*, 861 F.2d 99, 103 (5th Cir. 1988) (approving *Mathies* criteria).

The Commission recently clarified that the second step of the *Mathies* analysis requires the Secretary both to identify the relevant hazard at which the standard is directed, and to show a reasonable likelihood that this hazard will occur, in light of the facts surrounding the instant violation. *Newtown Energy, Inc.*, 38 FMSHRC 2033, 2038 (Aug. 2016). During the third step, the Secretary must prove that the hazard is reasonably likely to cause injury, with the assumption that the specific hazard identified in the second step exists. *Id.* at 2045 (internal citations omitted). The step three analysis is to assume the continuation of normal mining operations. *U.S. Steel Mining Co.*, 7 FMSHRC 1125, 1130 (Aug. 1985) (citing *Knox Creek Coal Corp. v. Sec'y of Labor*, 811 F.3d 148, 161-62 (4th Cir. 2016); *Peabody Midwest Mining, LLC*, 762 F.3d 611, 616 (7th Cir. 2014); *Buck Creek Coal*, 52 F.3d 133, 135 (7th Cir., 1995)). The Commission has emphasized that 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 1834, 1836 (August 1984).

## Pertinent Facts Upon Remand

In this Court's July 2013 decision in this matter, it found that the accident occurred near the end of truck driver Patterson's night shift. The driver, who was not wearing his seat belt, incurred an injury to his lower back from the truck overturning incident and missed some work days as a result of his injury.

At the hearing and in its post-hearing brief, "[t]he Secretary ... urged the Court to uphold Inspector Smith's S&S designation, for the injury producing event occurred as a result of Mr. Patterson not wearing his seat belt when his rock truck overturned." 35 FMSHRC at 2206 n. 5. The Respondent maintained that "the evidence does not support an S&S finding because the first two elements of the *Mathies* test were unproven by the Secretary." *Id.* at n. 6.

Post the Commission's remand, the Court invited the parties to submit additional arguments, if any, on the S&S and penalty issues.

The Secretary, via an email response,<sup>1</sup> asserted,

this matter is S&S. Our position incorporates the information, facts, arguments, and law argued in the briefs previously submitted to both the ALJ and to the Commission. In essence, at trial the Secretary proved that there was a reasonable likelihood that the hazard contributed to would result in an injury of a reasonably serious nature because the hazard did *in fact* result in an injury of a reasonably serious nature - the driver suffered an injury that caused him to miss multiple days of work. *See e.g., S&S Dredging Co.*, 2103 WL 3759791 (Jul.2013)<sup>2</sup> ('Muscle strains, sprained ligaments, and fractured bones are injuries of a reasonably serious nature for the purposed of the fourth element of the *Mathies* test.') [sic] ... see also decision *Nally & Hamilton*, 35 FMSHRC 2198, 2200 (2013) (noting Inspector Smith's testimony that he observed a 'big round knot' on Patterson's back; that Patterson was hospitalized for several hours after the accident; and that Patterson missed 'some work days' due to his injury).

E-mail from Secretary to the Court's law clerk, dated August 23, 2016.

On August 24, 2016, the Respondent submitted a post-remand letter to the Court. In that letter, it asserted that "[a] violation of 30 CFR 77.1710 [i] cannot be reasonably calculated to

---

<sup>1</sup> The Secretary's email response is part of the record within the e-CMS file for this docket.

<sup>2</sup> The Secretary's citation to *S&S Dredging Co.* is incorrect. The correct citation is 2013 WL 8562447 (FMSHRC July 11, 2013). The quote from that case actually reads, "muscle strains, sprained ligaments, and fractured bones are injuries of a reasonably serious nature for the purposes of the fourth element of the *Mathies* test." *Id.* at \*2. (emphasis added).

result in an injury, nor can it be reasonably calculated the hazard contributed to in a violation of 30 CFR 77.1710[i] will be of a reasonably serious nature.”<sup>3</sup> R’s letter at 1.

## **Analysis**

Applying the *Mathies* criteria, and the first factor, the Court begins with the Commission’s determination that the standard was violated. Moving to the second factor, whether there was a discrete safety hazard – a measure of danger to safety – contributed to by the violation, the record establishes that the discrete hazard is a vehicular accident. The violation contributed to a measure of danger: by not wearing a safety belt, miners face a higher risk of injury should an accident occur.

The third factor, the reasonable likelihood that the hazard contributed to will result in an injury, is more awkward to apply in this instance, as an accident did occur, and the driver was not wearing his safety belt. Therefore it is hard to apply the analysis in the abstract setting most often encountered.<sup>4</sup> The Commission has not directly addressed the application of *Mathies* when no prognostication is needed because an injury has occurred.

The Court concludes, per the existing *Mathies* standard, and apart from the particular facts in this case, that there is a reasonable likelihood that the hazard contributed to will result in an injury, based on the assumption that there is an inherent risk of an accident’s occurrence in the operation of any vehicle. Not wearing a seat belt can’t contribute to the hazard of a vehicular accident, but it can contribute to elements 2 and 4 of the *Mathies* analysis. It cannot be gainsaid that, with any vehicular accident, there is a reasonable likelihood that the injury in question will be of a reasonably serious nature. Accordingly, the Court finds that the violation was S&S.

## **Penalty Determination**

Under section 110(i) of the Mine Act,

The Commission shall have authority to assess all civil penalties provided in this chapter. In assessing civil monetary penalties, the Commission shall consider the operator’s history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator’s ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in

---

<sup>3</sup> The Respondent does not further explain the basis for those conclusions, but rather refers to its post-hearing brief and reply brief.

<sup>4</sup> The “Ironic process theory or the white bear problem refers to the psychological process whereby deliberate attempts to suppress certain thoughts make them more likely to surface. An example is how when someone is actively trying not to think of a white bear they may actually be more likely to imagine one. ‘Try to pose for yourself this task: not to think of a polar bear, and you will see that the cursed thing will come to mind every minute.’” *Ironic Process Theory*, Wikipedia (Jan. 6, 2017), [https://en.wikipedia.org/wiki/Ironic\\_process\\_theory](https://en.wikipedia.org/wiki/Ironic_process_theory) (citing Fyodor Dostoevsky, *Winter Notes on Summer Impressions*, Vremya, 1863); see also Joe Zimmerman, Op-Ed, *Don’t Think About the White Bear*, N.Y. TIMES, Mar. 11, 2017, at SR2.

attempting to achieve rapid compliance after notification of a violation. In proposing civil penalties under this chapter, the Secretary may rely upon a summary review of the information available to him and shall not be required to make findings of fact concerning the above factors.

30 U.S.C. §110(i).

The special assessment process is not applied by the Commission; it is a creation used by the Secretary when he believes such an assessment is “appropriate.” 30 C.F.R. §100.5(b). As Commission Judge David F. Barbour noted in a 2017 decision,

[t]he Commission has recently clarified that the Secretary's special assessment ‘does not negate the Judge's duty to exercise his or her independent authority to assess a penalty de novo based on the record and consideration of the section 110(i) criteria.’ The Commission has further instructed that, ‘Judges must be attentive to the rationale supporting the decision to seek the special assessment and the facts and circumstances supporting that decision, so that the ultimate determination of the penalty conforms to the Judge's findings and conclusions.’ *The American Coal Company*, 38 FMSHRC 1987, 1993-94 (Aug. 2016).

*Hunter Sand & Gravel v. Sec. of Labor*, 39 FMSHRC 239, 278 (Jan. 2017) (ALJ).

### **History of previous violations**

Per Exhibit P3, Respondent Nally & Hamilton’s Mill Branch mine has 15 violations in its history report. Exhibit A refers to Respondent’s Chestnut Flats mine, and that reflects, without elaboration, 51 violations. The Chestnut Flats Mine has no history of prior violations of the cited standard. The Secretary introduced Ex. P 3, but offered no explanation of the role, if any, as to Exhibit A, which is part of the official file. Unexplained, the information is undecipherable. The Court concludes that, at worst, the Respondent has a modest violation history.

### **Appropriateness of such penalty to the size of the business**

Applying, for the moment, the Secretary’s Mine Size criteria, per Part 100, the Respondent is in the range of a high moderate to large mine. However, per the parties’ stipulations, the Respondent is deemed to be a large mine operator.

### **Negligence**

The Commission (as well as this Court, in its initial decision) has determined that there was no negligence involved. The absence of negligence has significance in the Court’s penalty analysis.

A few observations about negligence made by fellow Commission Administrative Law Judges are mentioned here. Administrative Law Judge L. Zane Gill noted in *Northern Illinois Service Co.* that,

Negligence is ‘conduct, either by commission or omission, which falls below a standard of care established under the Mine Act to protect miners against the risks of harm.’ 30 C.F.R. § 100.3(d). Mine operators are ‘required to be on the alert for

conditions and practices in the mine that affect the safety or health of miners and to take steps necessary to correct or prevent hazardous conditions or practices.’ *Id.* No negligence exists when ‘[t]he operator exercised diligence and could not have known of the violative condition or practice.’ *Id.*

*Secretary v. Northern Illinois Service Co.*, 37 FMSHRC 1514, 1518 (July 2015) (ALJ) (emphasis added).

Administrative Law Judge Thomas McCarthy remarked in *Sims Crane*,

Negligence is not defined in the Mine Act. ... [however] an operator’s failure to satisfy the appropriate duty can lead to a finding of negligence if a violation of the standard occurred.” *A.H. Smith Stone Co.*, 5 FMSHRC 13, 15 (Jan. 1983) ... In determining whether an operator meets its duty of care under the cited standard, the Commission considers what actions would have been taken under the same or similar circumstances by a reasonably prudent person familiar with the mining industry, the relevant facts, and the protective purpose of the regulation. ... an operator is negligent if it fails to meet the requisite high standard of care under the Mine Act. *Brody Mining*, 37 FMSHRC at 1701.

*Secretary v. Sims Crane*, 39 FMSHRC 116, 118 (Jan. 2017) (ALJ).

The point is, by finding that Nally & Hamilton was not negligent, the Commission, correctly, in the Court’s view, determined that the Respondent met the high standard of care and that there were no other actions that it should have taken. Indeed, at least in this case, short of extreme and unreasonable measures, such as installing surveillance cameras in all of its trucks and having someone continually monitor the seat belt usage, Respondent did all that it could.

Thus, there can’t be any deterrent effect achieved by imposing a significant penalty, as the finding of no negligence means the operator could not have done more. This does not mean that the Respondent need do nothing. Looking forward, it may be that, by imposing a sanction on the employee for his failure to comply with the mine’s requirement that seat belts are to be worn, such discipline<sup>5</sup> may heighten the awareness of other employees that compliance is mandatory and the consequences may be significant, if the rule is not followed.

#### **Effect on the operator’s ability to continue in business**

The parties have agreed that the proposed penalty will not affect Respondent’s ability to continue in business. Sec PH Br. at 2.

#### **Gravity of the violation**

The Commission has spoken to the criterion of gravity, expressing that it has “consistently considered gravity holistically, considering ‘factors such as the likelihood of injury, the severity of an injury if it occurs, and the number of miners potentially affected.’” *Am. Coal Co.*, 9 FMSHRC 8, 20 (Jan. 2017) (internal citation omitted). It has also stated that “[t]he key

---

<sup>5</sup> Of course, the suggestion is made under the assumption that the mine’s disciplinary procedures are being properly followed.

element of the gravity determination is judging the type and extent of injuries or illnesses reasonably likely to occur based upon the record in the case.” *Id.*

In the *Newtown Energy, Inc.* decision, the Commission remarked that “[t]he gravity penalty criterion under section 110(i) of the Mine Act, 30 U.S.C. § 820(i), ‘is often viewed in terms of the seriousness of the violation.’ ... The gravity analysis focuses on factors such as the likelihood of injury, the severity of an injury if it occurs, and the number of miners potentially affected.” 38 FMSHRC at 2049 (citing *Consolidation Coal Co.*, 18 FMSHRC 1541, 1549 (Sept. 1996) (citing *Sellersburg Stone Co.*, 5 FMSHRC 287, 294-95 (Mar. 1983), *aff’d*, 736 F.2d 1147 (7th Cir. 1984); *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 673, 681 (Apr. 1987)).)

The inspector marked the gravity as “Occurred” with lost work days, S&S, and one person affected. The Court finds that the inspector’s evaluation of the gravity is consistent with the record evidence and, as noted, the Court has found that the violation was S&S.

### **Demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation**

The Secretary admits that the Respondent abated the violation in a timely manner and in good faith. Sec. PH Br. at 1.

### **Conclusion**

Upon consideration of each of the penalty factors, the Court imposes a civil penalty of \$200.00 (two hundred dollars), an amount which is double the amount it originally considered assessing if the Commission were to reverse the Court’s initial determination that no violation had occurred. To impose a larger penalty does not seem warranted or fair. In the Court’s view, among the statutory penalty factors, *negligence must be considered the first among equals*. To illustrate this, imagine each of the penalty factors to be as determined in this case and then assume further that a fatality occurred. If one were to conclude that a significant penalty was in order in such a case, it would mean that, though no negligence was attendant, such a penalty was appropriate merely because a fatal event occurred at a large mine, with no history of a prior violation of the standard. Under such circumstances, a hefty penalty would be solely for the purpose of imposing such a penalty for its own sake.

In the Court's estimation, with no deterrent effect possible, the Respondent, negligence-free as it was, could not have reasonably done anything else to avoid the violation's occurrence. With that in mind, the Court concludes that the penalty imposed is appropriate.

**ORDER**

The Respondent is hereby **ORDERED** to pay the Secretary of Labor the sum of \$200.00 (two hundred dollars) within 30 days of the date of this decision.<sup>6</sup>

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

---

<sup>6</sup> Payment should be sent to: MINE SAFETY AND HEALTH ADMINISTRATION, U.S. DEPARTMENT OF LABOR, PAYMENT OFFICE, P.O. BOX 790390, ST. LOUIS, MO 63179-0390

**Distribution:**

S. Thomas Hamilton, Esq., Saltsman & Willett, PSC, 212 E. Stephen Foster Ave., Bardstown, Kentucky 40004

Schean G. Belton, Esq., Office of the Solicitor, 618 Church Street, Suite 230, Nashville, Tennessee 37219

Martin J. Cunningham, Esq., Bingham Greenebaum Doll, LLP, 300 West Vine St., Ste. 1100, Lexington, Kentucky 40507

Sara L. Johnson, Esq., Office of the Solicitor, U.S. Department of Labor, 201 12th St. South, Suite 401, Arlington, Virginia 22202

W. Christian Schumann, Esq., Office of the Solicitor, U.S. Department of Labor, 201 12th St. South, Suite 401, Arlington, Virginia 22202

Melanie Garris, Office of Civil Penalty Compliance, MSHA, U.S. Department of Labor, 201 12th St. South, Suite 401, Arlington, Virginia 22202

Brian C. Mauk, Esq., Office of the Solicitor, 618 Church Street, Suite 230, Nashville, Tennessee 37219

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

721 19<sup>TH</sup> STREET, SUITE 443  
DENVER, CO 80202-2500  
303-844-3577/FAX 303-844-5268

March 20, 2017

STAR MINE OPERATIONS, LLC,  
Contestant

v.

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

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

v.

STAR MINE OPERATIONS, LLC,  
Respondent

CONTEST PROCEEDING

Docket No. WEST 2014-592-RM  
Order No. 8754779; 04/01/2014

Revenue Mine  
Mine ID 05-03528

CIVIL PENALTY PROCEEDINGS

Docket No. WEST 2014-994-M  
A.C. No. 05-03528-359228-01

Docket No. WEST 2014-995-M  
A.C. No. 05-03528-359228-02

Docket No. WEST 2015-023-M  
A.C. No. 05-03528-360911-01

Docket No. WEST 2015-024-M  
A.C. No. 05-03528-360911-02

Docket No. WEST 2015-025-M  
A.C. No. 05-03528-360911-03

Docket No. WEST 2015-030-M  
A.C. No. 05-03528-361952-01

Docket No. WEST 2015-031-M  
A.C. No. 05-03528-361952-02

Docket No. WEST 2015-037-M  
A.C. No. 05-03528-363546-01

Docket No. WEST 2015-038-M  
A.C. No. 05-03528-363546-02

Docket No. WEST 2015-098-M  
A.C. No. 05-03528-365154

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

v.

RORY WILLIAMS, agent of  
STAR MINE OPERATIONS, LLC,  
Respondent

Docket No. WEST 2015-127-M  
A.C. No. 05-03528-365446-01

Docket No. WEST 2015-128-M  
A.C. No. 05-03528-365446-02

Docket No. WEST 2015-304-M  
A.C. No. 05-03528-369866-01

Docket No. WEST 2015-305-M  
A.C. No. 05-03528-369866-02

Docket No. WEST 2015-306-M  
A.C. No. 05-03528-369866-03

Docket No. WEST 2015-370-M  
A.C. No. 05-03528-372806

Docket No. WEST 2015-440-M  
A.C. No. 05-03528-375046

Docket No. WEST 2015-462-M  
A.C. No. 05-03528-376084

Docket No. WEST 2015-547-M  
A.C. No. 05-03528-378328

Docket No. WEST 2015-596-M  
A.C. No. 05-03528-379026

Docket No. WEST 2015-670-M  
A.C. No. 05-03528-381766

Revenue Mine

CIVIL PENALTY PROCEEDING

Docket No. WEST 2017-093-M  
A.C. No. 05-03528-423306 A

Revenue Mine

**ORDER LIFTING STAY**  
**DECISION APPROVING SETTLEMENT**

Before: Judge Manning

These cases are before the Federal Mine Safety and Health Review Commission (the “Commission”) on one contest case brought by Star Mine Operations, LLC (“Star Mine”), 21 petitions for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration (“MSHA”), against Star Mine pursuant to sections 105 and 110(c) of the Federal Mine Safety and Health Act of 1977, as amended (the “Mine Act”), and one petition for assessment of civil penalty brought by the Secretary against Rory Williams under section 110(c) of the Mine Act. 30 U.S.C. §§ 815 and 820. The parties have filed a Joint Motion to Approve Settlement and Order Payment (“Joint Motion”).

Star Mine began operating the Revenue Mine (the “Mine”), an underground silver mine in Ouray County, Colorado, in 2011. These cases involve 172 citations and orders that were issued by MSHA following two separate accidents at the Mine that were subject to MSHA investigations.

On November 17, 2013, two miners died of carbon monoxide poisoning in an unventilated portion of the Mine. Other miners were taken to a hospital and subsequently released. The deaths occurred when miners entered an area where there had been an exceptionally large detonation of explosives the previous day. The Secretary referred this accident to the United States Attorney for the District of Colorado for a criminal investigation. On August 29, 2014, two miners sustained injuries following a planned underground blast. This second accident was not the subject of a criminal investigation but this settlement includes citations and orders issued following that accident.

The cases before me were stayed pending the completion of a criminal investigation, which has now been completed. The parties have entered into a Plea Agreement resolving all criminal matters arising out of the November 17, 2013 accident. The Plea Agreement was approved by the Honorable Christine M. Arguello of the United States District Court for the District of Colorado on March 16, 2017 in Case No. 16-CR-00350.

Star Mine and other entities with ownership interests in the Mine contracted with Fortune Revenue Silver Mines, Inc. (“Fortune”) to sell to Fortune all the assets related to the operation of the Mine and to transfer operational responsibility to Fortune effective October 1, 2014. Following that effective date, Star Mine and its owners and managers ceased to hold any interest in the Mine.

The parties have proposed a settlement that resolves all matters pending before me. Star Mine has agreed to accept all the citations and orders as written. The parties state that since October 1, 2014, the closing date of the sale to Fortune, Star Mine has not directly or indirectly participated in the mining business in the United States and Star Mine agrees to be permanently barred from the mining business in the United States. Star Mine’s co-owners and managers, Rory Williams and James W. Williams, Jr., agree that they will not, directly or indirectly, actively

participate in or manage, or hold any controlling interest in any mining business or operation in the United States. These two individuals owned the entities that were majority participants in the ownership of Star Mine.<sup>1</sup>

The Plea Agreement is attached as an exhibit to the Joint Motion and is incorporated herein by reference. It contains a section entitled “Stipulation of Factual Basis and Facts Relevant for Sentencing” at pages 5-12. This section summarizes the facts agreed upon by the parties with respect to the November 2013 fatal accident. In the Plea Agreement, Star Mine agrees to plead guilty to felony Count One of the criminal information that charged a violation of section 110(f) of the Mine Act for making false statements, representations, or certifications. 30 U.S.C. § 820(f). These false statements, representations or certifications relate to information Star Mine provided to MSHA with respect to the ventilation provided in certain areas of the Mine. The parties to the Plea Agreement recommended a sentence of probation for a period of up to five years, restitution in the amount of \$1,333,000 to the surviving families of the deceased miners, and a small fine. The Plea Agreement also asks the court to consider the settled penalty amount to be paid in the cases before me to “satisfy the requirement of a fine in [the criminal] case.” (Plea Agreement at 14). As stated above, District Court Judge Arguello approved the Plea.

The parties are proposing a substantial reduction in the total civil penalty to be assessed against Star Mine. The proposed penalty was \$2,010,614 and the proposed amended penalty is \$300,000, which is about an 85% reduction. The \$10,000 penalty proposed against Rory Williams is not being reduced. The breakdown of the amended penalties is set forth in a table attached to this decision approving settlement. The parties state that given the terms of the settlement, “the deterrent purpose of the Mine Act is no longer served by imposing penalties greater than the agreed-upon amount on an insolvent operator that will no longer participate in the mining business and where the above-referenced criminal sanctions have been imposed.” (Draft Decision Approving Settlement prepared by counsel for the Secretary at paragraph 5).

The sentencing recommendations made by the parties to the District Court in the Plea Agreement took into consideration the guidelines issued by the United States Sentencing Commission. Pursuant to those guidelines, the parties state that “the payment of an additional amount in fine may not be appropriate in [the criminal] case as that could interfere with the Defendant’s ability to pay restitution” to the families of the deceased miners. (Plea Agreement at 14). It is clear that the parties in the criminal proceeding considered restitution to the families of the deceased miners to be a principal element of the sentence. Whether there would be sufficient funds for restitution once a civil penalty is paid is not one of the elements in section 110(i) of the Mine Act, but I find that it is a factor that should be considered by me in assessing civil penalties in these cases. Although a Commission judge is “bounded by consideration of the statutory criteria” when assessing a penalty he is also permitted to factor in the “deterrent purpose underlying the Act’s penalty scheme.” *Sellersburg Stone Co.*, 5 FMSHRC 287, 294 (Mar. 1983), *aff’d*, 736 F.2d 1147, 1152 (7th Cir. 1984). In this instance, the mine operator is no longer in business and the operator and its principals are barred from reentering the mining business.

---

<sup>1</sup> At all relevant times, Star Mine was owned by Silver Star Resources, LLC (“SSR”) (100% owned by the Williams’), Revenue-Virginus Mines (“RVM”) (98% owned by the Williams’ and the remainder 2% owned by three individuals), and Yankee Boy Resources, LLC (“YBR”) (owned by another individual). SSR and RVM jointly owned 98% of Star Mine.

Higher penalties would not serve a deterrent purpose and could well “increase the burden on the victims of the offense.” (Plea Agreement at 14).

I have considered the representations and documentation submitted and I conclude that the proposed settlement is appropriate under the criteria set forth in section 110(i) of the Act. In accepting the penalty reduction, I have taken into consideration the following factors.

1. Ability to Continue in Business – Star Mine provided the Secretary with information regarding its financial condition before and after the two accidents, including information relating to the asset sale to Fortune. This information shows that Star Mine is insolvent because it has no assets and all proceeds from the sale of the Mine were reserved to pay creditors. There is no evidence to show that it discontinued business operations to avoid paying the proposed civil penalties. Since the sale to Fortune, Star Mine and its managers Rory Williams and James W. Williams, Jr., have not participated in the mining business and agree that they will be permanently barred from participating in the mining business in the United States. “[T]he purpose of a civil penalty is to induce those officials responsible for the operation of a mine to comply with the Act and its standards.” S. Rep. No. 95-181 at 41, *reprinted in Senate Subcomm. on Labor, Comm. on Human Res., Legislative History of the Federal Mine Safety and Health Act of 1977*, at 629 (1978). Given the above, I find that the amended penalty proposed by the parties will not affect Star Mine’s ability to continue in business.

2. History of Previous Violations – The citations and orders in these cases were issued between November 2013 and October 2014 for conditions that arose between November 17, 2013 and August 29, 2014. Star Mine was issued 17 section 104(a) citations during the 15 months prior to November 17, 2013, based on information at MSHA’s Mine Data Retrieval System on its website. The history of previous violations for citations and orders issued after that date would include the previously issued citations listed in the table.

3. Size of the Mine Operator – In calendar years 2013-14, Star Mine employed about 95 miners and worked just over 200,000 hours each year based on information at MSHA’s Mine Data Retrieval System on its website. MSHA’s penalty point system assigned the Mine 7 points out of 15 for the size of the mine and 3 points out of 9 for the size of the controlling entity. The mine was mid-sized.

4. Negligence - The negligence attributable to Star Mine for each violation is set forth in the citations and orders at issue.

5. Gravity – The gravity of each violation is set forth in the citations and orders at issue.

6. Good Faith – The parties agree that all the violations were timely abated in good faith.

Star Mine has agreed to withdraw its contest of Imminent Danger Order No. 8754779 in Docket No. WEST 2014-592-RM. As a consequence, that docket is dismissed.

## **ORDER**

I have considered the representations and documentation submitted and I conclude that the proposed settlement is appropriate under the criteria set forth in section 110(i) of the Mine Act. The stay entered in the cases involving Star Mine is **LIFTED**, the Joint Motion to Approve Settlement and Order Payment is **GRANTED**, Star Mine Operations, LLC, is **ORDERED TO PAY** the Secretary of Labor the sum of **\$300,000** within 40 days of the date of this order, and Rory Williams is **ORDERED TO PAY** the Secretary of Labor the sum of **\$10,000** within 40 days of the date of this order. Docket No. WEST 2014-592-RM is **DISMISSED**.

/s/ Richard W. Manning  
Richard W. Manning  
Administrative Law Judge

### Distribution:

Tyler P. McLeod, Esq., Office of the Solicitor, U.S. Department of Labor, 1244 Speer Blvd., Suite 515, Denver, CO 80204 (Certified Mail)

Peter S. Gould, Esq., and Matthew S. Cooper, Esq., Squire Patton Boggs LLP, 1801 California Street, Suite 4900, Denver, CO 80202-2613 (Certified Mail)

RWM

**TABLE SETTING FORTH SETTLED CITATIONS  
STAR MINE OPERATIONS  
DOCKET NOS. WEST 2014-994-M et. al.**

<b>Citation/Order</b>	<b>Modification to Citation/Order</b>	<b>Proposed Penalty</b>	<b>Amended Penalty</b>
<b>WEST 2014-994-M</b>			
8769616	Penalty reduction	\$51,900	\$2,000
<b>WEST 2014-995-M</b>			
8769617		\$5,000	\$5,000
<b>WEST 2015-023-M</b>			
92 Citations		\$25,664	\$25,664
<b>WEST 2015-024-M</b>			
6582222	Penalty reduction	\$5,645	\$4,000
8754780		\$4,000	\$4,000
8754781		\$4,000	\$4,000
8754788		\$4,000	\$4,000
8761624		\$4,000	\$4,000
<b>WEST 2015-025-M</b>			
8769605	Penalty reduction	\$112	\$100
<b>WEST 2015-030-M</b>			
8769586		\$2,000	\$2,000
8792289	Penalty reduction	\$6,624	\$2,000
8769600		\$2,000	\$2,000
<b>WEST 2015-031-M</b>			
8769574	Penalty reduction	\$207	\$100
8769577	Penalty reduction	\$207	\$100
<b>WEST 2015-037-M</b>			
8792285		\$100	\$100

<b>WEST 2015-038-M</b>			
8769568		\$2,000	\$2,000
8769569		\$2,000	\$2,000
8792278	Penalty reduction	\$6,624	\$2,000
8792275		\$2,000	\$2,000
8792277	Penalty reduction	\$6,624	\$2,000
8792281		\$2,000	\$2,000
8792282		\$2,000	\$2,000
8769588		\$2,000	\$2,000
8756393		\$2,000	\$2,000
8792292	Penalty reduction	\$6,624	\$2,000
8769602		\$2,000	\$2,000
8769603		\$2,000	\$2,000
8757031	Penalty reduction	\$5,645	\$2,000
<b>WEST 2015-098-M</b>			
8769606	Penalty reduction	\$156,300	\$16,175
8769607	Penalty reduction	\$156,300	\$16,175
8769608	Penalty reduction	\$156,300	\$16,175
8769609	Penalty reduction	\$70,000	\$7,243
8769610	Penalty reduction	\$156,300	\$16,175
8769611	Penalty reduction	\$70,000	\$7,243
8769613	Penalty reduction	\$156,300	\$16,175
8769614	Penalty reduction	\$156,300	\$16,175
<b>WEST 2015-127-M</b>			
8769566	Penalty reduction	\$6,600	\$2,000
8769567	Penalty reduction	\$7,700	\$2,000
8769575	Penalty reduction	\$7,700	\$2,000
8769597	Penalty reduction	\$7,700	\$2,000
8769581	Penalty reduction	\$7,700	\$2,000
8769582	Penalty reduction	\$7,700	\$2,000
8769593	Penalty reduction	\$8,400	\$2,000
8756382	Penalty reduction	\$7,700	\$2,000
8769592	Penalty reduction	\$12,500	\$2,000
8756392	Penalty reduction	\$9,100	\$2,000
8792294	Penalty reduction	\$32,800	\$2,000
8757027	Penalty reduction	\$7,700	\$2,000
8757029	Penalty reduction	\$27,900	\$2,000
8757030	Penalty reduction	\$27,900	\$2,000
8757032	Penalty reduction	\$27,900	\$2,000

8757033	Penalty reduction	\$27,900	\$2,000
<b>WEST 2015-128-M</b>			
8769565	Penalty reduction	\$3,000	\$100
8761663	Penalty reduction	\$20,000	\$5,000
<b>WEST 2015-304-M</b>			
8757026	Penalty reduction	\$1,842	\$100
8769599	Penalty reduction	\$6,624	\$100
<b>WEST 2015-305-M</b>			
8756373		\$2,000	\$2,000
8756375		\$2,000	\$2,000
8792276		\$2,000	\$2,000
8792279	Penalty reduction	\$6,624	\$2,000
8792280		\$2,000	\$2,000
8769587	Penalty reduction	\$5,645	\$2,000
8756383		\$2,000	\$2,000
8756385		\$2,000	\$2,000
8792290	Penalty reduction	\$6,624	\$2,000
8792293	Penalty reduction	\$6,624	\$2,000
<b>WEST 2015-306-M</b>			
8761658		\$4,000	\$4,000
<b>WEST 2015-370-M</b>			
8756380	Penalty reduction	\$25,800	\$2,000
8769585	Penalty reduction	\$30,200	\$2,000
<b>WEST 2015-440-M</b>			
8754775		\$4,000	\$4,000
8754776		\$4,000	\$4,000
8754778		\$4,000	\$4,000
<b>WEST 2015-462-M</b>			
8769615	Penalty reduction	\$70,000	\$2,000

<b>WEST 2015-547-M</b>			
8761659	Penalty reduction	\$15,971	\$4,000
8761660	Penalty reduction	\$15,971	\$4,000
8761664	Penalty reduction	\$15,971	\$100
8761665	Penalty reduction	\$15,971	\$4,000
<b>WEST 2015-596-M</b>			
8761661	Penalty reduction	\$15,971	\$4,000
<b>WEST 2015-670-M</b>			
8761657	Penalty reduction	\$125,400	\$4,000
8761662	Penalty reduction	\$122,700	\$4,000
<b>WEST 2017-093-M</b>			
8769608 Rory Williams	§ 110(c) violation	\$10,000	\$10,000
<b>TOTAL SETTLEMENT AMOUNT</b>		<b>\$310,000</b>	

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

OFFICE OF ADMINISTRATIVE LAW JUDGES  
1331 PENNSYLVANIA AVENUE, NW, SUITE 520N  
WASHINGTON, DC 20004-1710  
PHONE: (202) 434-9933 | FAX: (202) 434-9949

March 24, 2017

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

v.

PEABODY MIDWEST MINING, LLC,  
Respondent.

CIVIL PENALTY PROCEEDING

Docket No. LAKE 2016-0232  
A.C. No. 12-02295-404287

Docket No. LAKE 2016-0269  
A.C. No. 12-02295-404287

Docket No. LAKE 2016-268  
A.C. No. 12-02295-406669

Mine: Francisco Underground Pit

**DECISION DENYING MOTION IN LIMINE**

Before: Judge Moran

These consolidated dockets are before the Court upon petitions for the assessment of civil penalties under section 105(d) of the Federal Mine Safety and Health Act of 1977.<sup>1</sup> The Respondent has filed a Motion in Limine to Preclude the Secretary’s Use of Photographs and Reference to Measurements (“Motion”) and the Secretary filed a response in opposition thereto. For the reasons which follow, Respondent’s Motion is **DENIED**.

**Respondent’s Motion and the Secretary’s Response**

Respondent succinctly expresses its request that the Secretary be precluded “from introducing photographs and measurements with respect to Order Nos. 9036922 and 9036924[,] [b]ecause the Secretary cannot establish the location where the photographs and measurements were taken, [and therefore the] introduction of such evidence would be prejudicial to Peabody.” Motion at 1.

---

<sup>1</sup> A motion for approval of settlement has been presented for Docket No. LAKE 2016-268. However, the motion has not yet been approved as the Court has some questions about the motion. Therefore, it is still listed in the caption as one of the dockets to be heard for the hearing scheduled to commence on May 31, 2017.

The Respondent notes that the two orders involved reflect the inspector's allegation that, for Order No. 9036922,<sup>2</sup>

[l]oose coal ribs were observed in 10 entries for a distance of approximately 300 feet on the MMU-002 and MMU-012 active working sections measuring approximately 8 inches to 24 inches in thickness by 5 ½ to 6 feet in height and 30 to 40 feet in length gapped away from the solid pillar approximately 3 to 6 inches with rock dust present behind them[,] [and that for Order No. 9036924,<sup>3</sup> an associated inadequate preshift is alleged concerning] [a] hazardous condition (inadequately supported ribs) [ ] located on the #2 Unit, MMU-002 and MMU-022 active working sections from crosscut #1 to #5 in all entries and crosscuts.

R's Motion at 2.

In support of its motion, Respondent states that some 20 photographs associated with the Order are flawed in that neither the MSHA inspector who took the photos, nor the inspector's supervisor, was able to "identify with *specificity* the location at which each was taken." Motion at 3. (emphasis added). Instead, with respect to the location, each states "all 10 entries in by crosscut #1 to the face on both MMU-002 and MMU-022 active working sections." *Id.* Depositions of the MSHA officials served to reinforce the Respondent's position that "[i]t is unclear how many different areas these photographs depict, or whether these photographs are of different conditions or locations." *Id.* at 5. The Respondent's same objections as to vagueness apply to the measurements listed in Order No. 9036922 — the inspector "could not identify the location of the rib or ribs that gave rise to those measurements." *Id.* at 6.

Because of the above-described evidentiary infirmities, Respondent contends that admission of these items will be "unfairly prejudicial." *Id.* at 7. It asserts that such materials deprive it of the opportunity to defend against these allegations, as without "the specific locations of the photographs or measurements, Peabody cannot meaningfully rebut that evidence or the Secretary's characterization of the condition," and this thwarts its ability to challenge the claim that it engaged in aggravated conduct. *Id.* at 7-8.

The Secretary filed a Response in Opposition to the motion ("Response"), noting, "[t]he photographs included in the December 22, 2015 inspection notes from pages 34 to 52 contain time and date stamps. ... [that] [a]ll of the photographs included are taken on 12/22/15. ... [and that] [t]he measurements in the notes are consistent with the measurements expressed in the body

---

<sup>2</sup> Order No. 9036922 was issued on December 22, 2015 at 10:00 a.m.

<sup>3</sup> Order No. 9036924 was issued at 10 a.m. on December 23, 2015, the day after Order No. 9036922 was issued. It is unclear whether Order No. 9036922's reference to the loose coal ribs in 10 entries for a "distance of approximately 300 feet on the MMU-002 and MMU-012 active working sections" and the inadequate preshift exam alleged in Order No. 9036924 "located on the #2 Unit, MMU-002 and MMU-022 active working sections from crosscut #1 to #5 in all entries and crosscuts" relate to exactly the same areas. For example, it is unclear whether the reference to MMU-012 and MMU-022 is a typographical error.

of Order 9036922.” Response at 1-2. Perhaps more importantly, though not a direct response to the issue in the motion, the Secretary contends that “[t]he exact location of each photo and measurements would not change whether Respondent violated 30 C.F.R. §75.202(a).” *Id.* at 2.

Speaking to the particulars of the motion, the Secretary notes that the “Respondent will have an opportunity to cross examine the [inspector] about his photographs and measurements [and that] [t]he exact location of the photographs and measurements goes to weight and credibility of the evidence.” *Id.* at 3. The Secretary also filed a Memorandum of Law in support of its Response (“Memorandum”). That document notes that, per the inspector’s notes pertaining to the location and photographs, they pertain to “[a]ll 10 entries inby crosscut #1 to the face on the MMU-002 and MMU-022 active working section.” Memorandum at 2. The Secretary also, in effect, maintains that, assuming the infirmities alleged by the Respondent, “[t]he probative value of the photographs and measurements outweigh the prejudicial effect of the evidence on Respondent.” *Id.* at 3. The Secretary further points out that the photos are each date- and time-stamped, that the inspector was only at the Francisco Underground Pit that day, that they were taken in the MMU-002 and MMU-022 active working section, and that the inspectors were with mine personnel during the times the photos were taken. *Id.* at 2, 5. Finally, assuming that the shortcomings asserted by the Respondent are established, such information goes to the weight, as opposed to the admissibility, of such evidence. *Id.* at 7.

## Discussion

Although the Respondent has raised the specter of prejudice, the Court does not agree that it is presently “real and substantial” as the Respondent has suggested. Motion at 7. The protection provided against such potential prejudice is through the weight afforded to such evidence, a determination which cannot be made until all the evidence has been received concerning the photographs and the measurements. Thus, it is premature to speak of “actual prejudice.”<sup>4</sup> The Court, while agreeing with the broad principle cited by the Respondent that “[a] party is prejudiced when it is deprived the opportunity to defend against an allegation,” notes that Peabody Midwest will have a full opportunity to defend against the Orders. Motion at 7. This includes the opportunity to present such evidence as may establish that little weight should be afforded to the challenged photographs and measurements. If Respondent can establish that the “the absence of the specific locations of where the photographs and measurements were taken” deprives it of “the opportunity to meaningfully defend against the use of the photographs and measurements,” the weight afforded such evidence will be slight.<sup>5</sup> Motion at 8. *See, e.g., Black Beauty Coal*, 33 FMSHRC 1482, 1490 (June 2011).

---

<sup>4</sup> The Respondent acknowledges this in its motion, citing *Long Branch Energy*. *Long Branch Energy* 34 FMSHRC 1984, 1993 (Aug. 2012); Motion at 7.

<sup>5</sup> Accordingly, while the principle cited by the Respondent in *Cumberland Coal Resources*, 32 FMSHRC 442, 449 (May 2010), is correct, Peabody Midwest will have a fair and full opportunity to defend against the alleged violations.

The Court concludes that, on balance, the Secretary has the better of the argument in that, assuming the foundations can be properly laid for the introduction of the measurements and photographs, the objections raised by the Respondent more properly go to the weight of such evidence, not to admissibility. In reviewing the motion and the response, the Court contemplated a number of questions it would have about these evidentiary matters, but it will initially leave it to the able counsel to raise such points during the hearing.

**WHEREFORE**, the Respondent's Motion in Limine is **DENIED**.

**SO ORDERED.**

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

Distribution:

Paige I. Bernick, Esq., Office of the Solicitor, U.S. Department of Labor 211 7th Avenue North, Suite 420, Nashville, Tennessee 37219-1823

Anthony Fassano, Esq., U.S. Department of Labor, Office of the Solicitor, 170 S. Independence Mall West, Suite 630E, The Curtis Center, Philadelphia, PA 19106

Arthur M. Wolfson, Esq., Jackson Kelly PLLC ,Three Gateway Center, 401 Liberty Ave, Suite 1500 Pittsburgh, PA 15222

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

OFFICE OF ADMINISTRATIVE LAW JUDGES  
1331 PENNSYLVANIA AVE., N.W., SUITE 520N  
WASHINGTON, DC 20004-1710  
TELEPHONE: 202-434-9958 / FAX: 202-434-9949

March 30, 2017

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

v.

NEWMONT SLATE COMPANY, INC.,  
Respondent.

CIVIL PENALTY PROCEEDING:

Docket No. YORK 2016-20-M  
A.C. No. 43-00011-393999

Mine: Newmont Slate Co.

**DECISION**

Appearances: Emily B. Hays, Esq., U.S. Department of Labor, Office of the Solicitor,  
Denver, Colorado for Petitioner

John Williams, President, Newmont Slate Company, Inc., West Pawlet,  
Vermont for Respondent

Before: Judge Barbour

In this civil penalty proceeding arising under sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, as amended, 30 U.S.C. §§ 815, 820 (2012) (the “Mine Act”), the Secretary of Labor on behalf of his Mine Safety and Health Administration (“MSHA”) petitions for the assessment of civil penalties for 16 violations of mandatory safety, health, and training standards found in Parts 56, 46 and 62 of Title 30 Code of Federal Regulations. The violations are alleged to have occurred at a slate quarry and mill owned and operated by Newmont Slate Company, Inc. (“Newmont”). At the facility slate is quarried and then cut and shaped into shingles used primarily for roofing and cladding. Newmont is one of the few companies in the United States that does such work.

The citations were issued by MSHA Inspector John Burton who made findings regarding the existence of the alleged violations, the gravity of the violations and the negligence of the

company.<sup>1</sup> Burton also found that three of the alleged violations were significant and substantial contributions to mine safety hazards (“S&S violations”). The Secretary proposed civil penalties that in the aggregate total \$6,002.00. Newmont contested the violations and the proposed penalties asserting that some of the violations did not occur or if they did that Burton’s findings and many of the proposed penalties were not justified by the facts.

After the chief judge assigned the case the court issued an order requiring the parties to confer to determine if they could resolve their differences. When they could not the court asked a special counsel to intervene in the hope that an independent and impartial official could facilitate a settlement. When counsel’s efforts failed the court scheduled a hearing in Rutland, Vermont. The Secretary was represented by counsel. The company was represented by its president, John Williams.<sup>2</sup>

Prior to going on the record the court asked the parties to make a final attempt to reach an agreement on the case or at least to resolve their differences with regard to some of the alleged violations. The parties conferred, but again were unable to come to an understanding, and the case then went forward. Tr. 9-10.

---

<sup>1</sup> John Burton is a duly authorized mine inspector working out of the MSHA field office in Albany, New York. Burton graduated from high school in 1988 and then went into the United States Army where he served as a combat engineer and a heavy equipment operator. Following his honorable discharge Burton worked for a construction company as a foreman and a heavy equipment operator. After leaving the construction company Burton worked for a company producing and selling concrete redi-mix and the aggregates from which redi-mix is produced. While working in the redi-mix business Burton operated and maintained a wash plant, a screening plant, and he operated various types of mobile equipment. Tr. 33. He also was responsible for conducting workplace examinations and mobile equipment examinations. Tr. 33-24. Burton next worked as a haul truck driver for a construction company where he once again operated various types of heavy equipment.

<sup>2</sup> Williams has been mining slate for 53 years. He knows the business inside and out. However, he is not conversant with the mechanics of the Mine Act. Williams explained to the court that while in the past he accepted citations as written and paid fines as assessed, he found the process “downright annoying.” Tr. 19. Adding to his pique was his claim that the inspection during which the subject citations were issued resulted in the most citations the company ever received in a single inspection. Tr. 77. Williams stated he decided to use the present case to “see how the system works.” Tr. 19. He credited the Secretary’s counsel with perseverance and patience in explaining to him how violations are assessed and how they are contested. The court also recognizes and commends counsel’s willingness to add a teaching function to her many other duties. In going out of her way to assist Williams counsel acted in the best interests of her client and the public. The court also commends Williams for his efforts to better understand the Mine Act. The court recognizes the company was engaged in a learning experience that required a more than ordinary investment of counsel for the Secretary’s and the court’s time, but the court believes that the experience was worthwhile and that it will lead to a safer mine and a more harmonious relationship between the company and the agency.

**AGREED UPON FACTS AND CONCEDED VIOLATIONS**

Prior to hearing the witnesses, counsel for the Secretary reported that she and the company agreed upon several relevant facts, namely:

1. When the subject citations were issued, the company was subject to the jurisdiction of the Mine Act.
2. The company engaged in slate mining operations at the subject mine.
3. The company’s mining operations affected interstate commerce.
4. At all times relevant the company [was] an “operator” as defined in section 3(d) of the Mine Act.
5. Inspector Burton was acting in his official capacity as a duly authorized representative of the Secretary when he issued the subject citations.
6. The proposed penalties will not affect the company’s ability to remain in business.

Tr. 17-18, 21.

After stating his agreement with the facts, Williams advised the court that through his better understanding of the assessment and contest processes there were several citations he could accept as written, or, as Williams put it, he could “skip right over.” Tr. 20. As further explained below, ultimately Williams withdrew Newmont’s contests of seven citations. See “The Uncontested Citations,” *infra*.

**THE CONTESTED CITATIONS**

<b><u>CITATION NO.</u></b>	<b><u>DATE</u></b>	<b><u>30 C.F.R. §</u></b>	<b><u>PROPOSED ASSESSMENT</u></b>
8917961	8/25/15	56.4101	\$263

The citation states:

There were no signs readily visible prohibiting open flame or smoking or open flames at the 4 propane tanks [at] the west side yard area of the mill. The propane tanks supply propane to the mill building and miners transport and cleave slate in the west side yard area of the mill. This condition exposes a miner to a

fire/explosion hazard. In the event an accident were to occur it would be likely that fatal injuries would be expected.

Gov't Exh.9 at 1. The citation contains the inspector's findings that the cited condition was unlikely to lead to a fatal injury and was due to the company's low negligence.

In August 2015 Burton was assigned to inspect Newmont's quarry. Although he had inspected other slate quarries, the August inspection was his first visit to Newtown's facility.<sup>3</sup> Tr. 40. Burton began the inspection on August 25. Burton had been conducting inspections on his own for about 18 months. Tr. 70. When Burton arrived the mine was operating and production was ongoing. Tr. 62. During the inspection Burton was accompanied by Albert Gallupe, Newmont's maintenance foreman. *Id.*

Among the first things Burton observed were four propane tanks on the west side of the mill building. Burton looked but saw no signs prohibiting open flames or smoking in the vicinity of the tanks. Tr. 50. Burton described mandatory safety standard section 56.4101 (30 C.F.R. § 56.4101) as requiring "a mine operator [to] post readily visible signs where a . . . fire [and/or] explosion hazard exists." Tr. 50-51.

Burton explained that the tanks supply propane to the mill where miners cleaved slate into shingles.<sup>4</sup> No signs were posted on the tanks or in the area of the tanks warning miners of a fire or explosion hazard. Tr. 51. Burton found that the lack of signs constituted a violation of section 56.4101. *See* Gov't Exh. 9 at 3. However, he also found that it was unlikely the company's failure to post the signs would result in an accident. Still, if the gases in one of the tanks "were to vent" (meaning were to escape the tank) and to do so in the vicinity of an open flame, a fatal accident could occur.<sup>5</sup> Tr. 54. Burton stated that even though, "There were no open flames or sparking materials observed in or around the . . . tanks[.]" (Tr. 52) if an accident occurred, "the fireball and flying projectiles that would come from the steel tank would be expected to kill a miner." *Id.*; *see also* Tr. 130. Burton testified that only one person was subject to the hazards of a tank explosion, the person who regularly cleaved the slate. Tr. 55. He noted however that the area was traveled, albeit not regularly, by other miners in mobile equipment. Tr. 56 (*referencing* Gov't Exh. 9 at 4.), 58.

Burton found that Newmont's negligence was low. He acknowledged that Newmont management officials did not travel the area on a regular basis. He was of the view that the

---

<sup>3</sup> At the time the mine consisted of the quarry where slate was extracted, the mill buildings in and around which slate was processed and other structures related to the business. Tr. 41. The mine employed approximately 45 to 48 people. Tr. 43. Burton described the facility as "one of the larger slate mines in the region." Tr. 42. Burton stated if he were to rate the mine for cleanliness and organization he would consider it "about average." Tr. 69.

<sup>4</sup> According to Burton, the process of cleaving the slate requires the use of pneumatic hammers to "size the slate for thickness." Tr. 51.

<sup>5</sup> Indeed, as Burton noted, such a fatal accident occurred in 2001 at a different metal/nonmetal facility. Tr. 53-54; *see* Gov't Exh. 9(b).

officials might not have been aware of the absence of the required signs. This was especially true since the area was not required to be pre-shift or on-shift examined on a regular basis. Tr. 58. To abate the alleged violation the company placed a sign stating “No Smoking –Danger” at the edge of the road adjacent to the tanks. Tr. 64; Gov’t Exh. 9 at 4.

For his part Williams maintained that miners would recognize the propane tanks for what they were and would know not to have open flames or lighted cigarettes around them. Therefore, in William’s opinion a fatal accident was very unlikely. *See, e.g.*, Tr. 76.

**THE VIOLATION, ITS GRAVITY AND NEWMONT’S NEGLIGENCE**

Section 56.4101 states, “Readily visible signs prohibiting smoking and open flames shall be posted where a fire or explosion hazard exists.” Burton’s unrefuted testimony established the violation. A precondition for posting the required signs is a “fire or explosion hazard.” It is common knowledge that propane is highly flammable and explosive and as Burton stated, if the gases in any one of the tanks “were to vent” an open flame could spark an explosion. Tr. 54. The record supports finding the propane was regularly used in the process of cleaving slate in the mill and mill yard. Tr. 55. While it is true that Burton saw no open flame or flames in the vicinity of the tanks (*Id.*), without a warning sign or signs there was the potential hazard of a miner using flame producing equipment (*e.g.*, welding) or of lighting a cigarette dangerously near the tanks. If one or more of the tanks vented the gas could ignite and a catastrophic explosion could result. The court credits Burton’s testimony that such an event would likely result in a fatality. Tr. 130. Because of the grave consequences, the court concludes that violation was moderately serious, even though a resulting fire or explosion was unlikely given the small chance of a tank venting and of an ignition source being in the area.<sup>6</sup>

Burton found that Newmont’s negligence was low and the record supports the finding. Burton’s testimony that the area containing the propane tanks was not subject to regular pre-shift or on-shift examination and management officials did not travel past the tanks frequently was not contradicted. Tr. 58. Given this, it would have been easy for the company frequently to fail to note and correct the lack of warning signs.

<u>CITATION NO.</u>	<u>DATE</u>	<u>30 C.F.R. §</u>	<u>PROPOSED ASSESSMENT</u>
8917962	8/25/15	56.13011	\$585

The citation states:

There were two air receiver tanks . . . that did not have automatic relief valves or pressure gauges installed. First a blue Emglo 50 gallon air tank was connected to the air compressor in the yard splitting area. Second a 30 gallon air tank was mounted to air compressor c9804 in the

---

<sup>6</sup> The court fully agrees with Williams that most miners would recognize the propane tanks and would know not to produce an ignition source in their presence. Tr. 76.

quarry. Both air tanks did not have automatic pressure relief valves or an air pressure gauge installed on the air tanks. This condition does not allow a miner to know how much air is inside the portable air tanks nor does it allow the tank to vent if the maximum allowable working pressure is exceeded creating and exploding of a pressure vessel hazard [(sic.)]. In the event an accident were to occur it would be likely that a fatal injury would be expected.

Gov't Exh.10 at 1. The citation contains the inspector's findings that the cited condition was unlikely to lead to a fatal injury and was due to the company's moderate negligence.

Burton issued the citation because, "There were two receiver tanks at the mine that were not equipped with safety valves or pressure gauges." Tr. 84. Burton found the condition violated section 56.13011, which states that such tanks "shall be equipped with one or more automatic pressure relief valves" and that "[a]ir receiver tanks also shall be equipped with . . . pressure gauges." 30 C.F.R. § 56.13011; Tr. 84. Burton testified the words "shall" as used in the standard mean that the presence of pressure relief valves and gauges on the tanks are mandatory. *Id.* Burton maintained that one of the air tanks (the Emglo 50 gallon tank) was connected to an air compressor in the slate splitting area of the mill yard (also known as the slate cleaving area). The tank was not equipped with a pressure relief valve or a pressure gauge. Tr. 85. He further testified that he saw another air tank that was mounted on an air compressor. That tank, like the Emglo 50 gallon tank, did not have a pressure relief valve or a pressure gauge. *Id.* The two tanks were approximately 700 to 1000 feet apart. *Id.*

Burton identified a photograph of the Emglo 50 gallon tank and circled two ports on the tank where a pressure relief valve should have been located. Tr. 86; Gov't Exh. 10 at 3. Burton also identified a photograph of the air receiver tank that was mounted on an air compressor. Gov't Exh. 10 at 4. Neither a pressure relief valve nor a pressure gauge was present. Tr. 92. On the photograph Burton circled the ports where the relief valve and the pressure gauge should have been. Tr. 91-92; Gov't Exh. 10 at 4. Burton explained that the valves protected against the tanks exploding if they were "over pressured" (Tr. 86), and the gauges insured miners knew the tanks contained the right amounts of air. (Tr. 87).

In Burton's opinion both tanks presented with two conditions that violated section 56.13011. The tanks had no pressure relief valves and no pressure gauges. Tr. 88-89. Burton explained that the relief valves and pressure gauges are sometimes combined as a single piece of equipment and sometimes they are two separate pieces of equipment. Tr. 90-91. However, neither tank had either configuration.

Burton found that an injury was unlikely to occur as a result of the missing valves and gauges. Tr. 93. He noted the Emglo 50 gallon tank had a cracked air valve. Because of this it was operated at a lower air pressure than otherwise would have been the case. Tr. 93. Nonetheless, if either of the tanks became over pressurized and exploded, flying shrapnel could easily kill a miner. Tr. 95; Gov't Exh. 10 at 1. Burton believed the persons most likely to be affected were miners who used the tanks to cut slate. Tr. 96. He concluded that the hazard was enhanced by the

fact that both tanks were portable. They “could be moved anywhere on the mine site” and could be used by a miner who was not familiar with the equipment. Tr. 121, *see also* Tr. 125, 128.

Burton found that the company was moderately negligent. Gov’t Exh. 10 at 1. He based his finding on the fact that a miner told him it was permissible to operate the tanks without the valves and gauges because the tanks were usually connected to a “regulated compressor” and the regulated compressor system contained the required valves and gauges. Tr. 96. Based on the miner’s statement Burton concluded that mine management knew the condition existed. *Id.*

Williams was able to provide more information regarding the operation of the tanks. He explained that they were used to power a “rivet buster,” a pneumatic hammer used to break slate. He agreed pressure relief valves and pressure gauges were required but in his opinion their presence on the tanks was not mandatory. Rather, he thought they could be located as part of the regulated compressor system.<sup>7</sup> Tr. 103-04. Williams testified that the system’s compressor was located inside the mill. The compressor was connected to the cited tanks with a three quarter inch airline. Tr. 105. Although at the time of the inspection the Englo 50 gallon air tank was disconnected from the system and the air compressor was 400 feet away from the tank, Williams agreed that the tank could be moved and was available for use. Tr. 115-16. The same thing was true of the other cited tank. Tr. 116.

Williams maintained there was no chance the cited tanks would explode because the air pressure in the tanks was below the level necessary to cause their failure. Tr. 116. While an “oddball tank” could be dangerous, he noted the cited tanks had been checked and tested prior to use to confirm their integrity. Tr. 106. Williams argued that although the standard refers to “tanks,” technology had advanced to the point where the standard should be revised to apply to “[a]ir receiver systems.” *Id.*; *See also* Tr. 114. If the standard were reworded this way the company would be in compliance. *Id.* Nonetheless, Williams agreed that both of the cited tanks were air receiver tanks and that neither had a pressure relief valve and a pressure gauge on the tank. Tr. 109-10.

### **THE VIOLATION, ITS GRAVITY AND NEWMONT’S NEGLIGENCE**

The court finds the violation existed as charged. The standard is clear. It states that air receiver tanks “shall be equipped” with one or more automatic pressure relief valves and with pressure gauges. 30 U.S.C. § 56.13011. As Burton correctly noted, “shall be equipped” means that the specified items must be present on the tanks. Tr. 84-85. Burton testified that the items were not present on either tank (Tr. 85-86, 88-89, 91-92), and Williams agreed. Tr. 108-10.

While there was a violation, the testimony leads the court to conclude the violation was technical and that it presented virtually no hazard to the company’s miners. Burton agreed with

---

<sup>7</sup> Burton recognized that the system as a whole might have a pressure relief valve and that if it did the likelihood of an injury would be much reduced, but in his opinion the presence of a valve or gauge elsewhere in the system did not invalidate the violation. Tr. 119. Burton also agreed that the PSI rating of the tanks was lower because they were part of a system and that this too reduced the likelihood of an injury arising from the cited conditions. Tr. 120-21.

Williams that because the tanks were each part of a system they had a PSI rating below the level that was necessary for the tanks to pose an explosion hazard. Tr. 120-21. Moreover, according to Williams, there were valves and gauges in the system which served the same purpose as valves and gauges on the tanks. Tr. 106, 114. Williams's suggestion that the standard be revised to apply to "air receiver systems" rather than to tanks, was reasonable, and it may well be that such a revision would provide miners with the same level of protection as the present regulation.

Burton was concerned about the portability of the tanks. He feared they could be moved and used when not part of an overall system and thus be totally without the protection afforded by the valves and gauges. Tr. 121, 125, 128. However, the court notes that while Williams agreed such use was possible (Tr. 115-16), there is nothing in the record to indicate it was likely. Rather, Williams's testimony establishes that the tanks were primarily used to provide pneumatic pressure to the rivet buster and that when used this way the system of which the tanks were a part was protected with the valves and gauges. Tr. 103-04. Further, while Williams agreed that an "odd ball" tank could be dangerous, nothing in the record indicates either of the cited tanks was structurally defective in a way that posed a danger. For many of these reasons Burton found that it was unlikely a miner would be injured due to the violation. Gov't Exh. 10 at 1. The court goes further and for all of these reasons finds that it was extremely unlikely.

The court also departs somewhat from Burton's negligence finding. Burton believed the company knew its tanks lacked the required valves and gauges because a miner told him the tanks could be operated without that equipment since the tanks were connected to a regulated compressor. Tr. 96. The court credits what Burton was told, but unlike Burton the court concludes it significantly mitigates the company's negligence. The court finds that the miner was conveying to Burton the same belief about which Williams testified, to wit that if the required valves and gauges are a part of the system they are not required on the tanks. Tr. 103-04, 114. The company's belief, although mistaken, was reasonable, and the court concludes that Newmont's genuine, good faith belief it was in compliance reduced the company's otherwise moderate negligence to low.

<u>CITATION NO.</u>	<u>DATE</u>	<u>30 C.F.R. §</u>	<u>PROPOSED ASSESSMENT</u>
8917959	8/25/15	56.12018	\$585

The citation states:

There were two circuit breaker panels . . . that had circuit breakers that were not labeled to show the units they controlled. First, the main mill, east splitting room circuit breaker had one 480 volt 30 amp breaker that was not labeled. Second, the new mill 480 volt circuit breaker panel had one 100 amp and one 15 amp circuit breaker that were not labeled. The circuit breakers were in the ["on[]"] position. This condition does not allow a miner to know which circuit to de-energize in an emergency. In the event an accident were to occur it would be likely that fatal injuries would be expected.

Gov't Exh. 7 at 1. The citation contains the inspector's findings that the cited conditions were unlikely to lead to a fatal injury and were due to the company's moderate negligence.

During the course of his inspection Burton examined two circuit breaker panels that he found to be defective. One panel was in the main mill. The other was in a different mill, the “new mill.” Tr. 141; Gov’t Exh. 7 at 3. Each panel contained circuit breakers that were not properly labeled. Tr. 139. Therefore, Burton issued a citation to the company for violating section 56.12018, a mandatory safety standard requiring “the identification of power switches.” Tr. 140, Gov’t Exh. 7.

Burton described the first circuit breaker panel as the panel containing the breakers for the main mill’s east slate splitting room. In the panel there was one 480 volt 30 amp circuit breaker that was not labeled. *Id.* The unlabeled circuit breaker was in the “on” position, which indicated to Burton that the panel was energized. Tr. 141. The second panel was for the new mill building. It too was a 480 volt panel. The second panel contained two unlabeled circuit breakers, one for a 100 amp circuit and one for a 15 amp circuit. Tr. 140. These breakers also were in the “on” position. Tr. 141, 144. Burton testified that the lack of labels meant that a miner would not know which circuits to de-energize in an emergency or which breakers to lock out when making repairs. Tr. 141-42. Burton physically checked the unlabeled circuits with a “tick tracer” and confirmed that power was flowing to each of the three unlabeled circuits.<sup>8</sup> Tr. 142, 143-44; *See* Gov’t Exh. 7 at 3, 4.

Section 56.12018 requires the identification of “principal power switches.” In Burton’s view, both of the cited panels were principal power switches for the circuits controlled by the circuit breakers. Tr. 163-64. He explained when electricity enters the panels and comes to the circuit breakers, the breakers “[become] the principal power switch[es] for[the] circuit[s] from the circuit breaker panel[s] to the equipment.” Tr. 163-64. He stated, “[T]he power is subbed out from the panel and it is branched down to that circuit breaker which is the primary switch . . . for that circuit.” Tr. 155.

Burton described the hazard posed by the lack of labeling. “An unlabeled circuit breaker does not allow a miner to know which circuit to de-energize in an emergency, and it also does not allow [a] miner to know which circuit to de-energize, lock and tag out for repairs.” Tr. 141-42. However, Burton did not believe the conditions were likely to result in an injury. He noted that both panels were subject to main circuit breakers and that to de-energize the circuits in either panel “a miner could go to the main and switch that main breaker off in an emergency.” Tr. 149. Also, if work needed to be done on equipment on any of the subject circuits a miner would likely call on an electrician to do it. Referring the work to a knowledgeable electrician would reduce the chance of injury. Tr. 149. Nonetheless, were an injury to occur, Burton believed it was likely to result in a fatality. He noted that a “480 volt electric shock is often associated with fatal-type injuries.” Tr. 150.

Burton found the company was moderately negligent. There were numerous circuit breaker panels at the mine and the company knew the requirements of the standard since all but the cited circuits were labeled properly. Tr. 154. He also testified that although the company

---

<sup>8</sup> A “tick tracer” is a pocket tool designed to detect the presence of voltage in a wire or in a piece of equipment without actually making direct contact with the conductor or energized part.

subcontracted its electrical work, a management official told him that the company did not follow up with the subcontractor to ensure contracted electrical work was done correctly.<sup>9</sup> Finally, there is a requirement that the panels be inspected and none of the three unlabeled circuits was reported on a workplace examination report. Tr. 154-55.

Williams testified there are three safety features on the cited circuits. There is the main circuit breaker that cuts off power to all of the circuits, the individual circuit breakers that cut off power to the individual circuits and “fuse cut-offs” at the particular machines powered by the cited circuits. Tr. 159-60. In Williams’s view each protection reduced the likelihood of an electrical accident. Tr. 160.

### **THE VIOLATION, ITS GRAVITY AND NEWMONT’S NEGLIGENCE**

The standard is simply worded, “Principal power switches shall be labeled to show which units they control unless identification can be made readily by location.” It is certain that there were three circuit breakers in two panels that were not labeled. Burton’s oral testimony and the photographs introduced into evidence by the Secretary prove this. Tr. 139-42; Gov’t Exh. 7 at 3, 4. The unresolved issue is whether the circuit breakers were “principal power switches” within the meaning of the standard. Based solely on the record presented in this case, the court concludes they were.

As the court has previously noted:

[Q]uestions regarding the meaning of the phrase ‘principal power switch’ and whether particular cited equipment come within the meaning have repeatedly been brought to the Commission’s judges. While the judges have decided whether certain equipment is covered by the standard based on the facts of the cases before them, a definitive meaning of the phrase ‘principal power switch’ has yet to emerge. *See, e.g., Beverly Materials, LLC*, 35 FMSHRC 88, 95-97 (Judge Moran); *Cemex Construction Materials of Florida, LLC* . 34 FMSHRC 170, 174 (Jan. 2012 (Judge Zielinski); *Omya Arizona, A Division of Omya, Inc.*, 33 FMSHRC 2738, 2739-40 (Judge Miller); *Blue Mountain Production Co.*, 32 FMSHRC 1464, 1473-74 (Oct. 2010) (Judge Miller); *Tide Creek Rock, Inc.*, 19 FMSHRC390, 399 (Judge Manning); *Walker Stone Co., Inc.*, 12 FMSHRC 256, 264 (Feb. 1990 (Judge Fauver); *FMC Corp.*, 6 FMSHRC 1294, 1299

---

<sup>9</sup> Williams seemed to agree with Burton that although work on the panels was subcontracted, the company should have known the circuits were not labeled. He stated that although it was the electrical contractor who “screwed up,” “I should have caught it.” Tr. 160; *see also* Tr. 162.

(May 1984) (Judge Vail) (decided under identically worded standard (30 C.F.R. § 57.12-18.)

*US Silica Company*, 36 FMSHRC 517, 519 (Feb. 2014) (*fn omitted*); *see also Northern Illinois Service Co.*, 37 FMSHRC 1225 (June 2015) (ALJ Barbour).

In this particular case the record establishes that, as Burton testified, the circuit breakers were power switches in that they were components that could break an electric circuit. While, as the court has noted, there is no accepted meaning of the phrase “principal power switch” there is an accepted meaning of the word “principal” when it is used as an adjective. It means “chief” or “leading.” *See* Houghton Mifflin Harcourt, *The American Heritage Dictionary of the English Language, Fourth Edition* (2009) at 1395. Here, as Burton testified, the cited circuit breakers were the first switch[es] in the line of the individual circuit[s]” (Tr. 156) so that each switch was “the primary switch . . . for [its] circuit.” Tr. 155. The court construes a primary switch as the chief or leading switch in a circuit, and the court concludes that each cited circuit breaker was a “principal power switch” for its circuit. It may be, as Williams’s questions on cross examination suggest, that there was a principal power switch for all of the circuits in each breaker box. *See* Tr. 155-58. Indeed, Burton himself alluded to the presence of such a switch when testifying that the cited conditions were unlikely to result in an accident because “a miner could go to the main and switch the main breaker off in an emergency.” Tr. 149. However, Williams did not offer oral or visual evidence regarding such a switch or switches, and the court must rule based on the record before it, not on speculation as to what the record might have been if Williams had pursued the issue. The court therefore finds that the Secretary proved the violation.

Burton found that the violation was unlikely to result in an accident, and the court fully agrees. There evidently were other ways to shut power off to the affected circuits prior to working on them and the employees of the company’s electrical subcontractor would have been much more likely to recognize this than the company’s employees who did not specialize in electrical work. However, had an accident occurred, the court agrees with Burton that a fatality was likely. Burton stated the obvious when he testified that “a 480 volt electric shock is often associated with fatal-type injuries.” Tr. 150.

Finally, the court concurs with Burton that the company was moderately negligent. While Williams may have been right when he testified the company’s electrical subcontractor “screwed up” and failed to ensure the three circuits were labeled, as Williams also recognized, the company should have “caught” the mistakes. Tr. 160. Further, and as Burton testified, the workplace examination forms for the panels did not record the missing labels. While the company may have relied on the “expertise” of its subcontractor, it still was under a duty to ensure compliance with the standards. The company failed in its duty.

<u>CITATION NO.</u>	<u>DATE</u>	<u>30 C.F.R. §</u>	<u>PROPOSED ASSESSMENT</u>
8917956	8/25/15	56.14112(a)	\$585

The citation states:

The guard for “The Beast” [trimmer] saw was not secured in place. The saw was equipped with a nine-inch (approximate)

cutting blade. The saw[']s sliding table top is (approximately) 22 inches wide. The trimmer saw[']s cord was plugged in and the saw was available for use. The saw is used at the mill to custom trim dimension slate as needed. This condition exposes a miner to contact with the trimmer[']s rotating blade. In the event an accident were to occur it would be reasonably likely that permanently disabling injuries would be expected.

Gov't Exh. 4 at 1. The citation contains the inspector's findings that the cited condition was S&S, was reasonably likely to cause a permanently disabling injury and was due to the company's moderate negligence. Gov't Exh. 4 at 1.

Burton stated that he issued the citation because the trimmer saw's guard had been removed.<sup>10</sup> Tr. 173. The trimmer saw has a nine-inch blade and a 22-inch-wide tabletop. *Id.* The saw is used to trim slate to order. Tr. 183-84. When Burton inspected the saw he noticed that the guard for the blade was off and was sitting on a shelf beside the saw. Tr. 173-74; Gov't Exh. 4 at 6. Burton believed the saw had been used. Tr. 174. The saw was plugged into an energized wall outlet, and near the saw Burton observed pieces of slate that were typical of slate trimmed with the saw. Tr. 174-75, 177; Gov't Exh 4 at 7. Burton also noted dust around and on the pieces of the guard, which indicated to Burton that the "guard [had] been off . . . for a particular period of time, long enough to accumulate dust on it." Tr. 175. During that time Burton thought it likely the saw had been used since it was usually used daily at the mine. Burton also recalled that the mine foreman told him the guard was purposefully removed because it "may have been sticking." Tr. 185. This was another reason Burton thought it was likely that the saw had been operated with the guard off. Tr. 204

Burton believed the lack of a guard violated section 56.14112(b), which requires that guards be securely in place while machinery is operated. Gov't Exh. 4. He was quick to point out, however, that he could have cited the company for a violation of section 56.14107(a), a standard requiring the guarding of moving machine parts that can cause injury to persons. Tr. 200. In view of Burton's testimony counsel for the Secretary moved to amend the Secretary's petition to plead in the alternative a violation of section 56.14107(a). Williams did not object, and the motion was granted. Tr. 205-08.

Burton testified that the danger presented by the condition was that a miner's hands might contact the rotating saw blade. Tr. 178. He explained that when a miner trims slate, the miner secures the slate piece to the saw's table top, places his hands on the hand holds of the table top and pushes the table top and slate through and past the saw's rotating blade. The procedure brings the miner's hands very close to the turning blade. Tr. 180-81. The lack of a guard means there was "direct exposure of a miner to the rotating and moving machine parts" of the saw. Tr. 183-84. While only the miner who operated the saw was likely to be affected by the alleged violation (Tr. 188), Burton thought an accident involving the miner was reasonably likely and that as a result of the accident the miner was likely to lose all or part of his or her hand, and possibly all or part of his or her limb. Tr. 186. Burton termed such an injury a "dismemberment-type injury." *Id.* Burton emphasized that the saw was not tagged out and that electricity was

---

<sup>10</sup> Burton described the guards as ""two pieces [of plastic] that join together." Tr. 176.

flowing to it. Tr. 184, 186. He also noted that the saw was typical of the type that is used daily at mine. Tr. 185. Because the lack of a guard meant that a miner was directly exposed to the moving saw blade and therefore was “reasonably likely . . . [to] make contact with [the saw’s moving blade]” and suffer a permanently disabling injury, Burton found that the alleged violation was S&S. Tr. 187-88.

Williams testified that the company owned the saw for approximately five years. Because the saw did not come with a guard the company manufactured and installed one. Tr. 197. Williams agreed the saw was “safer if it is guarded.” *Id.* Williams stated that one of his employees removed the guard on purpose. Tr. 198.

### **THE VIOLATION, ITS S&S NATURE, ITS GRAVITY AND NEWMONT’S NEGLIGENCE**

Section 56.14112(b) requires guards to be “securely in place while machinery is being operated.” Although the standard can be read narrowly as requiring an inspector to observe cited machinery in operation without a required guard, the court believes a more expansive reading is equally valid, to wit that a violation can properly be cited if it is reasonable to infer cited machinery was operated without a required guard. A persuasive argument can be made that the dust that accumulated on the parts of the guard (Tr. 175, 190), the slate ready to be cut and trimmed that was near the guard’s parts (Tr. 174-75, 177; Gov’t Exh. 4 at 7), the fact that the saw was plugged into an energized outlet (177-78) and the fact that Burton and Williams were told the guard was purposefully removed (Tr. 204, 198), when coupled with the fact that the saw was of the type in daily use at the mill (Tr. 185), support the inference that the saw was used without the guard prior to Burton’s inspection. In the court’s opinion, this inference would establish the alleged violation of section 56.14112(b), and the court would find a violation of the standard were it not for the court’s belief that the Secretary’s alternative theory rests on an even more solid legal footing.

Section 56.14107(a) states that moving machine parts shall be guarded to protect persons from contacting “gears, sprockets, chain . . . pulleys, flywheels, couplings, shafts, fan blades and similar moving parts that can cause injury.” While saw blades are not specifically mentioned in the standard they are similar to the moving parts mentioned and contact with moving saw blades can cause injury. Therefore, saw blades must be guarded. The blade of the cited stripping saw was not guarded, and the court finds the failure to guard the blade violated section 56.14107(a).

An S&S violation is “of such nature as could significantly and substantially contribute to the cause and effect of a . . . mine safety . . . hazard.” 30 U.S.C. §814(d). 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 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.*, 53 F.3d 133, 135 (7<sup>th</sup> Cir. 1995); *Austin Power Co., Inc.* 861 F.2d 99, 103 (5<sup>th</sup> Cir. 1988) (approving the *Mathies* criteria). An experienced MSHA inspector’s opinion that a violation is S&S is an important element for the court to consider when making an S&S determination. *Harlan Cumberland Coal Co.*, 20 FMSHRC 1275, 1278-79 (Dec. 1998).

The Commission has explained that the focus of the *Mathies* analysis “centers on the interplay between the second and third steps.” *ICG Illinois*, 38 FMSHRC 2474, 2475 (Oct. 2016) (citing *Newtown Energy Inc.*, 28 FMSHRC 2033 (Aug. 2016)). The second step requires the judge to adequately define the “particular hazard to which the violation allegedly contributes[,]” and then determine whether “there exists a reasonable likelihood of the occurrence of the hazard against which the mandatory safety standard is directed.” *Id.* at 2475-76. This determination must be made “based on the particular facts surrounding the violation[.]” *Id.* The third step requires the judge to assume the existence of a hazard and assess whether the hazard “was reasonably likely to result in a serious injury.” *Newtown* at 2038; *ICG Illinois* at 2476. Applying that test, the court concludes the violation of section 56.14107(a) was S&S.

First, as the court has found, the company violated section 56.14107(a). The second step requires the court to define the particular hazard to which the violation contributed and then to determine whether there existed a reasonable likelihood of the occurrence of the hazard. The hazard in this instance was of a miner being cut by a moving saw blade, and it is clear to the court that the lack of a guard for the blade contributed to this hazard. Therefore the question is whether there was a reasonable likelihood a miner would be cut by the moving, unguarded blade. Burton’s testimony established that there was. He described how a miner must place his or her hands on hand holds adjacent to the blade as the miner pushes the table top through and past the rotating blade. Tr. 180-81. A misplaced hand, a slip while pushing the table top, and a lack of attention to the task, singly or in combination, could result in the loss of a finger or hand or the maiming of an arm. In other words, the nature of the task and the closeness of the saw operator’s hands to the moving blade in the court’s view support Burton’s finding that it was reasonably likely the saw operator would be injured. It is obvious to the court that the injury would be serious. The saw operator would be lucky if he or she only lost a finger. The court affirms Burton’s opinion that the violation was S&S.

In addition to being S&S the violation was serious. A violation that places a miner in reasonably likely danger of being maimed or dismembered cannot be viewed otherwise.

There is also the question of Newmont’s negligence. The court accepts the inspector’s finding that the company’s lack of care was moderate. Management should have detected and corrected the violation. It was, as Burton testified, open and obvious. Tr. 189. Moreover, the dust on the pieces of the guard leads to the reasonable inference that the violation existed for some time. Management certainly understood that the guard should have been in place. After all, the company provided the protection in the first place. Tr. 197. The company was under a duty to ensure that the saw was guarded, and it failed to meet its duty.

<u>CITATION NO.</u>	<u>DATE</u>	<u>30 C.F.R. §</u>	<u>PROPOSED ASSESSMENT</u>
8917963	8/25/15	56.14103(b)	\$392
<u>CITATION NO.</u>	<u>DATE</u>	<u>30 C.F.R. §</u>	<u>PROPOSED ASSESSMENT</u>
8917968	8/26/15	56.14103(b)	\$362

The two citations concern cracked windows, one on a haul truck and one on an excavator.

Citation No. 8917963 states

The front window of . . . [a] haul truck . . . was cracked creating a hazard to the operator. The front window had two vertical cracks and one horizontal crack spanning the width of the window. A pen tip test of the widow[']s cracks indicated the cracks had raised edges. A miner was observed touching the glass with finger tips. This condition creates a laceration hazard to a miner[']s hands while touching the glass. In the event an accident were to occur it would be likely that injuries resulting in lost work days or restricted duty would be expected.

Gov't Exh. 11 at 1. The citation contains the inspector's findings that the cited condition was S&S, was reasonably likely to lead to a lost workdays or restricted duty injury and was due to the company's low negligence.

Citation No. 8917968 states:

The lower window in the operator's station of the Volvo EC290CL . . . [excavator] was damaged creating a hazard to the operator. The lower window measured (approximately)  $32\frac{1}{4}$  inches by  $14\frac{5}{8}$  inches. The left side of the window and the upper right corner was taped with duct tape restricting an operator[']s vision and the lower right corner of the window had star shaped cracks with raised edges and divots in both sides of the glass. A miner was observed touching the glass with a bare hand. This condition restricts an operator[']s vision through the window and [creates] a laceration hazard to a miner[']s hands from contact with the broken window. In the event an accident were to occur it would be reasonably likely a miner would receive injuries resulting in lost work days or restricted duty.

Gov't Exh.16 at 1. The citation contains the inspector's findings that the cited condition was S&S, was reasonably likely to lead to a lost workdays or restricted duty injury and was due to the company's moderate negligence.

According to Burton, section 56.14103(b), the standard cited in both instances, requires that windows of the cabs of self-propelled mobile equipment be "maintained for visibility and also that [the windows] not create a hazard to the operator." Tr. 214-15. Burton described the subject front window of the haul truck as having "two vertical cracks and one horizontal crack. The horizontal crack spanned the width of the window." Tr. 215. *See* Gov't Exh. 11 at 6. He described the cracks as being toward the middle of the window. Tr. 221; *See* Gov't Exh. 11 at 6. He further observed that the cracks had "raised edges" that subjected the hand on anyone touching the window to cuts. *Id.* Burton knew the cracks had raised edges because he moved the tip of his ball point pen over the cracks and could hear the pen tip "click" when it traveled over a

raised crack.<sup>11</sup> He also testified that the company's maintenance foreman agreed that the edges of the cracks were raised. Tr. 218. According to Burton, the truck is used daily to move slate to the waste pile or to the mill. Tr. 220.

In Burton's view the raised cracks presented a cut hazard in that a miner would clean the window of the truck to maintain visibility. In addition, during the preoperational examination of the truck the truck driver would move his bare hand across the crack. Tr. 216. Burton testified that during his inspection of the truck, he saw the truck driver touch the crack with his bare hand, although this was in response to a pen tip test conducted by Burton. Tr. 217, 218-19. Burton also stated he determined "through interviews" that miners used "paper towels or rags to clean the glass," which would put a miner's hand directly on the cracks with only a piece of paper towel or a piece of cloth between the cracks and the miner's skin. Tr. 218. Burton believed that a miner was putting his bare hand "in close proximity" to the cracked glass every time he or she cleaned the windshield. Tr. 220. He further noted that the window needed to be cleaned frequently because of dust accumulating on it.<sup>12</sup> Tr. 221-22.

Burton believed an injury was reasonably likely because he "observed a miner reaching out and directly . . . exposing himself to [the] hazard" and because a miner put a bare hand in close proximity to the glass every time he or she cleaned it. Tr. 219-20. Burton found the resulting injury was likely to result in lost workdays or restricted duties because if a miner cut his or her finger the miner would first have to have someone look at the cut and then, perhaps, have the cut stitched. Also, if a glass shard lodged under the miner's skin the injury could lead to an infection and the infection could cause a miner to miss work. Tr. 220-21.

Burton found that the company's negligence was low. Burton testified he was told that two weeks prior to his inspection the truck had stopped abruptly, the hood had popped up hitting and cracking the front window, and the truck operator had not told mine management or noted the condition on his pre-shift report. Tr. 227. Burton learned that the haul truck driver was the only person who operated the truck and that the driver did not tell management because he did not believe the cracks interfered with his vision. Tr. 224. But, the condition had existed for two weeks and Burton thought that during the two weeks management officials should have seen the cracks and replaced the window. Tr. 225.

---

<sup>11</sup> Burton explained the "pen tip" test as follows:

I don't put my hand against the glass. I take [a] pen tip and I go across the glass, and if that pen tip clicks when it comes to a crack I know that the two pieces of glass are not on the same plane and it indicates that there is a raised crack in the glass and a cut hazard to a miner's hand.

Tr. 215-16.

<sup>12</sup> However, when Burton was asked how likely it was a miner would clean the windshield in August when the cab side windows would be rolled up to take full advantage of the cab's air conditioning system, Burton responded that it was "tough to say." Tr. 223.

With regard to the excavator, Burton stated that it was used multiple times a day to move slate, stone or rubble to the mill or to the waste dump (Tr. 231-32) and that he issued the citation because the lower window of the operator's compartment on the excavator was damaged and Burton believed that the damage created a hazard to the excavator operator and others. Tr. 229. The left side (when viewed from inside the compartment) of the window was half covered with duct tape. There was also a smaller amount of duct tape on the right side of the window. Tr. 230; Gov't Exh. 16 at 4. Under the duct tape on the lower right side were star shaped cracks with raised edges. Both sides of the window had divots. *Id.* According to Burton, the duct tape, cracks and divots obscured the excavator operator's vision. Tr. 230. He feared that "with [the] reduced visibility . . . a miner might not be able to effectively see to operate the equipment." Tr. 321. Burton testified that the lack of full visibility could cause a fatality in that when the excavator was operated near the edge of a highwall or drop off, the miner operating the excavator might not see the edge or might misjudge the distance resulting in the excavator over-traveling the edge and causing serious injury or death to the excavator operator. Tr. 233. Moreover, other miners worked in close proximity to the excavator and they could be hit and/or run over because the operator's vision was limited. Tr. 233-34. The possible injury would affect one person, either the operator of the excavator or a miner working near the excavator. *Id.*

Burton also feared the cracks created a hazard by exposing the excavator operator to cuts on his or her hands. Tr. 230. Burton thought it was reasonably likely a miner would suffer hand cuts because he actually saw a miner touch the cracks with his bare hand after Burton conducted a pen tip test on the window. Tr. 231. He further believed the condition of the window was likely to lead to lost workdays or restricted duty because if a miner cut his hand while making contact with the glass it could involve a trip to the doctor and the cut or imbedded glass shards might lead to an infection. Tr. 232.

Burton concluded that Newtown was moderately negligent. The fact the window was taped indicated someone knew of the condition but did not correct it. Tr. 235.

Williams did not challenge the existence of the defective windows but he was skeptical of the inspector's S&S findings. He questioned if, given the small elevation between the cracks in the haul truck's window, anyone touching the cracks was likely to get more than a minor cut or an abrasion requiring a Band-Aid. Tr. 239. Williams also disputed Burton's scenario that

A miner would receive a cut to the finger, he or she would have to go to a doctor [to] have it evaluated. There is the potential that bandaging would have to be applied, that there is a potential for infection to the cut and/or bandaging or stitches would have to be [applied and] a doctor would have to be visited a second time and those materials be removed and the cut inspected.

Tr. 243-244. Williams responded, "Pretty doomy and gloomy for a little cut. I've been cut a million times and never gone to a doctor for anything unless it was real deep." Tr. 244.

## THE VIOLATIONS, THEIR S&S NATURE, THEIR GRAVITY AND NEWMONT'S NEGLIGENCE

Section 56.14103(b) requires the replacement or removal of damaged windows on operators' stations of self-propelled mobile equipment if the damage obscures visibility necessary for the safe operation of the equipment or if the damage creates a hazard to the equipment operator. The court finds the Secretary proved both of the alleged violations, albeit for somewhat different reasons. Because there was no evidence to the contrary the court concludes that the front window on the haul truck was cracked as described by Burton. Tr. 215, 221, Gov't Exh. 11 at 6. The cracks caused the edge of the glass on one side of the cracks to be slightly raised above the other side. The raised nature of the cracks was confirmed by Burton's "pen tip" test. Tr. 215-16. The court agrees that the raised cracks presented a cut hazard to the haul truck operator as he cleaned dust from the windshield. Tr. 217-19. The hazard caused by the damage to the window established the violation with regard to the haul truck.<sup>13</sup>

The damage to the window of the excavator as described by Burton also was not disputed by Newmont. Therefore, the court finds that the lower window of the operator's compartment was extensively taped to the point where the left side of the window was totally covered and the right side had a rectangular block of tape covering the upper right side of the lower window. Tr. 229-30; Gov't Exh.'t. 16 at 4. In addition, there were cracks with raised edges on the lower right side of the window. *Id.*

The court credits Burton's testimony that the damaged window presented a hazard to the excavator operator. The duct tape on the lower window obviously obscured his or her vision of the immediate vicinity in which he or she was operating the excavator. The court agrees with Burton that failing to see the ground near the equipment could lead to the equipment operator misjudging the room in which he or she had to maneuver. As Burton maintained, if the excavator was near a highwall or other drop off the operator might not see the edge or might mistakenly think there was more room to operate than in fact was the case sending the excavator and its operator over the edge. Tr. 233. Or, as Burton noted, the operator might not see a miner working in the immediate vicinity of the excavator and might because of his or her limited vision hit or run over the miner. Further, the court credits Burton's testimony that the raised cracks exposed the equipment operator to cuts as he or she tried to clear dust from the lower window. Tr. 230. Therefore, the court finds the damaged window of the excavator both created a cut hazard to the equipment operator and obscured the operator's visibility—visibility necessary to safely operate the excavator. Tr. 233.

While the court agrees with the inspector that the company violated section 56.14103(b) in both instances, it finds that only the damage to the excavator's lower window was an S&S violation. There is no gainsaying the fact that a haul truck driver would from time to time clean the inside of the haul truck's windshield to remove dust. However, as Burton testified the driver would have a rag or paper toweling between his fingers and hands and the glass. This minimized the chance of a severe cut and/or of a glass shard lodging in the driver's finger or hand. Even if

---

<sup>13</sup> The court discounts the hazard allegedly posed by the driver touching the cracks with his bare hand. Burton's finding of this hazard was primarily premised on the driver responding to Burton's pen tip test, an action that was unlikely to recur.

the operator was bare handed nothing more than a painfully annoying cut or splinter was reasonable to expect, and such injuries do not rise to the level of being reasonably serious as required by *Newtown*. The court concludes Williams was correct when he stated that the cracks in the haul truck's windshield were most likely to result in a cut or an abrasion requiring a Band-Aid. Tr. 238. Burton's scenario of a cut or splinter requiring a doctor's care, bandaging, possible stitches and a resulting infection with follow up doctor's visits is possible, but not reasonably so. Tr. 243-44.

On the other hand, the damaged lower window on the excavator was indeed an S&S violation. All of the *Mathies* criteria as explained in *Newtown* were met. There was a violation of section 56.14103(b). The excavator was used multiple times a day, and the danger created by the violation was that its operator being unable to see in full the ground to the front and to the side of the excavator, would not see the distance he or she had in which to maneuver or would misjudge the distance and would inadvertently send the excavator over a drop off. Tr. 231-32. Williams did not challenge Burton's testimony in this regard. Nor did he contradict Burton's belief that the excavator operator's lack of full vision subjected a miner working in the immediate vicinity of the excavator to the danger of being hit and/or run over. Tr. 233. The court concludes that the frequent use of the excavator made the occurrence of these hazards reasonably likely as mining continued and it is obvious that the occurrence of either scenario was reasonably likely to result in a serious injury.

Given the findings with regard to the S&S nature of the haul truck violation the court concludes the cracks in its windshield did not constitute a serious violation. While it is true one person was subject to possible injury, the court has found that the injury was likely to be minor in nature. This is not the case with regard to the damaged lower window of the excavator. The restricted visibility that resulted from the violation was likely to cause the serious injury or death of the excavator operator or of a miner working adjacent to the excavator. The court therefore finds the violation was serious.

Finally, the court concludes that both violations were caused by Newmont's moderate negligence. The defective windshields were visually obvious. Both the haul truck and the excavator were subject to pre-shift examinations. The violations should have been detected and corrected, and they were not. *See* Tr. 225, 227, 235.

<u>CITATION NO.</u>	<u>DATE</u>	<u>30 C.F.R. §</u>	<u>PROPOSED ASSESSMENT</u>
8917967	8/26/15	56.6900	\$243

The citation states:

There were deteriorated explosives in magazine #2 of the mine. There was one box of explosive[s] containing 48 sticks of 1 – ¼ by 8 inch 60% explosive[s] (Lot number 08JA14J1). The explosive sticks['] wrapping paper was discolored and white crystals had begun to form on one of the sticks. This condition creates an uncontrolled detonation of

explosive materials hazard. In the event an accident were to occur it would be likely that fatal injuries would be expected.

Gov't Exh. 15 at 1. The citation contains the inspector's findings that the cited condition was unlikely to lead to a fatal accident and was due to the company's moderate negligence. Gov't Exh. 15 at 1.

On August 26 Burton examined the mine's Magazine Number 2, a magazine containing dynamite.<sup>14</sup> Tr. 255. Burton was accompanied by the company's blaster. Tr. 256. Burton noticed a box of explosives labeled "Lot No. 08JA14J1." Tr. 256. The label indicated the box contained 48 sticks of dynamite. To verify the number of sticks inside the box the inspector and the blaster opened the box. Each stick was an inch and a quarter in diameter by eight inches long. The sticks contained sixty percent explosive material. Tr. 254. Burton described the wrapping paper of the sticks as "discolored." Tr. 254. In addition, according to Burton, "White crystals had begun to form on the outside of one of the sticks." *Id.* The white crystals indicated to Burton that the explosive material in the stick had deteriorated to the point where, "The explosive agent on the inside [of the stick] had started to bleed out through the paper." *Id.* Because of the deterioration Burton questioned if the explosives were safe to handle. The blaster too felt uncomfortable because of the discoloration and crystal formation. Burton testified the blaster said that, "[T]he explosives contained in that box [are] unsafe." Tr. 257. Burton added that he was told by the blaster that agents from the Bureau of Alcohol Tobacco and Firearms ("ATF") visited the mine one week before Burton's inspection. The agents informed the company the explosives should be disposed of.<sup>15</sup> *Id.*, Tr. 261. The blaster added that the company planned to detonate the explosives in an on-site blast the next day, August 27. Tr. 262.

Despite the company's plan to dispose of the dynamite, Burton issued a citation to Newmont because of the deteriorated explosives. Gov't Exh. 15. The inspector cited the company for a violation of section 56.6900, which states that, "Damaged or deteriorated explosive material shall be disposed of in a safe manner in accordance with the instructions of the manufacturer." Burton recognized that under the standard the company needed to know who the manufacturer of the explosives was so as to conform to the manufacturer's disposal instructions. Tr. 259. Austin Powder was the manufacturer, and Burton called Austen Powder. Austin Powder's representative told Burton that the discolored and crystalized sticks had in fact deteriorated and that such explosives typically are consumed in a nonproductive blast or are burned. Tr. 259-60. In Burton's opinion the company "had been warned " by the ATF to eliminate the dynamite but they "had already let [them] set for six days." Tr. 266. He added, "When they have deteriorated explosives they need to take corrective actions to remediate that hazard. The fact that they were told days prior actually indicates . . . that the issue is not being taken seriously." *Id.*

---

<sup>14</sup> There are a total of five magazines at the mine. Tr. 277.

<sup>15</sup> Burton explained that ATF personnel from time to time inspect blasting operations at mines.

Burton recognized that the dynamite was being stored in an ATF approved magazine, which he stated was “about the safest place on the mine that explosives could be.” Tr. 263. However, should an unplanned explosion occur, a fatality could be expected. Tr. 263. The person most likely to be killed would be a miner accessing the magazine. Tr. 264. He noted that an unplanned explosion could result from just handling the explosives because once they start deteriorating, “They become potentially unstable . . . and merely even handling the explosive[s] could set [them] off.” *Id.*

Because the ATF put the company on notice and the company failed to act promptly Burton found the company to be moderately negligent. Tr. 265. Burton stated, “[O]ne week seems excessive.” *Id.*

Williams explained that explosives usually deteriorate during the summer when the heat causes the components of the dynamite to separate Tr. 272-73. He further explained that dynamite is not easy to detonate. To cause it to explode dynamite has to be “hit with quite a shock.” Tr. 273. In William’s opinion it is best to leave deteriorated dynamite in a static location and to dispose of it when the next regularly scheduled blast takes place. *Id.*

Williams explained that the company kept only one or two boxes of dynamite on hand to use for small projects. He speculated that the relatively infrequent use of dynamite at the mine was why the subject explosives deteriorated. Tr. 274. He was adamant the deteriorated dynamite was not dangerous. He stated, “There was no unsafe factor there. So, it was just an overeager inspector trying to get another citation.” *Id.* Williams added that a box of dynamite costs \$300.00 and because the company “didn’t feel like buying \$300 worth of dynamite for no reason at all” it was waiting “until the next shot . . . [which] hadn’t come yet.” Tr. 275.

When Burton returned to the mine on September 14, he was advised that the deteriorated explosives had been consumed in a blast before his return visit (Tr. 286), and he terminated the citation. Gov’t Exh. 15 at 2.

## **THE VIOLATION**

The court concludes the Secretary did not prove a violation. The court has no doubt the inspector identified a safety hazard. The court credits Burton’s description of the deteriorated dynamite and his explanation that the box and its contents posed a hazard. Tr. 254. The court also credits the blaster’s opinion as expressed to Burton that the dynamite was not safe. Tr. 257. When Burton wrote the citation he described the violative condition as the presence of the defective explosives. (“There were deteriorated explosives in magazine #2 of the mine.” Gov’t Exh. 15 at 1.) During his testimony he expanded his reason for issuing the citation by adding that when deteriorated explosives are present the standard requires an operator to “take corrective actions to remediate that hazard.” Tr. 266. In his view the company did not take the required corrective action in a timely manner. *Id.* The problem for the Secretary is that when drafting the regulation he said nothing overt about the time within which deteriorated explosives must be eliminated. Rather, the regulation addresses the manner in which such explosives must be destroyed or otherwise removed from the mine. The standard states that they must be eliminated, “in a safe manner in accordance with the instructions of the manufacturer.” 30 C.F.R. § 56.6900.

While it is conceivable a manufacturer would recommend a time within which a defective product should be removed or eliminated, the record does not reveal whether Austin Powder set or suggested such a time limit, or what that time limit otherwise was. *See* Tr. 260-66. Further, even if a “reasonable” time limit is implied in the otherwise silent standard, the court, like Burton, would credit the blaster’s statement that the deteriorated explosives would have been destroyed in a manner recommended by Austin Powder on August 27 [<sup>16</sup>], and the court would conclude that this was a reasonable time under all of the circumstances. Tr. 262, 266-67. The court notes the lack of any evidence the explosives would be handled before they were destroyed and the lack of evidence that their undisturbed presence in the magazine (“the safest place in the mine that explosives could be”) until August 27 would pose a hazard. Tr. 263. The Secretary needed to prove the passage of a week and a day was an unreasonable risk, and he did not do so.

<u>CITATION NO.</u>	<u>DATE</u>	<u>30 C.F.R. §</u>	<u>PROPOSED ASSESSMENT</u>
8917954	8/25/15	56.4201(a)(1)[ <sup>17</sup> ]	\$585

The citation states:

There were 4 fire extinguishers in the mill building at the mine that had not received monthly examinations. The [company’s] designee to conduct examinations had retired and [he had] not been replaced. Records located on the extinguishers showed exams had been performed through June of 2015. This condition does not allow a miner to know if the extinguisher will function in an emergency. In the event an accident were to occur it would be likely that injuries resulting in lost workdays would be expected.

Gov’t Exh. 2 at 1. The citation contains the inspector’s findings that the cited condition was unlikely to lead to an accident resulting in lost workdays or restricted duty and that the violation was due to the company’s high negligence. Gov’t Exh. 15 at 1.

During the course of the August 25 inspection Burton found four fire extinguishers in the mill that apparently had not been examined in more than a month. Tr. 295-96. According to Burton, under section 56.4200(a)(1) the extinguishers “are required to receive an exam on a monthly basis.”<sup>18</sup> Tr. 296. Burton stated that a tag on each of the four extinguishers recorded the last examination as taking place in June 2015. *Id.* Burton acknowledged that none of the extinguishers were functionally defective. *Id.* However, in Burton’s view a monthly examination

---

<sup>16</sup> Burton stated that he “took [the blaster] at his word.” Tr. 266.

<sup>17</sup> The inspector mistakenly cited the condition as violating section 56.4200(a)(1). At the hearing counsel for the Secretary moved to amend the citation to allege a violation of section 56.4201(a)(1). The company did not object, and the motion was granted. Tr. 310-11.

<sup>18</sup> Burton misspoke; he meant to say that monthly examinations are required under section 56.4201(a)(1).

is important because it “allows a miner to know that a . . . fire extinguisher will effectively function in an emergency situation.” Tr. 297. If an extinguisher malfunctions a miner can suffer prolonged exposure to smoke and fire and may lack the ability to control a fire in its early stages, which may in turn lead to smoke inhalation or burns. *Id.*

Burton found that the company was highly negligent. Gov’t Exh. 2 at 1. He stated the company knew the employee who conducted the examinations retired and Newmont should have assigned another miner to undertake the examinations. Tr. 298. Burton also observed that management officials traveled through the mill building daily. The fact the examinations had not been recorded was visually obvious given the last dates on the tags. *Id.* Burton stated that the only explanation he was given for the fact the inspections had not been conducted and recorded was that “the company had overlooked replacing the retired miner.” Tr. 299.

Williams maintained a person in fact examined extinguishers at the mine, and he asked Burton how many extinguishers Burton inspected. Burton stated he looked at “numerous” other extinguishers.<sup>19</sup> Tr. 299. Williams observed that “a new man missed [only] four of them.” *Id.* In Williams view failing to inspect and record the inspections of four of its many fire extinguishers was not egregious. Tr. 303-04.

Burton responded that Williams walked through the mill every day. In Burton’s opinion Williams knew the monthly examinations of the fire extinguishers had not been performed. Tr. 305-06. As Burton put it, “It is the mine operator’s responsibility to conduct [the] examinations or to designate somebody and follow up to make sure they have been done.” Tr. 308.

### **THE VIOLATIONS, ITS GRAVITY AND NEWMONT’S NEGLIGENCE**

The Secretary easily established that Newmont violated section 56.4201(a)(1) which requires that “fire extinguishers be inspected visually at least once a month to determine that they are fully charged and operable.” Burton’s testimony that the inspection tags on four extinguishers in the mill showed that the extinguishers were last inspected in June was not challenged by Newmont. Tr. 295-96. The court infers that Newmont’s failure to record the monthly visual inspections in July meant that the July inspections were not done with regard to the four extinguishers, just as Burton alleged, and it concludes Newmont violated section 56.4201(a)(1). While it is possible, as Burton testified, that the failure to monthly examine a fire extinguisher could lead to a miner suffering excessive smoke inhalation and/or burns, in the matter at hand the four extinguishers were in no way defective rendering the likelihood of injury somewhere between minimal and non-existent. Tr. 297. The violation was technical and non-serious in nature.

Further, the court concludes the company’s negligence was low. While Burton maintained the company should have assigned another employee to replace the missing examiner (Tr. 298, 299), the record supports finding that is exactly what the company did. Burton agreed that he examined “numerous” fire extinguishers at the mine and that only four were in violation of section 56.4201(a)(1). Tr. 299. The court concludes that someone conducted and recorded the

---

<sup>19</sup> Burton put the number between a dozen and twenty-five. Tr. 309.

monthly inspections for all of the fire extinguishers except four. In the court's opinion this mitigates Newmont's negligence to the point where its failure to comply was of a low degree.

<u>CITATION NO.</u>	<u>DATE</u>	<u>30 C.F.R. §</u>	<u>PROPOSED ASSESSMENT</u>
8917957	8/25/15	56.14100(b)	\$585

The citation states:

The manufacturer installed left hand seat belt on the #5 TMC forklift . . . was fastened to the manufactured mounting point by a knot tied in the seatbelt. The forklift is used to move slate products in the mill building of the mine. This condition exposes a miner to a fall/run over by mobile equipment hazard. In the event an accident were to occur it would be likely that fatal injuries would be expected.

Gov't Exh. 5 at 1. The citation contains the inspector's findings that the cited condition was unlikely to lead to an accident resulting in fatal injuries and was due to the company's moderate negligence. Gov't Exh. 5 at 1.

On August 25 Burton testified he inspected four or five forklifts at the mine. Tr. 325. All were manufactured by the same company, TCM. Tr. 325-26. Burton explained that when inspecting the No. 5 forklift he found that its left hand seat belt was fastened to the mounting point with a knot. The belt had "been cut off and . . . had been threaded back through the bracket and literally tied in a knot to hold it onto the forklift." Tr. 317. When seat belts are installed by TMC they are attached to a bracket and the bracket is bolted to the frame of the forklift. Tr. 317-18. Burton also explained that the No. 5 forklift was equipped with a falling object protection structure (a "FOPS") and that there is no standard requiring a forklift with a FOPS to have a seatbelt. However, Burton understood if the equipment comes from the manufacturer with a seatbelt, because the seatbelt affects safety, defects to the seatbelt must be timely corrected to prevent a hazard to the equipment operator. Tr. 318. Because the knot in the cited seat belt was hand tied, there was no way to ensure whether it would hold as intended by the manufacturer. Burton therefore believed that the hand tied seatbelt was defective and violated section 56.14100(b). Tr. 319.

The No. 5 forklift was used daily to move slate in and around the mill buildings. Tr. 319, 322. The danger posed by the condition was that in the event of an accident the seatbelt might not hold the forklift operator on the equipment. He or she could fall off and be hit or run-over by the forklift or by another piece of equipment. Tr. 319, *see also* Tr. 324

Burton checked and found that the defective seatbelt was not reported on any of the pre-shift examinations of the forklift. In his view this reflected management's misplaced belief that the seatbelt was not required to be maintained on the forklift, and he found that the company was moderately negligent. Tr. 325; Gov't Exh. 5 at 1.

Williams stated that only the No. 5 forklift came from the manufacturer with a seatbelt. Like Burton, Williams noted that seatbelts are not required on equipment with FOPS, and he

questioned why the company was required to maintain a seatbelt that was not a requisite component of the equipment. Tr. 327. Williams further stated that the mine's forklifts travel on level ground at about five miles per hour and that all have centers of gravity about one foot off of the ground, making them extremely unlikely to overturn. Tr. 328.

### **THE VIOLATIONS, ITS GRAVITY AND NEWMONT'S NEGLIGENCE**

Section 56.14100(b) states, "Defects on any equipment . . . that affect safety shall be corrected in a timely manner to prevent the creation of a hazard to persons." When determining whether the standard has been violated the evidence must be evaluated in the light of what a "reasonably prudent person, familiar with the mining industry and the protective purpose of the standard, would have provided in order to meet the protection intended by the standard." See e.g., *Cannon Coal Co.*, 9 FMSHRC 667, 668 (April 1987); *Quinland Coal, Inc.*, 9 FMSHRC 1614-1618 (September 1987). *Ideal Cement Co.*, 12 FMSHRC 2409, 2415 (September 1990). Applying this test, the court finds that the Secretary established the violation. TMC manufactured the fork lift with a seat belt. In the court's opinion a reasonably prudent person would assume the seat belt served its intended purpose of keeping the fork lift operator in place in case the fork lift was involved in an accident or overturned. To provide the maximum amount of protection the seat belt had to be securely affixed to the frame of the fork lift. Tying the seatbelt to its mounting point offered less protection in that the knotted belt would tend to give in the event of a mishap. In the court's view a reasonably prudent person would have replicated the condition of the seat belt as it came from TMC by permanently reattaching the belt to the frame.

The Commission addressed the timeliness requirement in section 56.14100(b) in *Lopke Quarries, Inc.*, 23 FMSHRC 705 (July 2001). The Commission determined that, "[w]hether the operator failed to correct the defect in a timely manner depends entirely on when the defect occurred and when the operator knew or should have known of its existence." *Id.* at 715. Little evidence was offered by the Secretary regarding "timeliness." However, a reasonable inference can be drawn that Newmont did not timely comply. Burton testified to his understanding that the forklift was used daily (Tr. 322). Williams did not dispute Burton or offer other evidence of the frequency of use, and the court concludes that the forklift was in fact used every day the mine operated. Burton also testified that he looked at the pre-shift examination reports for the forklift for several days prior to the inspection and found that the defective seatbelt was not reported. Linking the daily use with the non-reporting and with William's stated belief the company was under no obligation to return the seatbelt to its original condition, Burton inferred the defective seatbelt was not repaired in a timely manner. The court finds Burton's inference to be reasonable under the circumstances, and it affirms the violation.

The inspector found the violation was unlikely to result in a fatal injury. The court agrees and finds the gravity of the violation was nil. Williams's statement that the forklift was all but impossible to overturn because of its low center of gravity was not disputed, nor was his testimony that when in use the forklift traveled at about five miles per hour, a speed making collisions extremely unlikely. Tr. 328. Moreover, the fact that the parties agreed the forklift could have come from TMC without a seatbelt and not run afoul of any safety standards speaks volumes about the minimal hazard posed by the cited condition. Tr. 318, 327.

Burton found that Newmont was moderately negligent. The court finds the company's negligence was low. The violation was based upon the company's good faith belief compliance was not required because the seatbelt was not required. *See* Tr. 327. The company's conclusion was reasonable even though it was wrong. In the court's view Newmont's reasonable, good faith belief greatly mitigated its negligence.

**OTHER CIVIL PENALTY CRITERIA**

Counsel for the Secretary asserted that in the 15 months prior to August 25, 2015, there were 43 cited, assessed and paid violations at Newmont's mine, which counsel described as an "average" number. Tr. 166-67, 25; Gov't Exh. 1. The court finds the company's history of previous violations not to be such as to increase or decrease the court's assessments. With regard to the size of the mine, counsel maintained that the company was "not small." Tr. 168. However, the court notes that in proposing penalties the Secretary appears to have regarded the mine as somewhere between a small and medium size facility. *See* Petition for Assessment of Civil Penalty, Exh. A. The court finds the size to be such as not to warrant assessments above those proposed. The court further notes that in proposing penalties the Secretary credited Newmont with good faith in attempting to achieve timely compliance. *Id.* Finally, the parties agreed that any penalties assessed will not affect Newmont's ability to continue in business. Relevant Fact 6.

**ASSESSMENT OF CIVIL PENALTIES**

**THE CONTESTED CITATIONS**

<b><u>CITATION NO.</u></b>	<b><u>DATE</u></b>	<b><u>30 C.F.R. §</u></b>	<b><u>PROPOSED ASSESSMENT</u></b>	<b><u>ASSESSMENT</u></b>
8917961	8/25/15	56.4101	\$263	\$263

The court finds that the violation was serious and that the company's negligence was low. Given these findings and the other civil penalty criteria the court assesses the penalty proposed by the Secretary.

<b><u>CITATION NO.</u></b>	<b><u>DATE</u></b>	<b><u>30 C.F.R. §</u></b>	<b><u>PROPOSED ASSESSMENT</u></b>	<b><u>ASSESSMENT</u></b>
8917962	8/25/15	56.13011	\$585	\$200

The court finds that the violation was not serious and that the company's negligence was low. Given these findings and the other civil penalty criteria the court assesses a penalty of \$200 for the violation.

<b><u>CITATION NO.</u></b>	<b><u>DATE</u></b>	<b><u>30 C.F.R. §</u></b>	<b><u>PROPOSED ASSESSMENT</u></b>	<b><u>ASSESSMENT</u></b>
8917959	8/25/15	56.12018	\$585	\$585

The court finds that the violation was moderately serious and that the company's negligence was moderate. The court's findings do not diverge significantly from Burton's, and the court assesses the penalty proposed by the Secretary.

<b><u>CITATION NO.</u></b>	<b><u>DATE</u></b>	<b><u>30 C.F.R. §</u></b>	<b><u>PROPOSED ASSESSMENT</u></b>	<b><u>ASSESSMENT</u></b>
8917956	8/25/15	56.14112(a)	\$585	\$585

The court finds that the violation was moderately serious and that the company's negligence was moderate. The court's findings do not diverge significantly from Burton's, and the court assesses the penalty proposed by the Secretary.

<u>CITATION NO.</u>	<u>DATE</u>	<u>30 C.F.R. §</u>	<u>PROPOSED ASSESSMENT</u>	<u>ASSESSMENT</u>
8917963	8/25/15	56.14103(b)	\$392	\$250

The court finds that the violation was not serious and that the company's negligence was moderate. The court further finds that the violation was not S&S. Accordingly, the court will modify the citation to reflect that an injury could reasonably be expected to result in no lost workdays. In addition it will delete the inspector's S&S finding and modify his negligence finding from low to moderate. Given these findings and the other civil penalty criteria the court assesses a penalty of \$250 for the violation.

<u>CITATION NO.</u>	<u>DATE</u>	<u>30 C.F.R. §</u>	<u>PROPOSED ASSESSMENT</u>	<u>ASSESSMENT</u>
8917968	8/26/15	56.14103(b)	\$362	\$362

The court finds that the violation was S&S, was serious and was caused by the company's moderate negligence. The court's findings do not diverge from Burton's, and the court assesses the penalty proposed by the Secretary.

<u>CITATION NO.</u>	<u>DATE</u>	<u>30 C.F.R. §</u>	<u>PROPOSED ASSESSMENT</u>	<u>ASSESSMENT</u>
8917967	8/26/15	56.6900	\$243	\$0

The court finds that the Secretary did not prove the violation. A penalty cannot be assessed.

<u>CITATION NO.</u>	<u>DATE</u>	<u>30 C.F.R. §</u>	<u>PROPOSED ASSESSMENT</u>	<u>ASSESSMENT</u>
8917954	8/25/15	56.4201(a)(1)	\$585	\$200

The court finds that the violation was not serious and that the company's negligence was low. Given these findings and the other civil penalty criteria the court assesses a penalty of \$200 for the violation.

<u>CITATION NO.</u>	<u>DATE</u>	<u>30 C.F.R. §</u>	<u>PROPOSED ASSESSMENT</u>	<u>ASSESSMENT</u>
8917957	8/25/15	56.14100(b)	\$585	\$200

The court finds that the violation was not serious and that the company's negligence was low. Given these findings and the other civil penalty criteria the court assesses a penalty of \$200 for the violation.

### THE UNCONTESTED CITATIONS

As noted above, during the course of the hearing and after a discussion with counsel, Williams in effect withdrew the company's contest of the citations set forth below. Tr. 135-36,

165-66. Given Newtown’s withdrawal the court finds that the violations existed as charged. The penalties are assessed as proposed.

<u>CITATION NO.</u>	<u>DATE</u>	<u>30 C.F.R. §</u>	<u>PROPOSED ASSESSMENT</u>	<u>ASSESSMENT</u>
8917955	8/25/15	56.12032	\$176	\$176

<u>CITATION NO.</u>	<u>DATE</u>	<u>30 C.F.R. §</u>	<u>PROPOSED ASSESSMENT</u>	<u>ASSESSMENT</u>
8917958	8/25/15	56.14115(b)	\$263	\$263

<u>CITATION NO.</u>	<u>DATE</u>	<u>30 C.F.R. §</u>	<u>PROPOSED ASSESSMENT</u>	<u>ASSESSMENT</u>
8917969	8/25/15	46.9(a)	\$100	\$100

<u>CITATION NO.</u>	<u>DATE</u>	<u>30 C.F.R. §</u>	<u>PROPOSED ASSESSMENT</u>	<u>ASSESSMENT</u>
8917966	8/25/15	46.9(a)	\$100	\$100

<u>CITATION NO.</u>	<u>DATE</u>	<u>30 C.F.R. §</u>	<u>PROPOSED ASSESSMENT</u>	<u>ASSESSMENT</u>
8917965	8/25/15	56.6132(a)(6)	\$108	\$108

<u>CITATION NO.</u>	<u>DATE</u>	<u>30 C.F.R. §</u>	<u>PROPOSED ASSESSMENT</u>	<u>ASSESSMENT</u>
8917964	8/25/15	56.4201(a)(1)	\$100	\$100

<u>CITATION NO.</u>	<u>DATE</u>	<u>30 C.F.R. §</u>	<u>PROPOSED ASSESSMENT</u>	<u>ASSESSMENT</u>
8917960	8/25/15	56.9301	\$100	\$100

Tr. 135-36, 165-66.

**ORDER**

The inspector’s negligence finding in Citation No. 8917962 **IS MODIFIED** from “moderate” to “low,” his gravity finding in Citation No. 8917963 **IS MODIFIED** from reasonably likely to result in “lost workdays or restricted duty” to reasonably likely to result in “no lost workdays,” his S&S finding in Citation No. 89817963 **IS DELETED**, and the inspector’s negligence finding in Citation No. 8917957 **IS MODIFIED** from “moderate” to “low.” Further, Citation No. 8917967 **IS VACATED**.

Within 30 days of the date of this decision, Newtown **SHALL PAY** civil penalties in the amount of \$3,592 (\$2,645 for the violations found in the contested citations and \$947 for the violations found in the uncontested citations).<sup>20</sup> Upon **PAYMENT** of the penalties, this proceeding is dismissed.

/s/ David F. Barbour  
David F. Barbour  
Administrative Law Judge <sup>21</sup>

Distribution: (Certified Mail)

Emily B. Hays, Esq., U.S. Department of Labor, Office of the Solicitor, MHSA Backlog, 1244 Speer Blvd., Suite 216, Denver, Colorado 80204

John Williams, President, Newmont Slate Company, Inc., 720 Vt. Rte. 149, West Pawlet, Vermont 05775

/db

---

<sup>20</sup> Payment shall be sent to: MINE SAFETY AND HEALTH ADMINISTRATION, U.S. DEPARTMENT OF LABOR, PAYMENT OFFICE, BOX 790390, ST. LOUIS, MO 63179-0390.

<sup>21</sup> This is the last decision the court will author. The court thanks all who have appeared before it for the civility and respect they have shown the court and one another. The court believes it is decorum grounded in the recognition that through playing our parts to resolve disputes that inevitably arise over the interpretation and implementation of the Mine Act and the regulations promulgated thereunder, we are furthering the law's fundamental purpose – to enhance “the health and safety of [the industry's] most precious resource – the miner.” 30 U.S.C. § 802 (a). It has been a privilege for the court to be part of the process.

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES  
1331 PENNSYLVANIA AVENUE, N.W., SUITE 520N  
WASHINGTON, D.C. 20004

March 31, 2017

SECRETARY OF LABOR,  
MINE SAFETY AND HEALTH  
ADMINISTRATION (MSHA),  
on behalf of JEFFREY PAPPAS,  
Complainant,

v.

CALPORTLAND COMPANY, and  
RIVERSIDE CEMENT COMPANY,  
Respondents.

DISCRIMINATION PROCEEDING

Docket No. WEST 2016-264-DM  
WE MD 16-02

Mine ID 04-00011  
Mine: Oro Grande Quarry

## DECISION

Appearances: Abigail G. Daquiz, Esq., and Sonya P. Shao, Esq., U.S. Department of Labor, Office of the Solicitor, Seattle, Washington, on behalf of Complainant;

Brian P. Lundgren, Esq., and Erik M. Laiho, Esq., Davis Grimm Payne & Marra, Seattle, Washington, for CalPortland Company;

Karen L. Johnston, Esq., Jackson Kelly PLLC, Denver, Colorado, for Riverside Cement Company.

Before: Judge Paez

This complex case is before me upon a complaint of discrimination filed by the Secretary of Labor (“Secretary”), on behalf of Jeffrey Pappas, against CalPortland Company (“CalPortland”) and Riverside Cement Company (“Riverside”), pursuant to section 105(c)(2) of the Federal Mine Safety and Health Review Act of 1977 (“Mine Act”), 30 U.S.C. § 815(c)(2).<sup>1</sup>

### I. PROCEDURAL HISTORY

In October 2015, Jeffrey Pappas filed a complaint with MSHA alleging discrimination under section 105(c) of the Mine Act against CalPortland. After an investigation, the Secretary chose to pursue the case on behalf of Pappas and filed an application for temporary reinstatement pursuant to section 105(c)(2) of the Mine Act against CalPortland. I held a hearing on the temporary reinstatement on January 5, 2016, and granted the Secretary’s application. Upon review, the Federal Mine Safety and Health Review Commission (“Commission”) upheld Pappas’s temporary reinstatement. CalPortland subsequently filed a petition for review with the

---

<sup>1</sup> In this decision, the hearing transcript, the joint exhibit, the Secretary’s exhibits, Riverside’s exhibits, and CalPortland’s exhibits are abbreviated as “Tr.,” “Joint Ex. #,” “Ex. S-#,” “Ex. RCC-#,” and “Ex. CPC-#,” respectively.

U.S. Court of Appeals for the D.C. Circuit, which granted CalPortland's petition and vacated the Commission's decision and order for temporary reinstatement on October 20, 2016.<sup>2</sup> Pursuant to the D.C. Circuit's formal mandate, I dismissed the temporary reinstatement proceeding on December 14, 2016.

On February 11, 2016, the Secretary filed a discrimination complaint on behalf of Pappas with the Commission. Chief Administrative Law Judge Robert J. Lesnick assigned the matter to me on March 11, 2016. On March 11, 2016, the Secretary filed an amended complaint adding Riverside as a respondent to the proceeding and proposing penalties of \$20,000 and \$15,000 against Riverside and CalPortland, respectively.<sup>3</sup> CalPortland and Riverside each filed an answer to the amended complaint on April 8, 2016. After consultation with the parties, I issued a Notice of Hearing on April 14, 2016, and set this matter for hearing on December 6–9, 2016, in San Bernardino, California.

Prior to the hearing, the parties filed several motions. On November 10, 2016, Respondents Riverside and CalPortland each filed a motion for summary decision, which I denied in a separate order on December 2, 2016. On November 18, 2016, Respondents Riverside and CalPortland filed a Joint Motion to Compel Discovery Responses, which I also denied in a separate order on December 2, 2016. On December 2, 2016, the Secretary filed a Motion in Limine to Exclude Riverside Cement Company Witnesses and a Motion for Sanctions for Spoliation of Evidence, both of which I denied in a separate order on March 30, 2017.<sup>4</sup>

---

<sup>2</sup> The D.C. Circuit held Pappas was an “applicant for employment” under section 105(c)(2) who was not eligible for temporary reinstatement. *CalPortland Co. v. FMSHRC*, 839 F.3d 1153, 1156 (D.C. Cir. 2016). The court maintained, however, that CalPortland may still be held liable for discrimination under section 105(c)(2). *Id.* at 1164 (“In a final decision, CalPortland, as the successor operator of the Oro Grande plant, could perhaps be ordered to instate Pappas if it was found to have violated the Mine Act when it failed to hire him. . . .”) (internal citation omitted).

<sup>3</sup> At the hearing, the Secretary moved to amend the complaint to allege that CalPortland is a successor-in-interest to Riverside. (Tr. 312:2–16.) Counsel for CalPortland stated its objection to the motion on the record, arguing that CalPortland was not placed on notice and would be prejudiced by the amendment. (Tr. 313:3–21, 314:21–316:24.) However, I noted on the record that the Secretary pled the claim that CalPortland is a successor to Martin Marietta, Riverside's owner, in its initial application for temporary reinstatement filed on December 8, 2015. (Tr. 317:1–9; App. Temp. Restatement at 2.) I also noted that in its decision on appeal of the temporary reinstatement proceeding, the D.C. Circuit stated the Secretary could pursue a successorship theory during the discrimination case on the merits. (Tr. 317:11–15); *supra* note 2. I therefore concluded that the parties have been on notice that a successorship issue exists in this case. (Tr. 317:15–19.) For the reasons stated, I granted the Secretary's motion to amend the complaint with regard to the successorship issue. (Tr. 316:25–317:24.)

<sup>4</sup> The Secretary moved to exclude Riverside's presentation of Jamie Ambrose's and David Salzborn's testimony, asserting that Riverside falsely claimed it did not have access to  
(continued...)

I held a hearing on December 6–9, 2016, in San Bernardino, California. At the hearing, the parties stipulated to the following:

1. Respondent Riverside is an operator within the meaning of the Mine Act.
2. Respondent CalPortland is an operator within the meaning of the Mine Act.
3. Oro Grande Quarry, Mine I.D. No. 04-00011, is subject to the jurisdiction of the Mine Act.
4. The Administrative Law Judge has jurisdiction in this matter.
5. Jeffrey Pappas was a laborer at the time of his termination in September 2015 from his employment at Riverside.
6. On or about October 12, 2015, Jeffrey Pappas filed a discrimination complaint with MSHA under section 105(c) of the Mine Act.
7. Jeffrey Pappas’s employment with Riverside was terminated on September 30, 2015.
8. The exhibits to be offered by the parties are stipulated to be authentic, but no stipulation is made as to their relevance or truth of the matters asserted therein.

(Tr. 23:9–24:12, 26:18–22; Joint Ex. 1.) The Secretary presented testimony from three witnesses: Jeffrey Pappas, the complainant; William Arps, Jr.,<sup>5</sup> a miner at Oro Grande and local union

---

<sup>4</sup> (...continued)

these witnesses and failed to adequately respond to discovery requests related to their knowledge of Pappas’s work history. (Mot. to Exclude at 1–7.) Because the Secretary’s motion did not show any attempt to depose or obtain contact information directly for either witness, despite having advanced notice of their identity and role in these proceedings, I denied the motion.

<sup>5</sup> At the hearing, Riverside and CalPortland objected to the Secretary’s presentation of Arps’s testimony and requested it be excluded because he was not timely disclosed as a miner witness. (Tr. 322:20–324:25.) I issued a Notice of Hearing on April 14, 2016, which stated that if the Secretary intended to call miner witnesses, pursuant to 20 C.F.R. § 2700.62, the number of such witnesses shall be noted in a prehearing statement and a list of names of such witnesses with a description of their expected testimony shall be filed and served on all parties by 9:00 a.m., Pacific Time, on the second business day prior to the hearing.

Counsel for Riverside pointed out that the Secretary neither noted the number of miner witnesses in his prehearing statement nor timely filed the name of the miner witness with a description of his expected testimony. (Tr. 323:10–25.) Respondents asserted that the late filing hampered counsels’ ability to prepare for the witness. (Tr. 324:5–25.) Counsel for the Secretary admitted to the deficiencies in her filings, but suggested the miner be able to testify later in the

(continued...)

president; and Kyle Jackson, an MSHA special investigator.<sup>6</sup> Riverside presented testimony from three witnesses: Timothy Sheridan, Martin Marietta's director of employee relations; David Salzborn, former plant manager at Oro Grande; and Jamie Ambrose, a former human resources generalist for Riverside. CalPortland presented testimony from four witnesses: Jamie Ambrose, currently a human resources manager at CalPortland; Robert Binam, CalPortland's vice president, general counsel, and corporate secretary; Steven Antonoff, CalPortland's vice president of human resources; and Betsy Lamb, CalPortland's former vice president of organizational planning and development.

The parties completed briefing on February 10, 2017, and each filed post-hearing briefs and reply briefs.

## II. ISSUES

The following issues are before me: (1) whether the Secretary has established by a preponderance of evidence that Riverside discriminated against Pappas in violation of section 105(c) of the Mine Act, and if so, what are the appropriate remedies; and (2) whether the Secretary has established by a preponderance of evidence that CalPortland discriminated against Pappas in violation of section 105(c) of the Mine Act, and if so, what are the appropriate remedies.

## III. FINDINGS OF FACT

### A. Background of the Oro Grande Facility

The Oro Grande mine is a cement manufacturing facility located in Oro Grande, California. (Ex. S-31 at 104-115.) From 1998 to 2014, Texas Industries ("TXI") owned the Oro

---

<sup>5</sup> (...continued)

hearing to give Respondents additional time to prepare. (Tr. 325:2-15.) Counsel for the Secretary also stated on the record the purpose of Arps's testimony. (Tr. 326:15-20.)

The Secretary failed to abide by my Notice of Hearing. (Tr. 326:1-6.) I reasoned, however, that because only one witness was at issue the prejudice could be cured. (Tr. 326:21-327:12.) Respondents suggested and agreed to have a 10-minute break, allow Arps to subsequently testify on direct examination, and then have an extended lunch break after his direct examination to prepare their cross-examinations. (Tr. 327:24-328:14.) I granted Respondents' request and allowed Arps's testimony. (Tr. 328:15-17, 377:10-15.)

<sup>6</sup> At the close of the Secretary's case, Riverside and CalPortland each moved for a directed verdict. (Tr. 596:21-610:1.) Riverside moved for a directed verdict on the grounds that the Secretary failed to establish a nexus between Pappas's protected activity and the adverse action. (Tr. 596:21-599:15.) CalPortland moved for a directed verdict on the grounds that the Secretary did not establish that CalPortland had knowledge of Pappas's protected activity and that the Secretary's successorship theory of liability fails. (Tr. 599:17-610:1.) Given the volume of the record that needed to be reviewed in this matter to render a complete and full decision, I denied both motions for a directed verdict. (Tr. 613:8-614:4.)

Grande facility through a subsidiary named Riverside Cement Company (“Riverside”). (Tr. 61:24–62:2, 655:13–18; Ex. S–31 at 105.) In July 2014, Martin Marietta purchased TXI in a stock purchase and assumed operation of Riverside and its Oro Grande facility. (Tr. 409:16–410:9, 655:25–656:2, 777:2–4; Ex. S–31 at 105.)

Under Martin Marietta, Riverside operated the Oro Grande facility around the clock because of the difficulty of shutting down and restarting the cement plant’s kiln. (Tr. 64:19–21, 813:13–23.) The facility had several revolving shifts running 24 hours a day, seven days a week, and employed approximately 150 employees, approximately 110 of whom were hourly employees. (Tr. 44:14–16, 856:8–15; Exs. CPC–27, CPC–28 at 3–5, S–37 [112: 10–23, 127:3–7].) The mine’s hourly employees were represented by the United Steel Workers union. (Tr. 333:2–5, 412:22–413:6, 723:22–724:6; Ex. RCC–26.) Generally, a newly-hired hourly employee at the mine would begin as a laborer, which was physically demanding work involving shoveling debris and other tasks. (Tr. 37:18–23, 42:10–12, 331:10–12, 332:15–333:1.)

Hourly employees could transfer to different positions through a bidding process according to the collective bargaining agreement (“CBA”) the union had with Riverside Cement Company under TXI, which was extended by Martin Marietta. (Tr. 43:16–25, 414:6–415:8; RCC Ex. 26 at 50–57.) Under this process, consideration for a position was first based on seniority, provided the senior bidder was physically capable of performing the position’s duties. (Ex. RCC–26 at 53.) Additionally, an employee could “bump” into different positions at the mine in the event the miner’s current position was eliminated or re-organized. (Ex. RCC–26 at 50–51.)

The CBA also established grievance procedures by which the union represented employees who had disputes with the company. (Tr. 345:8–351:19; Ex. RCC–26 at 29–32.) The grievance process consisted of four steps. (*Id.*) The first step involved the aggrieved employee consulting his immediate supervisor. (Ex. RCC–26 at 29.) If the grievance remained unresolved, the second step involved a meeting between the company’s representative and the union committee to discuss the grievance. (*Id.* at 29–30.) If no agreement was made at the second step, the third step consisted of a meeting with the company’s director of human resources and union representatives. (*Id.* at 30.) Finally, the fourth step involved the grievance’s referral to arbitration, which included the involvement of the United Steel Workers’ international representative. (*Id.* at 30–31; Tr. 334:11–24.)

On June 30, 2015, just about a year after Martin Marietta acquired the mine, CalPortland signed an agreement with Martin Marietta to purchase Oro Grande in a limited asset sale. (Exs. CPC–2, CPC–3.) Under the asset purchase agreement, CalPortland would not assume certain liabilities associated with Riverside, including Riverside’s labor force and current CBA. (Ex. CPC–2 at 21–27.) The sale closed on October 1, 2015. (Tr. 680:4–9, 691:1–2, 731:6–9.)

## **B. Pappas’s Work History at the Oro Grande Mine**

Jeffrey Pappas worked at the Oro Grande facility for 16 years beginning in 1999 as a laborer during TXI’s ownership. (Tr. 37:10–23, 61:24–62:2; Ex. S–13 at 10–13.) Over time, Pappas held numerous hourly-wage positions, including recuperator, feed tender, preheater

helper, mill lube man, cement scheduler, quarry worker, and dust collector. (Tr. 42:9–45:6, 50:23–51:17, 59:1–60:11; Ex. S–13 at 10–13.)

In regard to his work history at the mine, Pappas has never been disciplined for safety or doing his job incorrectly and has been described as a hard worker and model employee. (Tr. 61:14–23, 372:15–373:1, 353:14–20.) However, during his first ten years at the mine, Pappas was disciplined for attendance issues.<sup>7</sup> (Tr. 161:17–162:9.) Additionally, while working as a cement scheduler at the mine’s pack house in 2010, a co-worker filed a complaint against Pappas, alleging he created a hostile environment by arguing with and complaining to fellow employees. (Tr. 60:18–61:4, 158:5–25; Ex. RCC–6 at 1.) As a result, the company found that Pappas violated the plant’s Work Rule 13(g).<sup>8</sup> (Ex. RCC–6 at 1.) As discipline, Riverside, under TXI’s ownership, suspended Pappas for three days, disqualified him from the cement scheduler position, and required him to attend anger management classes. (Tr. 61:5–10, 159:1–10; Ex. RCC–6 at 1.) Upon his return, Pappas was re-assigned as a laborer at the mine. (Tr. 160:19–24; Ex. RCC–6 at 1.) He eventually became a dust collector in 2012. (Ex. S–13 at 11.)

### **1. Prior Termination and Discrimination Case at Riverside/TXI in 2014**

In December 2013, when Pappas worked as a dust collector, he and two co-workers were assigned to replace filters on the chutes that loaded rail cars in the mine’s pack house. (Tr. 69:11–20.) As they were working on manlifts elevated above two of three tracks, a string of train cars moved backwards on the track towards them. (Tr. 72:2–17.) The train had no miner stationed at the end of the cars for safety to instruct the locomotive operator whether to stop. (Tr. 72:22–73:5.) The track split three ways, and the train eventually came down the third track where Pappas and his co-workers were not working. (Tr. 73:6–9.) Pappas felt his life had been endangered by the moving train, and the work crew subsequently placed a lock on the train. (Tr. 72:18–22, 75:17–20, 73:16–20, 74:15–17.)

Upon coming down from the manlift, Pappas’s supervisor singled Pappas out and reprimanded him, demanding he pull the lock off the train so the train could be moved. (Tr. 73:9–20.) Pappas informed his supervisor that the train should not have been operating while he and his co-workers were working on the track and demanded a safety review. (Tr. 73:21–25.) Company policy allowed workers to stop an assigned task and request a safety review whenever

---

<sup>7</sup> Pappas testified to having problems with alcoholism, which contributed to his attendance problems. (Tr. 161:17–162:9.) After the company warned him, Pappas corrected his behavior in order to prevent losing his job. (Tr. 162:4–9.) At the time, Riverside’s policy under TXI’s ownership allowed an employee’s personnel file to be expunged of his absentee issues after 12 months. (Tr. 289:24–19.)

<sup>8</sup> Riverside’s Work Rule 13(g), under TXI, prohibited “[t]hreatening, intimidating, coercing, or interfering with fellow employees on company premises.” (Ex. RCC–22 at 2.) The company marked Work Rule 13(g) as a major violation, which may subject a violator to immediate discharge. (*Id.* at 2.) According to the company, violating Work Rule 13(g) constitutes creating a “hostile work environment.” (Tr. 436:4–22; Ex. RCC–6 at 1.)

they felt unsafe. (Tr. 74:1–11.) Despite Pappas’s request, his supervisor threatened to charge Pappas with insubordination if Pappas did not remove the lock off the train. (Tr. 74:12–17.) Pappas removed the lock, but insisted on the safety review. (Tr. 74:18–75:1.) Three hours later, the mine’s safety director, Diane Fionda, arrived at their location to conduct the requested safety review. (Tr. 75:2–12.) Fionda told Pappas that the safety policy permitted miners to work on the tracks next to the locomotive. (Tr. 77:1–4.) Later, Pappas brought up the issue at a monthly safety meeting with then-plant manager, David Salzborn, who Pappas testified only got mad at him for accusing Pappas’s direct supervisor of lying about safety.<sup>9</sup> (Tr. 76:11–17.)

A few weeks later, Pappas approached an MSHA Inspector, who was conducting an on-site inspection with Fionda, and asked him whether the train incident created a safety issue. (Tr. 77:13–78:3.) Upon learning what happened to Pappas and his coworkers on the train tracks, the MSHA Inspector wrote TXI citations for safety violations and instructed the mine to place an additional lock on the rail tracks. (Tr. 78:12–22.)

Soon after, Pappas was told he had been abusing his truck privileges and was ordered by mine management not to use his truck on mine property during work. (Tr. 165:4–24.) However, Pappas testified his immediate supervisor later allowed him to use the truck periodically and did not reprimand Pappas when he saw Pappas using the truck. (Tr. 165:25–166:5, 167:18–24.) Nevertheless, on April 4, 2014, Pappas was terminated for gross insubordination after he was observed using his work truck. (Tr. 79:8–12, 165:4–167:24; Ex. S–1 at 1.) Later that same month, Pappas filed a section 105(c) discrimination complaint with MSHA against Riverside, alleging his termination was motivated by his reporting the train incident to MSHA. (Tr. 79:8–16, 255:19–24; Ex. S–1 at 1.) Following depositions in December 2014, Riverside and Pappas reached a Commission-approved settlement, which reinstated Pappas at the Oro Grande mine, expunged all records of the truck incident and termination from Pappas’s personnel file, and resulted in Riverside paying civil penalties.<sup>10</sup> (Tr. 763:11–764:2; Ex. S–1 at 1.) As part of the settlement, Pappas returned to work as a dust collector at the cement facility on January 5, 2015. (Tr. 79:21–80:1, 167:25–168:4.)

---

<sup>9</sup> Salzborn did not specifically testify about how he personally addressed Pappas at the safety meeting. However, Salzborn testified that after conducting a safety review and investigation of the incident, the company changed its policy regarding the amount of clearance required between the rail track and a manlift. (Tr. 646:14–18.) The record is unclear whether this change of policy occurred before or after MSHA issued citations related to the incident.

<sup>10</sup> During Pappas’s 2014 discrimination proceeding, Riverside was represented by TXI’s retained counsel, William K. Doran, from the law firm of Ogletree, Deakins, Nash, Smoak & Stewart, P.C. (Tr. 439:7–15.) In July 2014, Martin Marietta purchased TXI. (Tr. 409:16–410:9.) Doran continued his representation of Riverside because the 105(c) complaint was still pending when Martin Marietta acquired TXI. (Tr. 439:12–15.) Riverside, under Martin Marietta’s new ownership, carried out the terms of the settlement with Pappas because Martin Marietta’s purchase of TXI included Riverside’s liabilities. (Tr. 409:16–410:9.)

## 2. Incidents at Riverside/Martin Marietta after Pappas's Reinstatement

When Pappas returned to work in January 2015 as a result of the section 105(c) settlement, he felt harassed by his former coworkers because of his discrimination case and prior safety complaint. (Tr. 81:14–82:16.) Specifically, a miner named Stacy Portis,<sup>11</sup> who also worked as a dust collector and whom Pappas described as a friend, repeatedly made derogatory comments about Pappas being brought back to work and attempted to bait Pappas into conversations about race and gender. (Tr. 81:14–82:16, 247:18–248:10.) In early February 2015, Pappas met with human resources manager Jamie Ambrose (née Rowe) and asked her to intervene to stop the harassing behavior. (Tr. 82:17–83:3, 85:25–86:1, 659:21–660:6.) Ambrose informed Pappas that she would talk to his supervisor, and she asked Terry Jacobs, the mine's maintenance manager, to instruct Pappas's direct supervisor to monitor the situation and report to Ambrose if any further issues occurred. (Tr. 83:3, 660:22–661:5.) Around the same time, Pappas removed himself from the group by avoiding the breakroom and eating lunch by himself because he felt the harassment continued even after he asked Portis and his companions to stop. (Tr. 83:4–84:5, 172:21–173:4.) On April 17, 2015, Ambrose took maternity leave and did not return to work until July 6, 2015.<sup>12</sup> (Tr. 662:11–14.)

In late April 2015, a series of events led to a heated exchange between Pappas and Portis. Pappas along with three co-workers on the dust collector team had been responsible for gathering dust collector readings by the end of every week. (Tr. 81:9–13, 89:18–21.) Pappas was assigned to the plant's northern area, and Portis was assigned to the area between the pack house and the tower. (Tr. 89:21–24.) James "Slim" Wright, the team's lead man and local union vice president, decided to switch Pappas's and Portis's assignment areas. (Tr. 90:6–9.) On a Monday, while inspecting the area originally assigned to Portis, Pappas uncovered three broken interior dust collector doors. (Tr. 90:9–11.) Pappas wrote up a work order to have these doors fixed. (Tr. 91:11–13.)

On Tuesday, April 28, the following day, Pappas, Portis, Wright, and the fourth team member, Harold Cole, had to repair roofs at the mine's hammermills, which took the entire day. (Tr. 81:9–13, 92:20–93:6.) On Wednesday morning, April 29, Portis turned in his dust collector readings to Wright. (Tr. 93:7–17.) Pappas informed Wright that he did not believe Portis could

---

<sup>11</sup> Pappas has known Portis for 30 years and first started working with him at a trucking company prior to working at Oro Grande. (Tr. 40:18–41:7.) Despite Pappas's arguments with Portis, including one instance during their truck driving days when Pappas left Portis in Chicago but returned to get him, Pappas nevertheless still considers Portis a friend. (Tr. 41:3–7, 102:18–23, 153:9–11.)

<sup>12</sup> Pappas testified to meeting once more with Ambrose before she took maternity leave to address his harassment concerns. (Tr. 86:2–23.) However, Ambrose does not recall meeting with Pappas again before she took leave on April 17, 2015. (Tr. 662:11–19.) Nor does Pappas's own calendar note a second meeting. (Ex. S–2.)

have completed the assignment in such a short period of time and alleged Portis falsified his report.<sup>13</sup> (Tr. 93:13–95:5, 217:12–14, 467:7–469:1; Ex. RCC–12.)

The next day, Thursday, April 30, Pappas and Portis were assigned to fix the broken dust doors, a job which required two workers under the company’s policy and MSHA regulations. (Tr. 95:23–96:17.) Pappas arrived at the work location at 9:00 a.m. and waited for Portis for two hours before taking his lunch break. (Tr. 96:21–97:3.) At lunch, Pappas saw Portis socializing with Wright and another co-worker. (Tr. 97:4–10.) After lunch, Pappas spoke with Dan Kegel, a maintenance manager, and informed Kegel that he had not finished his assignment because he had been waiting for Portis to come help him. (Tr. 97:11–20.) Kegel assured Pappas he would tell Portis to meet him and instructed Pappas to go back to the work location. (Tr. 97:21–24.) Pappas waited another several hours and attended to other work duties in the area, but Portis never arrived to help fix the broken dust collector doors. (Tr. 97:25–98:9.)

Towards the end of the shift, Pappas put away his work tools and went back to the break room to pack up. (Tr. 98:6–13.) In the break room, Pappas saw Portis socializing again with co-workers, Wright, Cole and David Wray. (Tr. 98:13–18.) Pappas confronted Portis for not helping him earlier in the day by yelling, using profanity, and calling Portis a “lazy mother fucker” and a “piece of shit.”<sup>14</sup> (Tr. 98:19–99:5, 107:15–16, 183:14–17, 248:11–20; Ex. RCC–1.) Portis and Pappas engaged in a heated exchange that lasted for several minutes. (Ex. RCC–1.) Afterward, Pappas gathered his stuff, slammed his locker, and left for the day. (Tr. 99:11–13.)

The following day, Friday, May 1, 2015, Stacy Portis filed a written complaint with management against Pappas, stating that Pappas verbally assaulted him and that he feared Pappas may physically attack him, mentioning that Pappas had made it widely known that he owned guns. (Ex. RCC–1.) When Pappas arrived at the mine that morning, Cole advised Pappas that mine management was gathering statements from Portis, Wray, and Wright regarding the incident. (Tr. 103:1–19.) Pappas attempted to talk to mine management that day, but could not reach the plant manager, Kevin Grogan, or assistant manager, Kevin Deatley. (Tr. 104:2–5.) Pappas also attempted to speak to human resources, but Pappas could not locate anyone in that office either, and Ambrose was on maternity leave at the time. (Tr. 104:3–4, 662:11–14.) Later

---

<sup>13</sup> Pappas subsequently reported that Portis falsified the report to the Mojave Desert Air Quality Management District “MDAQMD,” which initiated an investigation. (Tr. 467:7–469:1; Exs. S–6, RCC–12.) The claim remained unsubstantiated because the investigator found no evidence the report had been manipulated. (Tr. 469:2–8; Exs. S–6, RCC–12.) Simultaneous to Pappas’s report, an anonymous call to the MDAQMD also alleged the mine had violative emissions, which resulted in a pop-up inspection. (Tr. 469:24–470:8; Exs. S–6, RCC–12 at 5–6.) During the inspection, the MDAQMD again did not find any evidence that the mine had manipulated its reports nor found any violative emissions. (Tr. 470:9–12; Exs. S–6, RCC–12.)

<sup>14</sup> Pappas told Portis that he was “lazier than James Hawthorne,” another miner at the plant who had a reputation for being lazy. (Tr. 99:1–10.) Riverside management noted in its investigation of the incident that both Portis and Hawthorne were African-American, though Portis himself did not mention in his complaint that he took Pappas’s comment to be racial. (Exs. S–7 at 1; RCC–1 at 3–7.)

that day, Pappas learned that Portis, Wray, and Wright were called into plant chemist Bob Sylvia's office to further discuss the incident. (Tr. 105:1-16.) Pappas finished his shift and returned home for the weekend without discussing his involvement with the incident in detail with a member of management. (Tr. 105:18-25.)

The next Monday, May 4, 2015, maintenance manager Terry Jacobs called Pappas into his office, and Pappas exercised his union rights to have the union's president, William Arps, Jr., present; Jacobs asked Pappas about the verbal incident. (Tr. 106:6-108:3; Ex. RCC-2.) When Pappas started to give background information, Jacobs refused to consider Pappas's explanation of the events leading up to the incident between Pappas and Portis and focused solely on the quarrel itself. (Tr. 107:6-11, 339:6-340:9.) The company conducted an investigation, gathering the statements of several witnesses including Pappas, Portis, Wright, Wray, and Cole. (Exs. RCC-1, RCC-2, RCC-3, RCC-4.) Grogan contacted Martin Marietta's director of employee relations, Timothy Sheridan, for his advice on the situation. (Tr. 420:20-421:25.) Grogan informed Sheridan of Pappas's 2010 suspension for violating Work Rule 13(g). (Tr. 424:16-23.) Sheridan reviewed the witness statements and spoke over the telephone with Grogan, Deatley, and Bob Kidnew, the president of the company's cement division, regarding the incident. (Tr. 422:15-21, 423:20-424:1.) After his telephone conversations and review, Sheridan concluded that Pappas was the instigator of the incident and engaged in threatening and intimidating behavior. (Tr. 424:5-10.) Sheridan was concerned that such behavior could lead to violence in the workplace. (Tr. 424:9-15.)

Grogan suggested to Sheridan that the company terminate Pappas. (Tr. 438:22-25; Ex. RCC-3 at 1-2.) During the course of his investigation, Sheridan discovered that Pappas had recently been reinstated to the mine following his 2014 discrimination case. (Tr. 439:1-6.) Sheridan expressed to Grogan his concern that terminating Pappas may pose a significant risk to the company. (Ex. RCC-3 at 2.) Sheridan, an attorney himself, then consulted with Doran, the attorney who represented Riverside under TXI's ownership, to ensure the company would not make any missteps in disciplining an employee who had recently been reinstated. (Tr. 439:16-24.)

Riverside determined that Pappas violated the plant's Work Rule 13(g) prohibiting conduct that threatened, intimidated, coerced, or interfered with other employees. (Tr. 108:18-109:3; Ex. RCC-4.) Upon Sheridan's recommendation, Riverside suspended Pappas for five days, required him to undergo a psychological evaluation before returning to work, and disqualified him from working in the dust collector shop. (Tr. 440:7-19, 109:8-22; Exs. S-8, RCC-4.) Pappas signed a statement outlining the discipline on May 12, 2015. (Ex. RCC-4.) Because of a delay in scheduling the evaluation, Pappas did not return to work for more than a month. (Tr. 110:19-111:23, 342:5-12.) While Pappas was not working, the union negotiated with Sheridan for Pappas to receive back pay for the period between the end of his suspension and the time he waited for his psychological review to be completed. (Tr. 200:19-201:13, 342:5-24, 446:6-447:8.) After receiving a psychological review, a doctor declared Pappas fit for duty to return to work and did not recommend Pappas attend anger management. (Tr. 114:5-12, 442:22-24, 484:2-7; Ex. S-38.)

### 3. Pappas's Grievances with Riverside/Martin Marietta

On June 22, 2015, Pappas returned to work and met with assistant manager Kevin Deatley to sign another form that outlined the discipline received and served as a documented warning. (Tr. 115:15–116:17; Ex. S–9.) The union filed grievances on behalf of Pappas to reduce the discipline he received for the incident.<sup>15</sup> (Exs. S–3, S–4.) After his return, Pappas attempted to speak with management to further dispute the discipline he received. (Tr. 117:13–126:17.) First, Pappas approached plant manager, Kevin Grogan, and after two meetings, Grogan informed Pappas that his dispute would be handled by the union's grievance procedures. (Tr. 118:10–121:12.) Pappas also wrote a letter to Donald McCuniff, Martin Marietta's senior vice president of human resources, explaining the incident. (Tr. 462:25–463:13; Ex. S–10.) Pappas received a call informing him the matter would be looked into, but received no substantive follow-up. (Tr. 123:13–25, 463:14–464:12.) McCuniff forwarded Pappas's letter to Sheridan, who read the letter and did not take further action because he believed the matter would be addressed in the union's grievance process and did not interpret the letter to be a complaint about an ethical violation. (Tr. 463:1–464:12.) In July, Pappas also approached Ambrose after she returned from maternity leave to discuss the matter, but Ambrose also informed Pappas the issue would be dealt with in the grievance procedure. (Tr. 124:3–126:19, 664:4–665:21.)

Pappas's grievance was moved to the third step of the union's grievance procedure. (Exs. S–3, S–4.) A third step meeting was held on August 27, 2015, at the plant. (Tr. 455:13–20, 627:17–20, 670:3–9.) Present for the company were Ambrose, Grogan, Deatley, and Sheridan. (Tr. 670:17–671:7.) Present for the union were union president Arps, union vice president Wright, and union international representative Ron Espinosa. (*Id.*) Also present was David Salzborn, the plant's retired former plant manager whom Martin Marietta hired back as a consultant in May 2015 and then as a plant manager in July 2015 to help the company transition during its sale to CalPortland. (Tr. 616:15–618:3, 627:17–20, 457:22–458:1.)

After the union settled Pappas's grievance on August 27, 2015, Ron Espinosa, the union's international representative, requested Pappas be brought up to their third step meeting. (Tr. 354:21–355:7, 630:12–15.) Several witnesses, including Pappas, testified that Espinosa's request was unusual and that employee grievants did not normally attend third step meetings. (Tr. 127:2–128:1, 204:4–8, 354:21–355:7, 460:16–23, 646:19–647:5.) Pappas joined the meeting where Espinosa instructed Pappas to put the behavior that contributed to the incident behind him. (Tr. 130:18–19, 355:8–22, 461:1–18, 630:15–631:1.) Arps described that Espinosa addressed Pappas like a "big brother" would, while Sheridan described that Espinosa "went off" on Pappas and dressed him down for close to five minutes. (Tr. 355:8–22, 461:1–18.) Afterwards, Sheridan told Pappas that he was responsible for Pappas's discipline and mentioned Pappas's 2014

---

<sup>15</sup> The union filed two grievances on behalf of Pappas related to his May 2015 suspension. (Tr. 387:2–7, 668:6–8; Exs. S–3, S–4.) One grievance requested that the discipline be reduced to a documented verbal, which would note in Pappas's personnel file that he was counseled about his behavior, but would not necessarily put Pappas at risk of termination for a subsequent offense. (Tr. 393:16–22, 394:7–395:10; Ex. S–3 at 1.) The other grievance requested that Pappas's disqualification from the dust shop be removed and his suspension be eliminated. (Tr. 197:10–25, 453:19–454:18; Exs. S–4, S–5.)

discrimination complaint. (Tr. 129:2–22, 356:2–16, 461:19–462:19.) Pappas felt that Sheridan belittled him. (Tr. 129:8–130:23.)

As a result of the grievance meeting, Pappas's suspension was reduced to three days. (Tr. 395:23–396:1, 460:1–4, 673:17–21.) Pappas received back pay for two days of his original five-day suspension. (Tr. 350:14–17, 395:16–24, 460:1–3.) Thereafter, on September 28, 2015, Pappas was among approximately 15 Oro Grande employees at Riverside who were not hired by CalPortland when it assumed control of the cement plant on October 1, 2015. (Tr. 142:18–144:6, 489:14–490:6.)

### **C. CalPortland Company's Acquisition of the Oro Grande Plant**

On June 30, 2015, CalPortland entered into an asset purchase agreement with Martin Marietta to purchase certain assets, including the Oro Grande facility, two shipping terminals in National City and Stockton, California, and some inventory stockpiled in Martin Marietta's storage facility in Crestmore, California. (Exs. CPC–2 at 12–15, S–37 [83:15–84:6].) In July and August 2015, CalPortland representatives began touring Oro Grande to understand how the plant operated in anticipation of the purchase's closing date. (Tr. 620:16–621:4.) The asset sale closed on October 1, 2015, when CalPortland took ownership. (Tr. 680:4–5, 680:9, 691:1–2, 731:6–7.)

The negotiated agreement did not include any employment liabilities, such as the CBA or the facilities' workforce. (Exs. CPC–2 at 24–27, S–37 [87:15–88:1].) CalPortland specifically structured the limited asset sale according to the model that the Supreme Court first recognized in *NLRB v. Burns International Security Services, Inc.*, 406 U.S. 272 (1972), to ensure CalPortland would be free to negotiate new employment terms. (Ex. S–37 [108:21–111:18]; see Ex. CPC–1.) Hence, Martin Marietta terminated all its employees at the purchased facilities on September 30, 2015, right before 12:00 midnight of the day the agreement closed. (Tr. 361:13–19, 417:12–17; Ex. S–25 at 1.) Immediately thereafter, at 12:01 a.m. on October 1, the prior Riverside employees that were hired at Oro Grande began working for CalPortland. (Tr. 682:1–2, 686:20–23; Ex. S–37 [108:10–17, 111:9–25, 113:4–21, 135:2–136:9, 146:9–12].)

Before hiring hourly workers, CalPortland sought to get its management team in place. (Tr. 882:23–883:18.) In mid-August, Ambrose interviewed for a position at CalPortland to be a human resources manager at Oro Grande following CalPortland's takeover. (Tr. 817:11–21.) CalPortland's vice president for human resources, Steve Antonoff, offered Ambrose the position at the Oro Grande, and Ambrose signed her offer letter acceptance on September 1, 2015. (Tr. 681:22–25, 804:5–9; Ex. CPC–23.) Because CalPortland wanted to take control of the Oro Grande cement operation without undergoing the expensive process of shutting down the plant's kiln, the company began the process of staffing the plant early. (Tr. 812:25–813:23, 869:17–24.) Martin Marietta provided a list of current employees to CalPortland's Antonoff. (Tr. 808:11–18.) Antonoff then contacted Ambrose, who was still an employee of Riverside, so they could discuss her hiring recommendations at the facilities. (Tr. 685:3–10, 812:18–815:13.)

On September 3, Ambrose and Antonoff met and went through the list of the employees who were currently employed at Riverside's multiple facilities. (Tr. 685:3–686:5, 711:20–23, 819:18–820:10, 854:16–22.) For each employee, Ambrose gave her recommendation by saying

“yes,” “no,” “pass” (meaning skip), or “unsure.” (Tr. 689:7–14, 815:15–22, 818:4–819:14.) Antonoff took notes on a spreadsheet he initially created to provide staffing information to payroll and highlighted the employees’ names Ambrose did not give a “yes” answer for in lavender (gray). (Tr. 688:24–689:6, 820:2–821:20, 843:3–18; Ex. CPC–27.) For some employees, Ambrose commented on whether the employee was close to retirement, on leave, or was on a performance improvement plan. (Tr. 693:7–23, 705:13–21, 707:11–708:1; Ex. CPC–27.) For Pappas, Ambrose told Antonoff that she was “not sure”; Antonoff highlighted Pappas’s name in lavender (gray), but made no further notation by his name. (Tr. 689:18–690:6; Ex. CPC–27 at 5.)

A week or so later, in a mid-September 2015 meeting open to all employees, CalPortland informed all of the miners at the Martin Marietta facilities that they would be fired and would need to reapply for positions at CalPortland. (Tr. 835:5–21, 872:6–873:12; Exs. CPC–6, CPC–7.) Because of the asset purchase, Riverside’s Crestmore facility would be shut down, so its miners would be unable to keep their jobs at Crestmore. (Tr. 918:5–8; Ex. S–37 [83:24–84:6, 86:3–6].) Based on the calls union president Arps received, this meeting created considerable anxiety among the Oro Grande workforce because their future employment was not guaranteed, in contrast to when Martin Marietta had bought Riverside Cement from TXI. (Tr. 359:21–363:23, 369:2–370:1.) Pappas did not attend that meeting. (Tr. 137:4–18.)

Thereafter, CalPortland sent out applications and arranged interviews for all of the miners applying to work for them, and the interviews at Oro Grande lasted for three days from September 21 to September 23, 2015. (Tr. 894:25–895:2; Exs. CPC–7, CPC–8, CPC–9, CPC–28 at 3–5, S–21, S–37 [112:24–113:3].) Nearly all of the miners from the four plants interviewed to work under CalPortland, including approximately 108 of the 110 hourly miners working at Oro Grande. (*See* Tr. 808:14–809:14, 810:1–13, 844:9–12; Exs. CPC–27, CPC–28 at 3–5, S–37 [112:10–23, 127:3–7].) Approximately 21 miners who were losing their positions at Crestmore applied to be reemployed at Oro Grande under CalPortland’s ownership. (Tr. 896:10–24; Ex. CPC–28 at 2.) Miners met at Oro Grande in a large break room with several tables set up and manned by interviewers from CalPortland. (Tr. 141:1–6, 364:2–10.) Each miner’s interview was brief, with some lasting anywhere from three to seven minutes. (Tr. 141:1–12, 364:2–16, 889:5–8.) CalPortland’s interviewers had a list of six questions for each miner regarding the miner’s honesty and workplace relationships. (Tr. 890:2–12; *see, e.g.*, Exs. S–14, S–33.)

The hiring decisions were made by Rich Walters, who was hired to be the plant’s new manager under CalPortland, and Betsy Lamb, CalPortland’s vice president of organizational planning and development at the time. (Tr. 632:1–5, 806:6–21, 876:21–877:1, 879:18–25.) Although Lamb reported to Antonoff, Antonoff himself was a new hire, so Lamb took over the task of hiring because of her experience even though she was considering retiring. (Tr. 870:7–871:11, 879:18–881:1.) In preparation, Walters also had a brief conversation with Salzborn regarding some employees who might be problematic. (Tr. 530:15–19, 581:13–23, 632:1–633:4.) During that discussion, Salzborn named two employees, one of whom was Pappas, whom he considered to be an issue. (*Id.*)

The interviewers’ notes were compiled and given to Lamb. (Tr. 806:4–14, 876:21–877:1, 879:18–25.) Lamb also received the information contained in Antonoff’s spreadsheet noting

Ambrose's hiring recommendations. (Tr. 824:9–14, 904:17–905:2; Ex. S–23.) Lamb reviewed the applications and interviews. (Tr. 900:4–902:16, 914:10–14.) She made her own notes on a separate spreadsheet, circling in blue ink applicants she would not extend an offer to and adding comments with her reasons for most of those applicants. (Tr. 915:3–13, 916:4–7; Ex. CPC–29.) The names Antonoff highlighted on his spreadsheet of people, who did not receive a positive recommendation from Ambrose, were also circled in blue ink on Lamb's spreadsheet. (Tr. 916:5–13; Ex. CPC–29.) Lamb circled Pappas's name in blue ink and also wrote “no” and “job hopping; safety” next to his name on her spreadsheet. (Ex. CPC–29 at 3.)

On Friday, September 25, 2016, Lamb met with Walters to make the final hiring selections. (Tr. 902:17–903:7.) In each job category, Walters informed Lamb how many people the plant needed for each position, and Lamb would provide him with a list of people she recommended to fill the positions. (Tr. 904:1–11.) Walters had final authority to make the hiring decisions, but ultimately adopted Lamb's recommendations from her list.<sup>16</sup> (Tr. 904:12–16.)

On September 25, 2015, CalPortland began extending employment offers for the Oro Grande cement plant and ultimately hired roughly 125 employees at the facility, approximately 100 of whom were hourly miners.<sup>17</sup> (Tr. 716:17–720:20, 836:25–837:2; Exs. CPC–14, CPC–15, CPC–18, CPC–19, CPC–31, CPC–32.) Two days later, on September 28, 2015, Martin Marietta informed the remaining miners that they would not be brought back to the mine. (Tr. 142:18–22, 489:14–490:6; Ex. S–25 at 2.) Martin Marietta told those miners to take the rest of the day off and not return for their shifts at Oro Grande the following two days. (Tr. 142:24–144:6; Ex. S–25 at 2.) The miners were paid through September 30, despite not coming to work. (Tr. 143:11–13.) For Oro Grande miners whom CalPortland did not hire, Martin Marietta paid severance packages in the amount of \$750 for any miner who had served at least three years. (Tr. 419:10–24; Ex. CPC–5.) Miners who had served longer received additional weeks of severance pay in three-year service increments, up to a maximum of six weeks of severance pay or \$4,500. (*Id.*) In addition to monetary compensation, Martin Marietta also provided a voluntary outplacement service that would help the unemployed miners with interview skills, résumé writing, and referrals to other jobs. (Tr. 420:6–12.)

Pappas was among 15 hourly workers who were told on September 28, 2015, that they did not receive an offer of employment from CalPortland. (Tr. 143:23–144:6; Ex. CPC–30.) He had not received a positive recommendation from Ambrose, who testified the discipline Pappas received for the incident with Portis had been fresh in her mind based on the August 27 grievance meeting. (Tr. 690:16–23.) Ambrose stated she therefore said “unsure” for Pappas during her meeting with Antonoff. (*Id.*) CalPortland's Lamb testified that she did not recommend Pappas be offered a position because his job application indicated job hopping and no

---

<sup>16</sup> Walters informed Inspector Jackson in an interview that the final decision to hire the hourly employees was not up to Walters, but that the final decision depended on a hire and no-hire list developed by human resources personnel from the interviews. (Ex. S–22 at 2.)

<sup>17</sup> CalPortland extended offers to approximately 115 hourly miners to work at Oro Grande. (Ex. S–37 [113:13–114:5].)

progression in employment and salary. (Tr. 906:16–908:15, 911:12–913:2.) Lamb said the answers Pappas gave during his interview did not reflect the type of answers CalPortland sought.<sup>18</sup> (Tr. 906:23–907:4, 913:3–914:9.) Specifically, Pappas’s interviewer wrote that Pappas would attempt to correct a miner he saw engaging in a safety violation and that he never had conflict with a co-worker<sup>19</sup> or boss. (*Id.*; Ex. S–14.) Lamb testified she looked for applicants who would report safety violations to supervisors, and she had trouble believing that a miner with such a long work history would have never had workplace conflicts. (Tr. 906:23–907:4, 913:3–914:9.) Lamb concluded that Pappas’s work history and interview answers demonstrated that Pappas likely had performance issues which he did not identify and that Pappas was not someone CalPortland should hire. (Tr. 912:1–913:2, 913:15–20, 914:5–9.)

On September 30, 2015, Pappas wrote Antonoff a letter seeking reconsideration of his job application. (Tr. 146:18–147:2, 845:11–846:20; Ex. S–15.) Antonoff read the letter, spoke with Lamb to ask why Pappas had not been hired, and reviewed Pappas’s application and interview questionnaire. (Tr. 846:12–20.) Antonoff testified that not only did Oro Grande not have open positions at the time of Pappas’s letter, but that he found items in Pappas’s application to be troubling, including some of Pappas’s answers to interview questions and indications of job hopping. (Tr. 847:4–848:3; Ex. S–24.) Antonoff concluded he would not consider Pappas for hire, which was consistent with what Lamb had told him. (Tr. 847:23–25.) On October 15, 2015, Antonoff wrote Pappas stating that CalPortland could not offer Pappas a job, but told Pappas out of professional courtesy that he would keep Pappas’s application on file. (Tr. 846:21–848:17; Ex. S–16.)

CalPortland advertised its open positions at Oro Grande to begin on October 1, 2015, only to Riverside’s current employees, though CalPortland openly advertised and hired for a few open positions at the mine two weeks later. (Tr. 732:18–738:10; Exs. S–37 [146:9–12], S–34, S–35, S–36, CPC–38.) Additionally, CalPortland did not receive Martin Marietta’s personnel files from the four facilities. (Tr. 676:7–677:1, 683:11–684:12; Exs. CPC–21, CPC–22.) CalPortland renamed a few positions at the mine and altered or combined job responsibilities for some hourly

---

<sup>18</sup> Although the interviewer’s form had six questions, Pappas testified that the interviewer only asked him three questions relating to (1) conflicts with co-workers, (2) what he would change about his last employer, and (3) how he would respond to a payroll mistake. (Tr. 144:20–146:15, 229:8–230:17, 231:14–20, 240:3–7; Ex. S–14.) He does not recall being asked the other three questions listed on the interviewer’s form involving how he liked to be managed, whether he had a disagreement with a boss, and what he would do if he saw a co-worker committing a safety violation. (Tr. 229:8–240:14; Ex. S–14.)

<sup>19</sup> Pappas explained that he believed the interviewer meant a physical altercation when she asked whether he ever had a conflict with a co-worker even though the question did not indicate the type of conflict. (Tr. 146:6–15, 262:22–265:11.) Pappas therefore answered that he never had a physical altercation with a co-worker, and testified the interviewer moved on without following up further on the question. (Tr. 262:22–265:11.) This makes sense since interviewers were specifically instructed to stick to the six interview questions, write down what they were told, and not do a lot of probing for answers, in part because the company had very limited time to complete the hiring process. (Tr. 890:2–18.)

positions. (Ex. S-37 [141:22-142:10].) Most of the job duties remained unaltered. (Ex. S-37 [143:7-145:18].) CalPortland also made modifications to the miners' shifts and attendance policy. (Tr. 728:9-13, 724:24-725:6, 750:5-8; Exs. CPC-16, CPC-17.) Because no collective bargaining agreement currently exists with the union at Oro Grande, the job bid process and grievance procedure no longer exist, the vacation policy and employee benefits have changed, and shift premiums have been modified. (Tr. 725:8-729:12; Exs. S-37 [140:4-141:4], CPC-16, CPC-17, CPC-20, CPC-35.) The mine now mostly produces the same cement product using the same equipment and the same processes as Martin Marietta. (Ex. S-37 [144:24-145:5, 171:18-172:18].) CalPortland continues to sell its cement to many of Martin Marietta's former customers with some changes in the customer base. (Ex. S-37 [168:2-12].)

#### IV. PRINCIPLES OF LAW

##### A. Section 105(c) Discrimination

Section 105(c)(1) of the Mine Act provides:

No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the statutory rights of any miner . . . because such miner . . . has filed or made a complaint under or related to this Act, including a complaint notifying the operator or the operator's agent . . . of an alleged danger or safety or health violation in a coal or other mine, or because such miner . . . has instituted or caused to be instituted any proceeding under or related to this chapter or has testified or is about to testify in any such proceeding, 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.

30 U.S.C. § 815(c)(1).

Under Commission law, a complainant establishes a prima facie case of a violation of section 105(c) if the preponderance of the evidence proves (1) that the complainant engaged in a protected activity, (2) that there was adverse action, and (3) that the adverse action was motivated in any part by the protected activity. *Driessen v. Nevada Goldfields, Inc.*, 20 FMSHRC 324, 328 (Apr. 1998); *Sec'y of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2799 (Oct. 1980), *rev'd on other grounds, sub nom. Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3d Cir. 1981).

In evaluating whether a complainant has proven a causal connection between protected activities and adverse action, the following factors are to be considered: (1) knowledge of the protected activity; (2) hostility or animus toward protected activity; (3) coincidence in time between the protected activity and the adverse action; and (4) disparate treatment. *Sec'y 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 mine 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. *Sec’y of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 818 n.20 (Apr. 1981). If the mine operator cannot rebut the prima facie case, it nevertheless may defend affirmatively by proving that it also was motivated by the miner’s unprotected activities and would have taken the adverse action in any event based on unprotected activities alone. *Driessen*, 20 FMSHRC at 328–29; *Pasula*, 2 FMSHRC at 2800.

The Commission has noted that its *Pasula-Robinette* test is “substantially the same” as and “virtually identical” to the National Labor Relations Board’s *Wright Line* test for discrimination. *Robinette*, 3 FMSHRC at 818 n.20 (citing *Wright Line*, 251 NLRB No. 150, 105 LRRM 1169, 1173–75 (1980)); *Schulte v. Lizza Indus., Inc.*, 6 FMSHRC 8, 15 (Jan. 1984). Both tests are based on a similar burden shifting scheme articulated in *Mount Healthy City Board of Education v. Doyle*, 429 U.S. 274 (1977), a Supreme Court case dealing with First Amendment claims.

## **B. Burdens of Production and Persuasion in Discrimination Cases**

In light of recent developments in Commission case law, I find it helpful to clarify the parties’ burdens of production and persuasion at the various intermediary stages of the Commission’s burden shifting framework.

To begin, it is important to have conceptual clarity on the differences between several legal burdens that tend to cause confusion. The Third Circuit has provided the following useful clarification on the distinctions between the terms “burden of proof,” “burden of persuasion,” and “burden of production”:

Many of the cases we cite use the terms “burden of *proof*” and “burden of persuasion” interchangeably. Yet the two concepts are not identical. The burden of proof comprises the burdens of production and persuasion. *McCann v. Newman Irrevocable Trust*, 458 F.3d 281, 287 (3d Cir. 2006). The former is the obligation to come forward with evidence of a litigant’s necessary propositions of fact. It often matters most before trial because plaintiffs who have not come forward with hard evidence to support their necessary allegations cannot survive a summary judgment motion by the defense. The burden of persuasion, on the other hand, is the obligation to convince the factfinder at trial that a litigant’s necessary propositions of fact are indeed true. 21B Charles Alan Wright & Kenneth W. Graham, Jr., *Fed. Prac. & Proc.* § 5122 (3d ed. 2005); *Black’s Law Dictionary* 190 (7th ed. 1999).

*El v. SEPTA*, 479 F.3d 232, 237 n.6 (3d Cir. 2007).

Deciding which of these burdens apply to the prima facie case requires careful analysis of what a prima facie case actually is, since there are multiple possible definitions for the term. In *Holo-Krome Co. v. N.L.R.B.*, 954 F.2d 108, 111 (2d Cir. 1992), a decision analyzing the NLRB’s *Wright Line* test for discrimination, the Second Circuit noted that the phrase “*prima facie* showing . . . sometimes means facts sufficient to send a disputed issue to a fact-finder, and

sometimes means facts that persuade a trier of the elements of liability, thereby placing on the defendant the obligation to prove an affirmative defense, if he has one, or else suffer an adverse decision.” After articulating these two options and acknowledging ambiguity in the wording of the *Wright Line* test that could suggest either meaning, the Second Circuit concluded “that the Board uses the phrase ‘*prima facie* case’ to mean the General Counsel’s burden to prove by a preponderance of the evidence that protected activity was at least part of the motivation for the employer’s adverse action.” *Id.* In other words, the “prima facie showing” in the NLRB context is more akin to a burden of persuasion than a burden of production. Since *Holo-Krome* was decided, several other circuits have come to the same conclusion, all of which have even advised the NLRB to stop using the term “prima facie” because of its potential to create confusion.<sup>20</sup> *See id.* at 112; *Valmont Indus. Inc. v. N.L.R.B.*, 244 F.3d 454, 464 n.2 (5th Cir. 2001) (rejecting the Title VII definition of “prima facie”); *N.L.R.B. v. Joy Recovery Tech. Corp.*, 134 F.3d 1307, 1314 (7th Cir. 1998); *N.L.R.B. v. CWI of Md., Inc.*, 127 F.3d 319, 330–31, 331 n.7 (4th Cir. 1997); *Sw. Merch. Corp. v. N.L.R.B.*, 53 F.3d 1334, 1340 n.8 (D.C. Cir. 1995).

As noted, the Commission has previously stated that its discrimination test is “substantially the same” as the NLRB’s *Wright Line* test, wherein a complainant’s burden of making out a prima facie case is treated as a burden of *persuasion* and established by a “preponderance of the evidence.”<sup>21</sup> *Pasula*, 2 FMSHRC at 2799. However, the Commission in *Turner v. National Cement Co. of California* subsequently defined the “prima facie” burden as the “production of enough evidence to allow the fact-trier to infer the fact at issue and rule in the

---

<sup>20</sup> As cases in point, at least one circuit and even the NLRB itself have occasionally slipped up and used the term “prima facie” in a contrary manner for NLRA discrimination claims, albeit with much more cursory treatment than the cases cited above provide. *See, e.g., FiveCAP, Inc. v. N.L.R.B.*, 294 F.3d 768, 777 (6th Cir. 2002) (defining a prima facie burden as “setting forth evidence that supports an inference” of discrimination, without further discussion). The NLRB and its judges have been rebuked by higher courts when this error has occurred. *See N.L.R.B. v. CWI of Md., Inc.*, 127 F.3d 319, 330–31 (4th Cir. 1997).

<sup>21</sup> Even when the Commission, like the NLRB, has used less-than-clear language to describe the “prima facie” burden, its actual application of the test demonstrated that it operated as a *Wright Line*-type burden of persuasion rather than a burden of production. *See, e.g., Driessen*, 20 FMSHRC at 328 (defining a prima facie case in an oft-quoted phrase as “presenting evidence sufficient to support a conclusion of” discrimination, but affirming a finding that the complainant failed to prove a prima facie case despite significant evidence from which a fact-finder could infer discriminatory intent).

party's favor.”<sup>22</sup> *Turner*, 33 FMSHRC 1059, 1065–66 (May 2011) (citation omitted) (emphasis added).

---

<sup>22</sup> In its analysis, *Turner* drew from the more common *Black's Law Dictionary* definition of “prima facie” that most circuits have rejected in the NLRB context and from the language in *Driessen* that resembles a burden of production but operates like a burden of persuasion. Otherwise, *Turner* drew nearly exclusively from U.S. court of appeals cases involving Title VII claims under the Civil Rights Act of 1964, which stand for the proposition that a Title VII prima facie burden is less “onerous” than the plaintiff’s ultimate burden of proving discrimination, and then cited to a small subset of those cases describing the burden of production necessary to survive summary judgment on the prima facie issue in a Title VII case. Putting all of these pieces together, *Turner* concluded that the “lower” or “less onerous” prima facie burden spoken about in many Title VII cases must be synonymous with the extra-minimal burden of *production* at the prima facie summary judgment stage and as defined in *Black's Law Dictionary*. *Turner*, 33 FMSHRC at 1065–66 (citing *Young v. Warner-Jenkinson Co., Inc.*, 152 F.3d 1018, 1022 (8th Cir. 1998), and *Black's Law Dictionary* 1310 (9th ed. 2009)).

The Supreme Court has made clear that the Title VII prima facie burden is not merely a burden of production. See *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 254 n.7 (1981). But, a plaintiff’s prima facie burden in a Title VII case is still less onerous than his or her ultimate burden of persuasion, while the Secretary’s or complainant’s section 105(c) prima facie burden is not. To understand why, it is first important to understand how Title VII discrimination analysis differs from the Commission’s *Pasula* test. First, in *Pasula*, the burden of persuasion shifts to the operator at the affirmative defense stage. In Title VII cases, this burden never shifts. Second, in *Pasula*, the prima facie, rebuttal, and ultimate burdens are all geared toward the same issue: whether an operator’s adverse action was motivated in part by protected activity. *Robinette*, 3 FMSHRC at 818 n.20. The Title VII prima facie inquiry, by contrast, is geared toward a more limited and distinct issue than the issue that the plaintiff will ultimately have to prove. See, e.g., *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973) (limiting the prima facie case to whether the plaintiff belongs to a protected class and was rejected for employment to an available position for which he or she was qualified, limiting rebuttal to merely “articulat[ing] some legitimate, nondiscriminatory reason for the employee’s rejection,” and only then reaching the ultimate issue of whether there was in fact discrimination).

These principles lead to two major distinctions between the *Pasula* and Title VII prima facie showings. First, depending on the type of Title VII case, the prima facie inquiry may be so limited that it resembles a burden of production. See, e.g., *CWI of Md.*, 127 F.3d at 331 n.7 (distinguishing the *Wright Line* prima facie burden from the *McDonnell Douglas* prima facie burden on this basis). This is not the case with *Pasula*. Second, even where the Title VII prima facie showing does not resemble a burden of production, it will only be the first step in a series of increasingly onerous burdens placed on the plaintiff. Thus, in the context of Title VII retaliation claims, the plaintiff’s initial prima facie burden of proving that protected activity was a motivating factor is still naturally “lower” or “less onerous” than the plaintiff’s later burden of proving that protected activity was the “but for” cause of an adverse action. See *Long v. Eastfield College*, 88 F.3d 300, 304–05 n.4 (5th Cir. 1996). *Pasula*, by contrast, does not place the burden

(continued...)

*Turner* did not address *Pasula*'s holding, as to the burden of *persuasion*, that “the complainant ... establishe[s] a *prima facie* case of a violation of section 105(c)(1) if a preponderance of the evidence proves (1) that he engaged in a protected activity, and (2) that the adverse action was motivated in any part by the protected activity.” *Pasula*, 2 FMSHRC at 2799 (emphasis added). In remaining silent on this point, *Turner* does not overturn the well-settled principles set forth in *Pasula*, *Robinette*, and their progeny. See *Michigan v. Thomas*, 805 F.2d 176, 184 (6th Cir. 1986) (“An administrative agency may reexamine its prior decisions and may depart from its precedents provided the departure is explicitly and rationally justified.”) (citations omitted). Instead, the Commission has in effect embraced multiple definitions of the term “*prima facie*,” thus requiring a weaker “*prima facie*” burden of production, contained within a stronger “*prima facie*” burden of persuasion.

In a recent decision, the Commission stated that once the Secretary establishes a *prima facie* case the burden then shifts to the respondent to rebut it, but did not clarify whether it is a burden of persuasion or merely a burden of production that shifts to the operator. See *Sec’y on behalf of Riordan v. Knox Creek Coal Corp.*, 38 FMSHRC 1914, 1931 n.25 (Aug. 2016) (noting that “[o]n rebuttal [of the *prima facie* case], the operator bears the burden of proof”). Shifting the burden of persuasion at the rebuttal stage would potentially violate the Administrative Procedure Act. See 5 U.S.C. § 556(d) (“Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof.”); cf. *Director, Office of Workers’ Comp. Programs v. Greenwich Collieries*, 512 U.S. 267, 278 (1994) (distinguishing the Department of Labor’s “true doubt rule” from the NLRB’s *Wright Line* test by clarifying that the *Wright Line* test is permissible under the APA because it shifts the burden of persuasion only at the affirmative defense stage and not earlier). It would also conflict with prior Commission precedent. See *Saab v. Dumbarton Quarry Assoc.*, 22 FMSHRC 491, 495 (Apr. 2000) (“At the rebuttal phase of the Commission’s discrimination analysis, the burden remains on the complainant.”) Moreover, at the rebuttal stage a judge could not find by a preponderance of the evidence that an adverse action was in no part motivated by protected activity, after already finding at the *prima facie* stage by a preponderance of the evidence that the act was in part motivated by protected activity. Those would be two mutually exclusive findings.

However, the above context clarifies that when a complainant produces sufficient evidence to allow the fact-trier to infer the fact of discriminatory motivation and rule in the party’s favor (i.e., when he meets his *prima facie* burden of production), the burden of *production* shifts to the respondent to demonstrate the absence of protected activity or articulate a non-discriminatory reason for its actions, cf. *Burdine*, 450 U.S. at 254–56 (imposing a similar burden of production at the Title VII rebuttal stage), while the burden of *persuasion* remains with the Secretary or complainant. This does not mean that the operator’s justifications will be

---

<sup>22</sup> (...continued)

of proving “but for” causation on the Secretary or complainant at any point. The operator may raise the issue as an affirmative defense, but it bears the burden of persuasion on this point. See *Sec’y of Labor on behalf of Riordan v. Knox Creek Coal Corp.*, 38 FMSHRC 1914, 1921 (Aug. 2016) (noting that the term “because” in section 105(c) of the Mine Act was not intended to condition liability on “but for” causation as it was in Title VII). In that sense, a Title VII plaintiff’s *prima facie* burden may be “lower” than his or her ultimate burden of persuasion, but a section 105(c) complainant’s *prima facie* burden is not.

examined superficially. Nor does it mean that the judge may not rely on reasonable inferences from circumstantial evidence to find discriminatory motivation. It simply means that the direct or circumstantial evidence that an adverse action was motivated in part by protected activity must be more persuasive than evidence that the articulated alternate rationale was the sole motivating factor.<sup>23</sup> Only when the Secretary or complainant proves his case by a preponderance of the evidence do the “twin burdens of producing evidence and of persuasion then shift to [the operator] with regard to th[e] elements of affirmative defense.” *Robinette*, 3 FMSHRC at 818 n.20.

### C. Successor Liability

A successor operator may be found derivatively liable for, and responsible for remedying, its predecessor’s discriminatory conduct. *Meek v. Essroc Corp.*, 15 FMSHRC 606, 610 (Apr. 1993). The factors for determining successorship are:

(1) whether the successor company had notice of the charge, (2) the ability of the predecessor to provide relief, (3) whether there has been a substantial continuity of business operations, (4) whether the new employer uses the same plant, (5) whether he uses the same or substantially the same work force, (6) whether he uses the same or substantially the same supervisory personnel, (7) whether the same jobs exist under substantially the same working conditions, (8) whether he uses the same machinery, equipment and methods of production; and (9) whether he produces the same products.

*Sec’y of Labor on behalf of Keene v. S&M Coal Co.*, 10 FMSHRC 1145, 1153 (Sep. 1988) (citing *Munsey v. Smitty Baker Coal Co.*, 2 FMSHRC 3463 (Dec. 1980), *aff’d sub nom. Munsey v. FMSHRC*, 701 F.2d 976 (D.C. Cir. 1983), *cert. denied*, 464 U.S. 851 (1983)). The last seven factors provide the framework for analyzing whether there is a continuity of business operations and workforce between the successor and its predecessor, which is the key question in the successorship analysis. *See Keene*, 10 FMSHRC at 1153 (including all of the last seven factors to determine whether a substantial continuity of business operations existed). This question is fact intensive and must be resolved on a case-by-case basis. *Id.*

In other labor cases, courts have held that a successor must have notice before liability can be imposed. *Golden State Bottling Co. v. N.L.R.B.*, 414 U.S. 168, 185 (1973); *Resilient Floor Covering Pension Trust Fund Bd. of Trustees v. Michael’s Floor Covering, Inc.*, 801 F.3d 1079, 1092–93 (9th Cir. 2015) (citing *Golden State Bottling Co.*, 414 U.S. at 185). The Commission

---

<sup>23</sup> Analogously, even the Sixth Circuit, which uses burden of production-type language to describe the Title VII prima facie case, *see EEOC v. Avery Dennison Corp.*, 104 F.3d 858, 861 (6th Cir. 1997) (defining the prima facie case as “sufficient evidence . . . to get a plaintiff past . . . a motion to dismiss in a nonjury case”), has clarified that the fact-trier can question the proof constituting the plaintiff’s prima facie case even after that initial burden has been satisfied, because any evidence that bears on the prima facie case is still relevant to the ultimate issue of discrimination. *See Kovacevich v. Kent State Univ.*, 224 F.3d 806, 825 (6th Cir. 2000).

has recognized that the notice factor examines whether the company could protect itself by taking into account the liability when negotiating a purchase. *See Munsey*, 2 FMSHRC at 3466 (finding that the asserted successor had “sufficient notice to enable it to protect itself by either an indemnification clause or a lower purchase price in the takeover agreement”).

## V. ADDITIONAL FINDINGS OF FACT, ANALYSIS, AND CONCLUSIONS OF LAW

### A. Whether Riverside Engaged in Discrimination

The Secretary alleges, and Riverside does not dispute, that Pappas engaged in protected activity when he filed a section 105(c) discrimination complaint in 2014.<sup>24</sup> (Sec’y Br. at 32; Riverside Br. at 16.) The Secretary further alleges that Pappas engaged in protected activity when he complained about harassment from his co-workers regarding the resolution of his section 105(c) discrimination complaint. (Compl. at 2–3; Am. Compl. at 2–3.) Complaining to management officials about hostility toward a reinstatement agreement reached pursuant to the Mine Act’s 105(c) provisions also qualifies as protected activity, and Riverside does not dispute this.<sup>25</sup> Therefore, the issues to be decided are: (1) whether Jamie Ambrose’s decision not to recommend Pappas for a position at the Oro Grande plant and David Salzborn’s statements to Rich Walters concerning Pappas constituted adverse actions; (2) if so, whether the negative recommendations were motivated, at least in part, by Pappas’s protected activity; and (3) if so, whether Riverside would have taken the adverse actions due to Pappas’s unprotected activity alone.

#### 1. Adverse Action

An adverse action is “an act of commission or omission by the operator subjecting the affected miner to discipline or a detriment in his employment relationship.” *Sec’y of Labor on behalf of Jenkins v. Hecla-Day Mines Corp.*, 6 FMSHRC 1842, 1847–48 (Aug. 1984). The Commission has looked to Title VII case law in defining the scope of adverse actions, *see Sec’y of Labor on behalf of Pendley v. Highland Mining Co.*, 34 FMSHRC 1919, 1930–31 (Aug. 2012) (adopting the Title VII adverse action test from *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 57 (2006)), and numerous circuits have held that a negative reference may qualify as an adverse action in a Title VII discrimination or retaliation claim even if the reference did not ultimately influence a prospective employer’s hiring decision. *See Hillig v. Rumsfeld*, 381 F.3d

---

<sup>24</sup> In his complaint, the Secretary also alleges that Pappas engaged in protected activity when he made hazard complaints to MSHA and reported safety issues to MSHA inspectors during their inspections, but this argument is absent from the Secretary’s post-hearing brief. (Compl. at 2–3; Am. Compl. at 2–3; Sec’y Br. at 32.) Since these instances of protected activity predate and form the basis of Pappas’s 2014 discrimination complaint, my analysis of that 105(c) complaint and whether it motivated any adverse action from Riverside also encompasses by reference the prior alleged protected activity.

<sup>25</sup> Instead, Riverside denies at length that this harassment and management’s response qualify as adverse actions. (RCC Br. at 25–27.) The Secretary has not alleged that this harassment constitutes an adverse action, so it is unnecessary to address this argument.

1028, 1031–35 (10th Cir. 2004); *E.E.O.C. v. L.B. Foster Co.*, 123 F.3d 746, 754 n.4 (3d Cir. 1997); *Hashimoto v. Dalton*, 118 F.3d 671, 673 (9th Cir. 1997); *Smith v. Sec’y of Navy*, 659 F.2d 1113, 1121–23 (D.C. Cir. 1981).

The Secretary alleges that Riverside effectively “blacklisted” Pappas for future employment at the Oro Grande plant through the recommendations of Ambrose and Salzborn to CalPortland officials and that these acts constitute adverse actions. (Sec’y Br. at 32–33.) Riverside denies that these statements qualify as adverse actions or even actual recommendations and instead characterizes Ambrose’s statements as “personal opinions” and Salzborn’s statement as a “stray remark” in a “general conversation.” (RCC Br. at 16–19.) Riverside also stresses that “Ambrose did not identify Pappas as an individual whom CalPortland should not hire,” but simply “did not offer an opinion one way or the other.” (RCC Br. at 17–18.)

In early September, CalPortland’s vice president for human resources, Antonoff, went through a list of Riverside employees with then Riverside human resources manager Ambrose and asked her whether or not she would hire each one. (Tr. 685:3–686:9.) Ambrose gave positive “opinions” for the overwhelming majority of Riverside employees (approximately 185 out of 205), but did not offer one for Pappas, instead stating she was “not sure” about him. (Tr. 689:22–690:4; Ex. CPC–27.) Ambrose was at the time still employed by Riverside and was providing this information to Antonoff pursuant to explicit authority from Riverside. (Tr. 687:4–7.) Antonoff explained to her that the answers would be used as a “reference check,” and the references ultimately played a part in CalPortland’s decision on whether or not to hire individual Riverside employees. (Tr. 814:2–6, 905:3–6.) In explaining her familiarity with the concept of a “reference check,” Ambrose described how she herself would often ask other employers whether they would rehire applicants under consideration. (Tr. 688:1–14.)

Around this same time, Salzborn offered a warning about Pappas to CalPortland’s plant manager Walters, who would have the final authority on whether or not to hire Pappas. (Tr. 632:6–20, 904:12–16.) Salzborn was a former plant manager at Oro Grande who had been specifically rehired by Riverside to help with the ownership transition taking place at the plant on October 1, 2015. (Tr. 620:2–10.) In his discussion with Walters, Salzborn identified Pappas as a problematic employee and discussed several disciplinary incidents involving Pappas, including the company’s revocation of Pappas’s use of a company truck and Pappas’s alleged insubordination for continuing to use the vehicle. (Tr. 632:12–20, 635:13–636:9, 641:4–17.)

I find that Ambrose’s and Salzborn’s statements amount to negative references, which satisfy the test for adverse action articulated in both *Hecla-Day* and Title VII case law. In making this determination I find it relevant that Ambrose declined to say “yes” to a relatively small number of employees, and that Antonoff told her that her “opinions” would be used as a “reference check,” which based on her understanding of the term would have alerted her to the possibility that her “opinions” would influence hiring decisions. Likewise, the relevant circumstances of Salzborn’s warning to Walters include Salzborn’s prominent role in facilitating the transition at the Oro Grande plant, the fact that only two employees were singled out as especially “problematic,” and Walters’s final authority to make hiring decisions. Moreover, Walters himself admitted in his MSHA interview with Inspector Jackson that Salzborn’s recommendations to him would have caused him not to hire Pappas had Betsy Lamb not already excluded Pappas from hiring consideration. (Tr. 530:12–19; Ex. S–22.) When a person in

Salzborn's position singles out a potential hire as "problematic" to the individual responsible for hiring, and the warning is so strong that the prospective employer admits that it would have prevented that employee's hiring had he been under consideration, the comment goes beyond a "stray remark." Given these factors, I find that Salzborn's warning and Ambrose's recommendations subjected Pappas to a detriment in his employment relationship and therefore qualify as adverse actions.

The key question then becomes whether there is a motivational nexus between these efforts and Pappas's protected activity.

## **2. Discriminatory Motive**

The Secretary alleges that Ambrose's and Salzborn's "blacklisting" of Pappas were motivated by Pappas's protected activity and relies largely on evidence of animus from Riverside to infer such motive. (Sec'y Br. at 33–37.) According to the Secretary's narrative, Riverside displayed indifference and hostility toward Pappas's concerns about harassment regarding his reinstatement, inadequately investigated the incident leading to his suspension, continued to inappropriately use his 2014 termination and reinstatement to label him a problem employee to others despite a settlement and Commission order barring the company from doing so, meted out disproportionate discipline to him for his comments to Portis, and made disingenuous statements to him in resolving his disciplinary grievance. (*Id.*)

Riverside argues that the alleged adverse actions were "solely and directly the result of [Pappas's] entire work history," including his argumentative, hostile, and insubordinate behavior. (RCC Br. at 19.) Riverside denies all of the Secretary's evidence of animus, and further argues that there is no indication of disparate treatment or a coincidence in time between Pappas's protected activity and the alleged blacklisting from which to infer discriminatory motivation. (RCC Br. at 20–22.)

In evaluating whether there exists a causal connection between Pappas's protected activity and Riverside's adverse actions, I consider the four *Chacon* factors: (1) knowledge of the protected activity; (2) hostility or animus toward the protected activity; (3) coincidence in time between the protected activity and the adverse action; and (4) disparate treatment of the complainant. *Chacon*, 3 FMSHRC at 2510.

### **a. Knowledge of Protected Activity**

David Salzborn and Jamie Ambrose both conceded that they had knowledge of Pappas's 2014 discrimination complaint when they made their recommendations to CalPortland. Not only was Salzborn the plant manager during Pappas's prior section 105(c) complaint in 2014, but he was ultimately responsible for the decision to terminate Pappas that formed the basis of that complaint, and he was thus named by Pappas in the initial 2014 complaint. (Tr. 647:20–648:21.) Ambrose admitted to MSHA that she was also involved in Pappas's prior termination, which led to the section 105(c) complaint. (Ex. S–17 at 3.) Ambrose was subsequently reminded of Pappas's protected activity when Pappas complained to her that he was being harassed because of his reinstatement. (Tr. 82:17–83:3, 760:20–22.)

The Secretary also paraphrases testimony from Arps to describe the plant as “a surprisingly active ‘rumor mill’ where word about employees who [are] fired and reinstated . . . travels fast.” (Sec’y Br. at 5; Tr. 336:9–20.) However, I do not infer from this testimony alone that each and every management official at the mine was aware of Pappas’s protected activity. This will have important implications in the following section for my analysis of Riverside’s alleged hostility toward Pappas’s protected activity, because questions remain about whether the employees and officials alleged to be hostile even knew about Pappas’s protected activity. Consequently, where the Secretary alleges that management officials displayed animus toward Pappas’s protected activity, more specific direct or circumstantial evidence would be required to establish that the named official actually knew about Pappas’s protected activity.

b. Hostility or Animus toward Protected Activity

The Secretary rests most of his case on evidence of hostility or animus toward protected activity. (*See* Sec’y Br. at 32–37.) At the outset, I note that this is not a temporary reinstatement hearing. The Secretary’s burden at the temporary reinstatement stage is to persuade the judge that a miner’s discrimination complaint was not frivolously brought. 30 U.S.C. § 815(c)(2). But at the merits stage, the Secretary’s burden of *persuasion* is to establish unlawful discrimination by a preponderance of the evidence.<sup>26</sup> Although I previously determined at the temporary reinstatement proceeding that the Secretary met his burden to establish that Pappas’s complaint against CalPortland was not frivolously brought, I must note that the Secretary has brought forth very little additional evidence to meet his higher burden at this stage of the proceedings, even after adding Riverside as a party to the complaint.

i. *Harassment*

The heart of Pappas’s allegations of hostility toward protected activity involves the words and actions of a Riverside employee, Stacy Portis. Pappas claims that Portis began verbally attacking him within two weeks of Pappas being reinstated. (Tr. 81:14–82:16.) According to Pappas, Portis allegedly told Pappas that he should never have been brought back. (*Id.*) If Riverside management was aware of this behavior but failed to respond adequately, that could constitute evidence of hostility or animus toward protected activity on the part of the company. *Cf. Turner*, 33 FMSHRC at 1069 (finding that a complainant may establish animus with evidence that management was non-responsive or dismissive toward safety complaints); *see also Pendley v. Highland Mining Co.*, 37 FMSHRC 301, 315 (Feb. 2015) (ALJ) (holding an operator responsible for a rank and file miner’s acts of interference when management responded inadequately to harassment).

However, the Secretary has not established that Riverside failed to respond adequately to Pappas’s complaints of harassment. The record supports a finding that Portis verbally harassed Pappas over the exercise of protected activity upon his reinstatement and that Pappas complained

---

<sup>26</sup> As discussed earlier, this burden is also higher than the Secretary’s burden of *production* at the prima facie stage.

to Ambrose in early February and requested her assistance with the matter.<sup>27</sup> (Tr. 81:22–83:3.) But, Ambrose’s initial response to this complaint was appropriate. In explaining the steps she took to address Pappas’s complaints, Ambrose credibly described the following conversation she had with Terry Jacobs about Pappas:

Pappas’[s] complaint was that . . . other employees that he interacted with were speaking about his previous case that had already been resolved. So my instruction to Mr. Jacobs was to make sure that he communicated that to Mr. Pappas’[s] direct supervisor and just monitor the situation, for lack of a better term . . . So my instruction was for him to just monitor any employees that interacted with Mr. Pappas. And if they saw anything like that going on, then I needed to be notified of who they were so that we could correct it with that person specifically.

(Tr. 760:16–761:6.)

Had Pappas’s supervisor then observed instances of harassment, or had any other instances of harassment over the exercise of protected activity come to Ambrose’s attention, Riverside’s failure to respond more forcefully could indicate animus or hostility toward protected activity. But, Ambrose never heard back from Pappas’s supervisors, managers, or fellow employees regarding this harassment,<sup>28</sup> and Pappas himself said that the harassment receded somewhat at that point around March and April.<sup>29</sup> (Tr. 662:20–663:14, 170:24–171:15.) Pappas also clarified that this occurred because he removed himself from potential interactions with Portis and other employees who also targeted him and that the harassment never fully stopped; but it is highly likely that Pappas’s withdrawal from these situations limited the opportunities that his supervisors had to observe instances of harassment. (Tr. 172:2–173:12, 250:18–252:6.) Moreover, Pappas described Ambrose’s demeanor as “polite” and “very professional,” when he raised a complaint with her, and stated, “I don’t have anything bad to say about her.” (Tr. 250:11–17.) I am unable to infer discriminatory animus from Ambrose’s conduct during this interaction.

---

<sup>27</sup> Pappas claims that he complained to Ambrose again in March, shortly before she left for maternity leave. (Tr. 86:2–9.) However, Ambrose did not recall Pappas coming to her again with similar concerns, and although Pappas documented visiting Ambrose the first time on his calendar, he did not have similar documentation for the second meeting he believed he had with her. (Tr. 86:4–5, 662:15–19; Ex. S–2.) Therefore, I credit Ambrose’s testimony that Pappas only met once with her about this issue prior to her maternity leave.

<sup>28</sup> It is quite possible that this did not happen because Ambrose left for maternity leave in April and returned in July. (Tr. 662:12–14.)

<sup>29</sup> Pappas’s own calendar notes appear to confirm that the harassment receded during this period. While Pappas documented an incident of harassment on January 19, shortly after his return, there are no documented incidents of harassment on the calendar after that. (Ex. S–2.)

Furthermore, the record remains unclear whether the harassment that Pappas says he continued to experience in March and April was related to his protected activity. Pappas testified about harassment related to his dismissal and reinstatement immediately upon his return and mentioned another incident of verbal harassment at an unspecified date from an employee involved in the facts of his original section 105(c) complaint (Russell Ontiveros); yet, his testimony about subsequent instances of harassment contains references to more general forms of harassment regarding a much broader range of topics, including racial and sexual subject matter. (Tr. 83:4–25, 247:13–248:10, 248:23–249:25.) Pappas also repeatedly testified that he and Portis had been good friends for over 30 years. (Tr. 41:4–7, 81:6–8, 102:18–32, 169:12–18.) This context raises further questions about whether or not Portis’s regular conduct toward Pappas would be reasonably perceived by others as harassment or simply banter among friends.

These allegations of harassment are inadequate to establish hostility or animus that would support a motivational nexus between the negative references and Pappas’s protected activity.

*ii. Suspension*

As previously mentioned, Pappas was suspended in 2015 following an altercation where Pappas confronted Portis for failing to show up to help repair broken dusty doors. The Secretary alleges that “Riverside’s investigation of the incident failed to take into account the history of their dealings,” and that the process that led to the suspension supports a finding of animus toward protected activity. (Sec’y Br. at 34.) This argument is bolstered by Pappas’s and Arps’s testimony that Pappas was not allowed to fully explain his side of the story when he was interviewed about the incident. He was only asked to repeat what he said to Portis in the specific incident and then was cut off when he tried to provide additional context. (Tr. 107:6–108:3, 254:5–255:2, 339:6–340:9.) Even before the investigation, Pappas claims that a fellow employee, Harold Cole, told Pappas that Portis and other employees in the break room (including James “Slim” Wright to whom Pappas initially voiced his concerns about Portis falsifying records) were “getting their stories together,” and then stated, “What they’re doing is wrong and it should never, ever, ever . . . be allowed to happen in a place like this.” (Tr. 103:5–19.) At the conclusion of this investigation, which was conducted by management officials Terry Jacobs and Bob Sylvia, acting plant manager Kevin Grogan initially recommended termination, but Sheridan opted for a five-day suspension instead, presumably after considering the Mine Act implications of termination. (Tr. 422:25–423:6, 420:17–421:5, 438:22–439:25; Ex. S–7.)

This evidence raises questions about the investigation into the breakroom incident and whether the suspension was imposed for legitimate reasons. Portis’s conduct leading up to the incident, Cole’s warning to Pappas, Jacobs’s and Sylvia’s reluctance to delve into Pappas’s and Portis’s prior history, and Grogan’s seemingly harsh recommendation for termination may justify Pappas’s feeling that he was being treated unfairly. However, this evidence does not establish a collective or widespread hostility toward Pappas’s protected activity.

In a letter to Martin Marietta, during the pendency of his grievance after the April 2015 incident with Portis, Pappas alluded to a conspiracy to terminate him involving Pappas's own union and the rank-and-file miners alongside him:

While I was off harold cole told me everyone in the shop (slim, david wray, stacy portis) would talk about me bad. they would talk about how they could get me out of the shop. how they all hatted me. I have documented proof in the msha investagation that shows the union (slim,bill arps.jr) had a large part of what happend to me. msha told me they have never had a union go against one of its members like they did me [sic]

(Ex. S-10 at 3.) The Secretary never developed this argument further or even referred to those specific allegations from Pappas, possibly because Arps testified on Pappas's behalf at the hearing and the union fought for Pappas and obtained some relief for him during his grievance process.<sup>30</sup> (Tr. 329-403, 342:5-343:1, 350:12-17.) However, the Secretary's argument that Pappas's suspension indicates hostility toward protected activity implicitly relies on a similar conspiracy theory involving management, union officials, and rank-and-file miners.

Perhaps Portis's and Wright's behavior immediately prior to Pappas's outburst and the failure of their immediate supervisor, Dan Kegel, to intervene adequately were motivated by animus toward protected activity and were (as per Cole's warning) part of a concerted effort to set in motion a series of events that might lead to Pappas's termination. Perhaps Jacobs and Sylvia conducted an arbitrary, one-sided investigation fueled by hostility and animus toward protected activity with the ultimate intention of getting Pappas fired. And perhaps Grogan's harsh recommendation of termination (before Sheridan talked him down to a suspension due to Mine Act concerns) was the culmination of Riverside's concerted effort to punish Pappas over his exercise of protected activity. It makes for a good narrative.

Yet, I can only speculate on the motives of Portis, Cole, Wright, Kegel, Jacobs, Sylvia, and Grogan because none of them were called to testify, and there is little evidence in the record that any of them (other than Portis) were even aware of Pappas's protected activity at the time of this implied conspiracy or involved in his original section 105(c) dispute. While there is evidence in the record that Grogan had been a general manager for a number of years, and that Sheridan discussed Pappas's reinstatement with Grogan after the initial termination recommendation, I find this insufficient to infer Grogan's awareness of the circumstances surrounding Pappas's

---

<sup>30</sup> There is a tension and irony in the fact that Pappas views many of his co-workers and those fighting on his behalf as part of a wide-ranging conspiracy against him, while simultaneously and regularly describing individuals with whom he has clashed as "good friends." These "good friends" include Rod Roderick, who previously reported Pappas in 2010 for creating a hostile work environment; James Hawthorne, whom Pappas compared Portis to unfavorably due to his reputation for laziness; and Portis, someone Pappas once left stranded in Chicago because he upset him and now alleges harassment against. (Tr. 41:4-7, 81:6-8, 102:18-23, 158:7-23, 169:12-18, 183:14-184: 6.) The incoherence of these descriptions makes me unable to fully credit Pappas's assessments of other individuals' behavior.

dismissal and reinstatement when he initially made his recommendation. (Tr. 117:17–118:2; Ex. S–7.) Similarly, there is evidence that Ambrose told Jacobs that co-workers were discussing a previous case of his, but the Secretary did not ask Ambrose on cross-examination whether she discussed anything more specific about Pappas’s case with Jacobs. (Tr. 760:16–761:6.) Without such evidence, I conclude that Grogan and Jacobs had little incentive to blacklist Pappas for future employment at Oro Grande or to retaliate against him over the exercise of protected activity.

*iii. Psychological Evaluation*

Pappas took offense to statements made to him by Dr. James O’Brien, the reviewing physician who examined him for a psychological evaluation. On the basis of Pappas’s recounting of the conversation that took place during that evaluation, the Secretary alleges that Riverside “told the reviewing physician about Mr. Pappas being a disgruntled employee who had been terminated and reinstated after filing a complaint” in violation of the settlement terms of his prior section 105(c) complaint, and that this is further evidence of animus. (Sec’y Br. at 34–35.) According to Pappas, O’Brien allegedly said he understood that Pappas had been nothing but a problem employee and that his employer had fired him for this reason. (Tr. 112:12–20.) Pappas says this was communicated by Riverside to O’Brien by fax prior to the evaluation. (Tr. 112:21–25.) The fact that Riverside communicated this information at all to O’Brien (when the details were meant to remain confidential) is troubling. However, a closer inspection of the faxed document that O’Brien relied on for this assessment reveals that Riverside did not describe Pappas or his protected activity with anywhere near the level of hostility that O’Brien’s alleged statements (or Pappas’s recollection of them) might suggest. Instead, the document appears to alert O’Brien to Pappas’s prior termination and reinstatement in the event that Pappas wished to discuss this incident himself. (Ex. S–38 at 2.)

The full text of the fax’s reference to Pappas’s prior complaint is as follows:

As additional background, previously Mr. Pappas had been terminated from employment at the plant, but subsequently reinstated in December 2014, following his claim that the termination was for retaliation for his reporting of adverse plant information to the Mine Safety and Health Administration (MSHA) during a plant inspection by MSHA. Mr. Pappas may provide his details of this as well as other events during the evaluation.

(Ex. S–38 at 2.) The language in this paragraph is fairly neutral toward Pappas’s protected activity and appears to be an attempt to ensure that O’Brien was not taken by surprise when the subject inevitably came up. I do not find this to be strong evidence of animus by Riverside. Rather, it is evidence of Riverside providing a physician with appropriate background.

*iv. Further Complaints to Riverside*

After Pappas was suspended, he attempted to raise complaints about retaliation and harassment against him to numerous management officials at Riverside and Martin Marietta. (Tr. 118:10–121:12, 122:22–123:25.) The Secretary notes that Pappas was “rebuffed on numerous

occasions.” (Sec’y Br. at 35.) It is once again unclear whether these complaints were related to newer incidents of harassment over the exercise of protected activity, or if they were still in reference to the early issues he faced with Portis upon his reinstatement or to issues of a racial or sexual nature. Nonetheless, management officials refused to deal with these complaints, because they believed the issues were closely tied to his suspension and that the union grievance process for that suspension was the only appropriate venue for addressing those concerns. (Tr. 243:15–244:25, 463:19–465:10, 664:4–665:21.) Tim Sheridan, who previously worked as a trial attorney at the NLRB, believed that under the NLRA, management could not even communicate directly with Pappas about these matters without first going through his certified union representative in the grievance process, and he surmised that this is why certain Riverside officials were reluctant to engage Pappas after his suspension when Pappas came to them with concerns about harassment and retaliation. (Tr. 407:2–6, 464:17–465:10.) All exhibits documenting these interactions support Sheridan’s understanding. (*See* Exs. S–10, S–11.)

For example, in his June 29, 2015 letter to Martin Marietta corporate management, Pappas related the following conversation he had with Kevin Grogan:

Kevin says to me what do you want to talk about? I said the investigation Terry conducted. Terry refused to include my witness Harold Cole in the investigation. .

..

Grogan said to me “this is on the grievance we can not talk about this now, we will talk about at grievance meeting, we can bring up then .” I said Mr. Grogan this is a complaint about procedure not a violation of the c.b.a.. If a fair investigation was conducted with my witnesses statements included the outcome would be different . Grogan stated “no we can talk about at grievance meeting ” [sic]

(Ex. S–10.) This confirms that Pappas’s complaints were ostensibly about his suspension, and that management did in fact reasonably respond to those complaints by noting that the issues raised should be resolved in the grievance proceeding for his suspension. Furthermore, the first two pages of this letter to Martin Marietta are entirely devoted to the alleged unfairness of Pappas’s suspension and do not mention protected activity. (*Id.*) While the last half-page contains references to his prior “MSHA case” the context of the preceding two pages would have reasonably led Martin Marietta to believe that the issues were closely bound up with his suspension. (*Id.*)

Similarly, Pappas’s July 23, 2015, three-page letter to Jamie Ambrose is predominantly about the alleged unfairness of his suspension. (Ex. S–11.) On the second page, Pappas references MSHA’s interviews with “Slim” Wright during the investigation into Pappas’s prior section 105(c) complaint, but only to support Pappas’s contention that Wright was predisposed against Pappas and lied to Terry Jacobs in the investigation that led to Pappas’s suspension. (*Id.* at 2.) Further in the letter, Pappas also contends that the arbitrariness of his suspension and the faxed document to Dr. O’Brien mentioning his prior section 105(c) complaint are evidence of retaliation over the exercise of protected activity. (*Id.*) While I have already determined that these incidents are not evidence of retaliation over the exercise of protected activity, Ambrose

would have been further justified in refusing to discuss these issues based on the way they were presented: sandwiched between extended discussions regarding issues with his suspension likely to arise during his grievance proceeding. (*Id.*)

Although Pappas's retaliation complaints may have in fact been distinct from his grievance, I find Riverside's belief that they were closely connected and that therefore legal risks existed in discussing such matters with Pappas to be, at the very least, understandable from management's perspective. This belief, rather than animus or hostility, explains why Pappas's complaints about harassment in conjunction with his grievance issues went partially ignored after his suspension.

v. *Statements from Tim Sheridan*

The Secretary also alleges that at the third step grievance meeting resolving Pappas's suspension, Sheridan made several comments indicative of hostility toward protected activity. Pappas took offense to what he viewed as Sheridan "talk[ing] down" to him during this meeting and bringing up his prior section 105(c) case for inexplicable reasons. (Tr. 130:3–23.) Sheridan also told him at this meeting that the fact Sheridan even knew his name means Pappas is a problem, and then promised him that if he cooperated he would have a future with Riverside, which the Secretary labels as disingenuous since Sheridan knew that Riverside would be laying off all its employees in September. (Tr. 129:19–23; Sec'y Br. at 36.) Sheridan was undoubtedly aware of Pappas's prior section 105(c) complaint, so the question becomes whether the statements above indicate hostility toward that protected activity. (Tr. 439:1–6.)

As an initial matter, although Pappas testified that Sheridan told him "we'll keep you here, [and we] want some kind of long-term thing," Pappas also admitted that he could not remember what Sheridan said at that point because Pappas was so disturbed by Sheridan bringing up his prior section 105(c) complaint. (Tr. 129:25–130:4.) The Secretary views Sheridan's promise as disingenuous and evidence of animus, even though Pappas himself does not describe it this way. Regardless, given Pappas's hazy recollection of the statement and surrounding context, it is hard for me to derive any strong meaning from those words other than a routine desire by Sheridan for Pappas to maintain an amicable long-term relationship at the mine with his coworkers and management. Sheridan may have expected most of the management officials and employees at Riverside to be hired by CalPortland, as they ultimately were, so his statement was not necessarily disingenuous.

Regarding the other statements made, Sheridan testified that he might have told Pappas that if he knew his name, it was not a good thing, because "95 percent of the employees" that Sheridan deals with come to his attention because of a disciplinary matter. (Tr. 461:22–462:1.) I find this explanation credible and not indicative of animus. In fact, I found Sheridan to be a wholly credible witness in general.

Sheridan also explained that his role is specifically set up to make him out to be "the bad guy" – the one "wearing a black hat" – in disciplinary matters, so as to reduce tensions between employees and local management officials who have to work together on a day to day basis. (Tr. 462:2–19.) Unlike Riverside management officials, Sheridan (who worked for Martin Marietta)

could return to his office on the other side of the country, in Raleigh, North Carolina, at the end of this meeting. (*Id.*) For this reason, Sheridan wanted to make it clear to Pappas that he alone was responsible for everything happening to him. (*Id.*) Thus, I find that Sheridan told Pappas he contacted the attorney who handled Pappas's prior section 105(c) complaint not as an expression of animus toward protected activity but rather as proof of how involved Sheridan was in the process that led to Pappas's suspension. The way that Sheridan perceived his role in these matters may also explain why Pappas believed that he was being "talked down to," since Sheridan felt it necessary to redirect the animosity of aggrieved employees toward him rather than management officials. Furthermore, Sheridan's allegedly condescending statements do not appear out of place or entirely uncalled for when juxtaposed with the similarly harsh message that Pappas's international union representative Ron Espinosa delivered in that very same meeting. (Tr. 461:3-11.)

Thus, I do not find animus toward Pappas's protected activity from Sheridan.

Up to this point, the Secretary has attempted to marshal all of the evidence surrounding Pappas's suspension, starting from the company's initial investigation into Portis's complaint to the grievance resolution, to suggest a collective hostility toward Pappas's protected activity. The evidence fails to support that conclusion. Accordingly, the Secretary cannot establish a motivational nexus between Pappas's protected activity and Ambrose's and Salzborn's references by imputing to them the alleged hostility of other management officials.

*vi. Statements from David Salzborn*

While there is insufficient evidence in the record to support a finding that Riverside or Martin Marietta management was collectively hostile toward protected activity, there is stronger evidence that Salzborn individually was. Pappas alleges that Salzborn was directly hostile toward the protected activity that formed the basis of his prior section 105(c) complaint. (Tr. 76:11-17.) In 2014, Pappas brought up the issue of the train car hazardous incident at a safety meeting and also noted at that meeting that his supervisor brushed off his concerns and then lied about whether Pappas brought this issue to his attention. (Tr. 74:1-76:17.) According to Pappas, Salzborn got mad at him for calling the supervisor a liar, even though that supervisor conceded that he had lied about the incident. (Tr. 76:11-23.) This testimony went un rebutted by Salzborn and Riverside. Accordingly, I find this to be evidence of animus toward protected activity from Salzborn.

In addition, Salzborn's decision to brief Walters on some of the specifics of the incident leading to Pappas's termination, when asked by Walters to name problem employees, could be viewed as evidence of animus or hostility, given that Riverside paid a penalty to MSHA for that incident and was required to expunge from Pappas's record any mention of his termination as a part of that settlement. (Tr. 648:24-649:2; Ex. S-1.) As previously discussed, Pappas was initially terminated by Salzborn in 2014 for allegedly insubordinate behavior in driving a company vehicle when he was ordered not to do so. Pappas filed a discrimination complaint that year alleging that the company's justification for terminating him was a pretext, and that he was actually terminated for safety complaints he had made to MSHA earlier. He was subsequently reinstated pursuant to the settlement agreement mentioned above. Riverside argues that

“Salzborn never described any of the factors underlying his opinion of Pappas as an employee” to Walters and “did not mention the underlying adverse action . . . at issue in the first” discrimination case. (RCC Reply Br. at 12.) While there is no evidence that Salzborn discussed Pappas’s protected activity with Walters, including his safety complaints to MSHA or his 2014 discrimination complaint (Walters did not testify and neither party elicited testimony from Salzborn on the topic), Salzborn’s testimony at hearing indicates that he went into much more detail about Pappas than Riverside now claims. When asked why he identified Pappas as a poor performer, Salzborn mentioned that Pappas had a long history of discipline and specifically noted the incidents that led to his suspension and termination, including the company’s revocation of Pappas’s use of a company vehicle. (Tr. 635:13–637:19.) Salzborn also testified that Pappas was disciplined for this behavior and subsequently reinstated. (*Id.*) Next, when asked directly whether he gave Walters the same details he described at hearing in explaining why he believed Pappas to be a poor employee and in relating the discipline Pappas received, Salzborn responded “I probably would have explained it in the same way I’ve explained it here.” (Tr. 641:4–14.) I conclude from this testimony that Salzborn did in fact describe to Walters the factors underlying his opinion of Pappas and did in fact mention the suspension and termination relating to his use of a company vehicle.

The Commission order approving the settlement for Pappas’s initial section 105(c) claim states, in no uncertain terms, “Respondent agrees to, within ten days of this order, remove from Complainant’s personnel file all records relating to the revocation of Complainant’s use of the company vehicle, Complainant’s March 21, 2014 suspension, and Complainant’s April 4, 2014 termination.” (Ex. S–1.) Given that Salzborn would have been prohibited from disseminating this information to CalPortland through a personnel file, Riverside similarly violated the spirit of this order by providing this information to CalPortland orally from one plant manager to another.

It is unclear from the record whether Salzborn was at the time aware of the settlement terms for Pappas’s initial section 105(c) complaint, as Salzborn had retired during the same month in which Pappas settled the matter and was therefore not working at the plant when Pappas returned to work. (Tr. 637:20–23, 648:16–649:25.) The Secretary’s cross-examination revealed Salzborn’s awareness of the settlement terms at the time of the December 2016 hearing, but left uncertain whether Salzborn knew these facts in 2015. (*Id.*) However, given Salzborn’s central role in the initial discrimination claim, I infer that he would have been made aware of the terms of Pappas’s reinstatement at some point prior to his discussion with Walters.

Salzborn’s deliberate disregard of a Commission order and settlement resolving Pappas’s section 105(c) claim is an expression of animus toward Pappas’s section 105(c) rights that should not be tolerated. This behavior is indicative of a discriminatory motive for providing a negative reference.

c. Coincidence in Time

The Commission does not have any hard and fast criteria for determining a sufficiently close temporal proximity between protected activity and adverse action, as it has stressed that “[s]urrounding factors and circumstances may influence the effect to be given to such coincidence in time.” *Hyles v. All Am. Asphalt*, 21 FMSHRC 34, 45 (Feb. 1999) (citation

omitted). In particular, “evidence of intervening acts of hostility, animus, and disparate treatment” may be relevant in making that determination. *Sec’y on behalf of Lige Williamson v. Cam Mining, LLC*, 31 FMSHRC 1085, 1090 (Oct. 2009).

Pappas filed his initial section 105(c) discrimination complaint on July 21, 2014. As a part of the terms of the settlement for that complaint, Pappas was reinstated at the Oro Grande Plant in January 2015. (Tr. 79:19–22.) Ambrose and Salzborn both provided their recommendations to CalPortland regarding Pappas in early September. (Tr. 632:7–11, 685:3–686:5.)

In this case, there was a 17-month window between Pappas’s discrimination complaint and the adverse actions alleged, a gap that does not support a finding of coincidence in time. While it may be more appropriate to begin counting from when Pappas was reinstated in January, I find that even an eight-month proximity between Pappas’s reinstatement and Salzborn’s and Ambrose’s September recommendations does not weigh strongly in favor of a coincidence in time finding. The Secretary wants me to treat Riverside’s actions as one continuous, escalating series of wrongdoings in order to shorten the gap between protected activity and adverse activity. The problem with this theory is that I do not find evidence of intervening acts of hostility, animus, or disparate treatment between Pappas’s reinstatement and the adverse actions alleged that would influence the effect to be given to this lengthy gap in time.

However, the Secretary has also alleged that Pappas exercised protected activity by complaining about harassment after his reinstatement to Riverside. He initially complained about this to Ambrose in early February 2015. (Tr. 81:14–82:16.) He next complained about related issues on June 29, 2015, to Kevin Grogan and Martin Marietta headquarters. (Tr. 117:13–123:25; Ex. S–10.) Finally, he requested help from Jamie Ambrose in July, approximately two months prior to when she gave CalPortland her reference checks. (Tr. 124:1–126:13.) In these discussions, Pappas raised concerns about Riverside’s indifference or hostility toward his protected activity, albeit as an aside in conversations more focused on other issues with his suspension. (*See* Ex. S–10 at 3.) Although the evidence is not overly compelling, this two-month window just barely establishes a sufficient coincidence in time between Pappas’s protected activity and Riverside’s adverse actions. *See Pero v. Cyprus Plateau Mining Corp.*, 22 FMSHRC 1361, 1365 (Dec. 2000) (finding that an adverse action taken three to four months after a miner’s exercise of protected activity constituted sufficiently close temporal proximity).

d. Disparate Treatment

i. *Suspension*

The Commission has determined that “[t]ypical 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.” *Chacon*, 3 FMSHRC at 2512. The Secretary does not cite extensively to evidence of disparate treatment in Ambrose’s and Salzborn’s references to CalPortland. However, the Secretary claims that Riverside meted out “disproportionate discipline,” referring to Pappas’s suspension which was in part the alleged basis for Ambrose’s and Salzborn’s negative references. (Sec’y Br. at 35.)

Pappas claimed, and Arps concurred, that profanity and heated exchanges were commonplace at the mine, because miners deal with dangerous and physically draining work, and tensions often run high in such conditions. (Tr. 100:2–102:17, 375:19–377:2.) However, neither witness established whether Riverside employees engaged in such behavior without disciplinary consequences, and thus whether Pappas was disparately treated. A Riverside employee, Russell Ontiveros, who threatened an employee in a manner similar to the conduct for which Pappas was suspended was, according to Pappas, also ultimately suspended for that conduct. (Tr. 290:23–293:7.) The Secretary attempts to distinguish Pappas’s and Ontiveros’s cases by noting, through Pappas’s hearsay testimony, that Ontiveros was “only disciplined after several complaints and an appeal to corporate headquarters” and that he only received a “brief suspension” without any “position change or staff changes to separate him from the complaining employee” or any “requirement for a psychological evaluation or anger management.” (Sec’y Br. at 36.) I do not find these facts to be meaningfully distinguishable. Pappas’s three-day suspension was also brief, also came after an earlier complaint against him, and also involved a delayed response after input from corporate headquarters. Importantly, Pappas did not know if Ontiveros had a “prior incident of a hostile work environment finding,” which caused Riverside to recommend additional measures for Pappas. (Tr. 309:24–310:14.)

The other incident that Pappas cited to as evidence of disparate treatment is similarly unpersuasive. After Pappas returned from his suspension, Portis and another employee allegedly teased him by repeating the same profane language that earned Pappas his suspension. Pappas allegedly reported this incident to Ambrose, but his concerns were brushed aside. (Tr. 296:17–298:25.) However, Pappas does not appear to have alleged to Ambrose that Portis’s language was similarly threatening in the way that Pappas’s language was perceived to be. (*Id.*) And once again, Pappas did not know if the individual who was with Portis had a prior incident of a hostile work environment finding. (Tr. 310:15–18.) Nothing in the record shows that Portis had a prior incident of a hostile work environment finding either. I can only conclude that in failing to develop this evidence further, the Secretary is conceding the weakness of this argument.

The Secretary’s claim that Pappas’s suspension was disproportionately harsh also does not stand up to scrutiny. While Arps testified that verbal counseling would be a more appropriate response to Pappas’s behavior and that the decision to disqualify Pappas from his position at the time was objectionable, he was unaware that Pappas had already been suspended once in 2010 for threatening language prior to the incident with Portis. (Tr. 403:8–12.) I agree with Riverside that this context is crucial for determining whether this discipline was an appropriate response the second time in 2015.

In this case, the strongest evidence weighing against a finding of disparate treatment for Pappas’s suspension is that Pappas had already received nearly identical discipline (a three-day suspension without pay, along with anger management counseling and disqualification from his position at the time) for a similar (and by Pappas’s telling a less serious) incident in 2010, involving a violation of the same work rule, and there is no allegation that the 2010 suspension was motivated by protected activity. (Tr. 158:7–161:3, 311:2–9; Ex. RCC–6.) This indicates that Sheridan’s punishment was not out of line with the operator’s normal business practices. Further, the company’s disciplinary rules allowed Riverside to terminate Pappas for a violation of this rule. (Tr. 434:25–435:5; Ex. RCC–22 at 2.)

Nor do I find that Riverside's justification was weak or implausible. Pappas's behavior was serious enough to merit discipline. His outburst lasted somewhere between two to seven minutes and occurred within 10-12 feet of Portis.<sup>31</sup> (Ex. RCC-1; Tr. 184:14-23, 433:13-21.) Ron Espinosa, a USW official, found Pappas's behavior troubling enough to merit calling him into his grievance proceeding and giving him a stern lecture, which numerous witnesses, including Pappas himself, credibly described as an unusual occurrence. (Tr. 127:23-128:1, 354:25-355:22, 460:11-461:18, 630:8-631:1.)

The Secretary's evidence is insufficient to establish disparate treatment in Pappas's suspension.

*ii. Salzborn's Statements*

When Salzborn was asked by Walters to identify "some of the employees that might be problematic," Salzborn listed only two employees that he felt posed an issue, one of whom was Pappas. (Tr. 632:12-20, 641:25-642:5.) Pappas was allegedly singled out because of disciplinary issues. At the hearing, Salzborn could not remember the name of the other employee he discussed with Walters, although he knew that the employee was a recent hire and was a mechanical supervisor. (Tr. 651:1-12.) Salzborn claimed that he was not aware of that employee having engaged in protected activity and that he mentioned that employee to Walters because of absenteeism issues. (Tr. 642:6-25.) Given the lack of information provided about this employee, it is difficult for me to evaluate whether both employees singled out had actually engaged in protected activity, which could provide evidence of disparate treatment. However, Salzborn neglected to mention a number of other employees with disciplinary issues. In her testimony, Ambrose named at least three different employees with multiple or recent disciplinary issues, and numerous more with related problems, none of whom Salzborn identified at hearing.<sup>32</sup> (Tr. 694:7-15, 695:5-11, 702:17-23.) I find this evidence to be marginally probative of disparate treatment.

*iii. Ambrose's Recommendations*

As a preliminary matter, I note that I found Ambrose to be a credible witness on the stand in regard to her motivation for not providing Pappas with a positive reference. Admittedly, she did have troubling inconsistencies in the statements she gave to MSHA Inspector Jackson

---

<sup>31</sup> Although "Commission precedent establishes that it is not the duration of various single incidents that is most relevant to disparate treatment analysis, but rather whether there was a prior problem with misconduct involving the complainant," in this case there was both a prior problem with misconduct and a verbal outburst of lengthy duration. *Sec'y of Labor on behalf of Bernardyn v. Reading Anthracite Co.*, 23 FMSHRC 924, 933 (Sept. 2001). Consistent with Commission case law, the prior misconduct is the more relevant factor in my analysis, but I find the length of his outburst to be somewhat relevant as well.

<sup>32</sup> Salzborn had recently attended a third step grievance in which several different miners' grievances were settled, but Salzborn testified that he did not recall any of those grievances or miners, or any of the disciplinary issues that may have been grieved. (Tr. 646:19-647:14)

regarding whom she spoke to from CalPortland and what the subject matter was, but her rationale for Pappas's non-recommendation did not change, and her testimony in-person on this point was reasonable, detailed, and consistent. Furthermore, Ambrose explained that some of the inconsistencies during the MSHA interview process were due to her not fully understanding Inspector Jackson's initial questioning. (Tr. 715:1-15.) I observed Ambrose and Inspector Jackson closely on the stand, and based on my observations I also found this explanation believable. Beyond those inconsistencies, the Secretary's direct examination of Jackson and cross-examination of Ambrose did very little to impeach Ambrose's credibility – for example by pointing out instances of disparate treatment in her recommendations.

Ambrose claimed that her decision not to recommend Pappas for hiring was based on Pappas's hostile work environment disciplinary issue, which was fresh on her mind due to the recent resolution of his grievance seven days prior. (Tr. 690:16-23.) Ambrose did not recommend hiring two other employees with disciplinary issues, both of whom also had their grievances settled alongside Pappas's in that same meeting Ambrose attended. (Tr. 694:7-695:11, 645:19-647:14.) The Secretary notes that Ambrose gave a positive reference to Russell Ontiveros, who Pappas claimed was also accused of creating a "hostile work environment." (Sec'y Reply Br. to RCC at 9; Tr. 290:20, 293:15). Pappas believed that Ontiveros's incident occurred at the beginning of 2015, around February, just after Pappas was reinstated. (Tr. 309:2-17.) But he did not mention when Ontiveros was suspended, or whether he grieved the suspension, such that the issue would have been fresh on Ambrose's mind in September. Pappas also admitted that he did not know if Ontiveros had a "prior incident of a hostile work environment finding." (Tr. 309:24-310:14.) The Secretary did not question Ambrose or any management official about their familiarity with Ontiveros's issues or introduce easily obtainable corroborating evidence about his discipline. Pappas recognized the potential for distortion, inaccuracy, and unfair reputational harm in rumors based off hearsay. (Tr. 82:3-6.) However, the Secretary appears to rely entirely on rumor and hearsay to make out a case of disparate treatment from Ambrose.

Without further information on the circumstances of Ontiveros's suspension and his prior disciplinary history, this one incident, only vaguely alluded to in Pappas's testimony, is very weak evidence of pretext. The Secretary failed to develop this evidence: he could have easily requested Riverside's personnel files, examined whether the employees Ambrose positively recommended for hiring had recent or recurrent disciplinary problems comparable to Pappas's, or questioned Ambrose about Ontiveros. The Secretary did not introduce any such evidence into the record, the absence of which prevents me from finding disparate treatment on Ambrose's part.

Consequently, the Secretary's evidence does not establish a motivational nexus between Pappas's protected activity and Ambrose's references.

e. Conclusion

The Secretary has produced evidence on all of the prima facie elements of a discrimination claim. Riverside has presented rebuttal evidence that Salzborn's and Ambrose's references were in no part motivated by protected activity and were instead motivated by

Pappas's disciplinary issues and recent suspension. After weighing this evidence, I find that the Secretary has proven by a preponderance of the evidence that Salzborn's statements to Walters were motivated in part by his protected activity. Salzborn had knowledge of Pappas's protected activity, displayed animus toward that protected activity in discussing his termination and reinstatement, and engaged in disparate treatment by failing to mention other miners with disciplinary problems at the mine.

However, the Secretary has not proven by a preponderance of the evidence that Ambrose's actions were motivated in any part by protected activity. I should first note that although I have already credited Ambrose's explanation for many of the inconsistencies in her MSHA interview, I am troubled by one piece of evidence from that interview. Ambrose stated she did not give Antonoff any reason for why she would not hire any of the employees she declined to recommend, but Antonoff told MSHA that Ambrose singled out employees with poor attendance, conflicts with supervisors, or imminent retirement, and that Ambrose "said she wouldn't hire the president and vice president of the union because of the union." (Tr. 519:22–520:18, 832:1–833:25; Exs. S–19, S–20.) This evidence slightly undermines Ambrose's credibility in her description of the meeting with Antonoff, but more importantly it indicates that Ambrose knew how to spot problem employees, harbored hostility toward protected activity in other statutory contexts like the NLRA, and passed along those concerns to CalPortland. In short, something does not smell quite right with this case. Inspector Jackson's preliminary investigation did indeed uncover problems – problems that would help the Secretary meet his burden in a temporary reinstatement proceeding. But these problems, on their own, do not satisfy the Secretary's higher burden in this proceeding on the merits. The Secretary had a year to develop this case and link these troubling answers to more reliable indicia of discriminatory intent. It is here where the Secretary's case against Ambrose falls short.

While Ambrose did have knowledge of Pappas's protected activity and there was a weak coincidence in time between that protected activity and her recommendations, there was no evidence that she was hostile toward Pappas or his complaints. Nor was there sufficient evidence of disparate treatment regarding whom she did or did not recommend, because the Secretary did not introduce personnel records for any miner she recommended or cross-examine her about the one case of disparate treatment alleged through hearsay testimony.

The Secretary attempts to tie Pappas's suspension, Ambrose's negative reference, and Salzborn's statements to Walters together as part of a larger effort from Riverside to blacklist Pappas for employment at the Oro Grande plant. This allows the Secretary to draw on evidence of animus and disparate treatment from other Riverside officials in inferring discriminatory motivation on Ambrose's part. The problem with this theory is that it would require far more evidence of coordination and widespread animus than the Secretary has provided, a problem that I have already detailed in the context of Pappas's suspension. Although Ambrose's negative reference was close enough in time to Salzborn's to raise concerns that the acts were coordinated, there is no evidence that the two communicated about Pappas with each other or through any other common Riverside management official outside of the third step grievance meeting, from which there is also no evidence of improper discussions. The Secretary has not presented sufficient evidence to tie Ambrose's recommendations to Salzborn's improperly motivated ones. Without this link, the Secretary has not persuaded me by a preponderance of the

evidence that Ambrose’s recommendations were in any part motivated by Pappas’s protected activity.

Therefore, I determine that Salzborn’s warning to CalPortland was in part motivated by discriminatory intent but Ambrose’s recommendation was not, and that these efforts were not a part of a larger conspiracy to prevent Pappas’s retention at the plant. However, as Salzborn was a management official, Riverside would still be liable for Salzborn’s unlawful acts if the operator cannot establish an affirmative defense.

### 3. Affirmative Defense

Riverside argues that “even if the Court finds that the Secretary established a prima facie case, the complaint must still be dismissed because Riverside established a proper business justification for its” adverse actions. (RCC Br. at 23; *see also* RCC Reply Br. at 11.) I interpret this as an affirmative defense.<sup>33</sup> While I have determined that Ambrose’s negative reference was in no part motivated by protected activity while Salzborn’s negative reference was, I will evaluate whether Riverside can establish a successful affirmative defense for both adverse actions.<sup>34</sup> The company articulates a nearly identical business justification for both Ambrose and Salzborn which allegedly would have motivated them to say what they did with or without protected activity. (RCC Br. at 23.) According to Riverside, Pappas’s 2015 hostile work environment claim and the incident with Portis that led to it were “fresh in [the] mind[s]” of Ambrose and Salzborn, who had both attended Pappas’s third step grievance meeting shortly before they gave their recommendations, and this is in fact what “caused them to formulate their respective opinions.” (RCC Br. at 21.) The Secretary responds that this explanation is mere pretext.

---

<sup>33</sup> Riverside supports its business justification by citing to a case in which the operator prevailed by proving as an affirmative defense that “it *would have* taken the adverse action . . . for . . . unprotected activity alone.” (RCC Br. at 23.) (emphasis added) In context, then, it is clear that Riverside’s business justification is an affirmative defense pled in the alternative after assuming, *arguendo*, that the Secretary has met his prima facie burden of persuasion.

<sup>34</sup> Recently, in rejecting an operator’s affirmative defense which had been pled in the alternative, the Commission stated, “Since [the operator] contends that its termination of Riordan was completely unrelated to his protected activity, this is not a ‘mixed-motive’ case where, under *Pasula-Robinette*, the operator could prove an affirmative defense by showing that it would have terminated Riordan for unprotected activity alone.” *Riordan*, 38 FMSHRC at 1923 n.11. I do not interpret this to mean that an operator cannot prevail on an affirmative defense if it is pled in the alternative. In *Riordan*, the ALJ wholly discredited the operator’s business justification on rebuttal and effectively determined that the adverse action was *in no part* motivated by *unprotected* activity. I interpret *Riordan*’s holding to mean that in such cases the operator cannot prevail on a “mixed-motive” affirmative defense, because the defense must rely in part on a credible business justification. *See Riordan* at 1930. In contrast, I have not wholly discredited the operator’s business justification on rebuttal.

When evaluating an operator's business justification for an adverse action,

[T]he inquiry is limited to whether the reasons are plausible, whether they actually motivated the operator's actions, and whether they would have led the operator to act even if the miner had not engaged in protected activity. The Commission may not impose its own business judgment as to an operator's actions.

*Pendley v. FMSHRC*, 601 F.3d 417, 425 (6th Cir. 2010) (citations omitted). However, the Commission has held 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) (citations omitted). The Commission has added,

In the context of other federal discrimination statutes, courts have analyzed the issue of pretext as follows: "A plaintiff may establish that an employer's explanation is not credible by demonstrating 'either (1) that the proffered reasons had no basis *in fact*, (2) that the proffered reasons did not *actually* motivate [the adverse action], or (3) that they were *insufficient* to motivate [the adverse action].'"

*Turner*, 33 FMSHRC at 1073 (citations omitted).

In this case, there can be no dispute that the proffered reason was plausible and had a basis in fact. Pappas was in fact suspended for his outburst toward Portis, and both Ambrose and Salzborn did in fact attend his grievance meeting for that incident shortly before giving their references. (Tr. 129:2–7.) I also do not find that this recent suspension was a weak justification or would have been insufficient to motivate a negative recommendation absent protected activity. A serious and recent disciplinary problem would certainly make someone in Ambrose's position "unsure" about whether or not to recommend Pappas for hiring to a new employer, and could easily lead someone in Salzborn's position to single out Pappas when asked to name problematic employees. The question then becomes whether the proffered reasons actually motivated Ambrose's and Salzborn's recommendations.

As discussed, there was very little evidence of disparate treatment at hearing, and the Secretary's case lacked detailed comparisons between employees who were and were not recommended, which an examination into Riverside's personnel records could have shed light on. Instead, Riverside has presented sufficient evidence that Ambrose gave negative or "unsure" references about multiple other employees with disciplinary issues comparable to Pappas's. (Tr. 694:7–695:11, 645:19–647:14.) While there is some evidence that Salzborn did not mention a couple other employees with similar disciplinary issues, Salzborn credibly testified that Pappas's issues were recent, recurrent, and unprecedented in provoking such a harsh response from the international union representative Ron Espinosa, an incident that caused Pappas's suspension to stick in Salzborn's mind. (Tr. 646:19–647:5.) Multiple witnesses, including Pappas himself, confirmed that this was an unusual response from Espinosa. (Tr. 127:2–128:1, 354:25–355:22, 460:11–461:18, 630:8–631:1.) Therefore, I find that both Ambrose and Salzborn would have given negative references for Pappas based on his unprotected activity alone.

The Secretary cites first to inconsistencies in the statements Ambrose and Antonoff gave to MSHA and then to language from Commission ALJ decisions that “where an employer provides an inconsistent or shifting rationale for its actions, a reasonable inference can be drawn that the reason proffered is a pretext designed to mask an unlawful motive.” (Sec’y Br. at 37.) However, it is not Ambrose’s rationale that has shifted or lacked consistency; it is her account of who she spoke to and what they discussed that has changed. Of the six or seven pieces of evidence that the Secretary cites to for the proposition that Riverside’s rationale was shifting or inconsistent, the only one that even mentions a rationale for not recommending Pappas is Ambrose’s Declaration filed in conjunction with CalPortland’s Motion for Summary Decision, and this rationale is consistent with Ambrose’s testimony at hearing that she was motivated by Pappas’s recent suspension and her recent participation in his grievance process. (*See* Sec’y Br. at 22–23; Tr. 690:16–23.) Her rationale for not offering a positive opinion on Pappas has remained consistent and credible throughout these proceedings.

Based on the above findings, I conclude that Salzborn and Ambrose would have provided negative references to CalPortland on the basis of Pappas’s unprotected activity alone.

#### **4. Conclusion**

The Secretary has failed to establish that Riverside unlawfully discriminated against Pappas in violation of Section 105(c) of the Mine Act. While Riverside may have been motivated in part by discriminatory animus, I find that the operator would have given the same negative references as a result of Pappas’s unprotected activity alone.

### **B. Whether CalPortland Engaged in Discriminatory Hiring**

The Secretary argues that CalPortland unlawfully discriminated against Pappas when CalPortland did not hire Pappas because of Salzborn’s and Ambrose’s recommendations. (Sec’y Br. at 39.) CalPortland does not dispute that Pappas engaged in protected activity when he filed his April 2014 discrimination complaint. (CPC Br. at 42.) CalPortland also does not dispute that its decision to not hire Pappas constituted adverse action. (*Id.* at 42–43.) Thus, the sole issue before me at this stage is whether CalPortland’s hiring decision was motivated in any part by Pappas’s first 2014 discrimination complaint.

#### **1. Discriminatory Motive**

The Secretary argues that CalPortland’s decision to not hire Pappas was motivated by Pappas’s protected activity. (Sec’y Br. at 39–45.) Specifically, the Secretary claims that CalPortland had knowledge of Pappas’s protected activities through Salzborn and Ambrose and that Ambrose exhibited animus toward Pappas’s protected activity through her inadequate response to Pappas’s harassment and her participation in disciplining Pappas for the incident involving Portis. (*Id.* at 33–36, 39–42.) The Secretary argues that Ambrose’s recommendation influenced CalPortland’s hiring decision and therefore her knowledge and animus may be imputed to CalPortland. (*Id.* at 40–44.) Lastly, the Secretary asserts that CalPortland’s reasons for not hiring Pappas are pretextual and that other miners with applications and interviews identical to Pappas’s were hired by CalPortland. (*Id.* at 43–45.)

In contrast, CalPortland argues that it had no knowledge of Pappas's protected activity and that such knowledge cannot be imputed from Ambrose because she did not work for CalPortland during the hiring process. (CPC Br. at 32–37.) Additionally, CalPortland argues that neither CalPortland nor Ambrose exhibited animus toward Pappas's protected activity, that no coincidence in time existed between Pappas's protected activity and CalPortland's hiring decision because Pappas's first discrimination case was resolved in December 2014, and that there is no evidence of disparate treatment. (*Id.* at 43–44.) Lastly, CalPortland maintains that the reasons behind its hiring decision were not pretextual and that Lamb had legitimate business reasons for not recommending Pappas for hire. (*Id.* at 44–47.)

In evaluating whether a causal connection existed between Pappas's protected activity and CalPortland's hiring decision, I again consider the four *Chacon* factors: (1) knowledge of the protected activity; (2) hostility or animus toward the protected activity; (3) coincidence in time between the protected activity and the adverse action; and (4) disparate treatment of the complainant. *Chacon*, 3 FMSHRC at 2510.

a. Knowledge of Protected Activity

The Secretary alleges that CalPortland had actual knowledge of Pappas's protected activity through Salzborn's conversation with Walters and Ambrose's interactions with Antonoff, who communicated Ambrose's recommendations to Lamb. (Sec'y Br. at 39–40.) Both Salzborn and Ambrose had knowledge of Pappas's protected activity and were questioned in Pappas's 2014 discrimination proceeding. (Tr. 635:13–637:19, 647:15–649:2, 763:11–764:10.) However, neither of them had the final authority to hire Pappas at CalPortland. (Tr. 632:1–5, 806:6–21, 876:21–877:1, 879:18–25, 904:12–16.) Instead, Walters and Lamb made the final hiring decisions for CalPortland. (*Id.*)

The Secretary points to Salzborn's conversation with Walters as evidence that Salzborn informed Walters about Pappas's protected activity. (Sec'y Br. at 39–40.) Salzborn identified Pappas as a problem employee and told Walters about Pappas's termination for insubordination. (Tr. 632:18–20, 633:7–639:12, 641:7–24.) Although this termination was the subject of Pappas's 2014 discrimination complaint, Salzborn never explicitly testified to mentioning Pappas's discrimination case to Walters, but only stated that he talked about the alleged insubordination regarding Pappas's use of his truck at the mine. (*Id.*) Walters stated in an interview with Inspector Jackson that he did not know Pappas filed a discrimination complaint in 2014. (Ex. S–22 at 2.) I cannot infer based solely on Salzborn's ambiguous description of his conversation with Walters and Walters's unsigned statement to Jackson that Walters had actual knowledge of Pappas's protected activity. Had the Secretary presented further testimony from Walters to clarify his conversation with Salzborn or discredit his statement to Jackson, then perhaps I would be able to reach that conclusion. However, no such testimony exists. I therefore determine that the Secretary has failed to establish that Walters had actual knowledge of Pappas's protected activity through Salzborn.

The Secretary also asserts that CalPortland had actual knowledge of Pappas's protected activity through Ambrose's contact with CalPortland. (Sec'y Br. at 39–40.) The record establishes that Ambrose met with Antonoff to conduct a reference check of Riverside's

employees. (Tr. 685:3–686:5, 711:20–23, 819:18–820:1, 854:16–22; Exs. S–18 at 2, S–19 at 3, S–20 at 3.) Although Ambrose initially told Inspector Jackson she did not talk about Riverside’s employees to CalPortland, Antonoff revealed to Jackson that Ambrose identified certain employees with attendance issues, supervisor conflicts, and upcoming retirements. (Exs. S–17 at 3, S–19 at 3, S–20 at 3.) While Ambrose’s inconsistent statements about the meeting cloud the record in regard to what exactly she shared about Pappas during the meeting, Antonoff’s spreadsheet does not contain any additional meeting notes for Pappas besides a highlight indicating that Ambrose did not give Pappas a positive recommendation. (Ex. CPC–27 at 5.) This evidence is not sufficient to establish that Antonoff had actual knowledge of Pappas’s protected activity through his conversation with Ambrose. Furthermore, the record provides no additional proof that Antonoff communicated any additional details to Lamb, who made the actual hiring decision. Although Antonoff’s spreadsheet was provided to Lamb, Lamb would not have learned about Pappas’s protected activity based on a review of the spreadsheet alone. (Tr. 824:9–14, 904:17–905:2; Ex. CPC–27 at 5.) The absence of further evidence from the Secretary therefore prevents me from determining that CalPortland had actual knowledge of Pappas’s protected activity through Ambrose.

Nevertheless, the Secretary also asserts that even if CalPortland did not have actual knowledge of Pappas’s protected activity, the knowledge of its agents may be imputed to CalPortland. (Sec’y Br. at 40.) A supervisor’s knowledge and animus may be imputed to an employer if the supervisor is consulted regarding the miner’s employment and influences the employment decision. *See Turner*, 33 FMSHRC at 1067–68 (imputing knowledge and animus of miner’s direct supervisors to official making disciplinary decision); *Metric Constructors, Inc.*, 6 FMSHRC 226, 230 n.4 (Feb. 1984) (“An operator may not escape responsibility by pleading ignorance due to the division of company personnel functions”); *Sec’y of Labor on behalf of Garcia v. Colorado Lava, Inc.*, 24 FMSRHC 350, 358 (Apr. 2002) (“If a supervisor has knowledge of an employee’s protected activities, harbors animus towards that protected activity, and influences or participates in a decision that adversely affects the employee, the courts have imputed knowledge and animus to the employer notwithstanding the actual decision-maker’s ignorance of the protected activities”) (Comm’r Jordan, concurring). A supervisor hired for future employment by a company purchasing a mine may be considered an agent of the purchasing company though he or she remains employed by the selling company. *Meek v. Essroc Corp.*, 13 FMSHRC 1970, 1978 (Dec. 1991) (ALJ) (finding a plant manager and a human resources manager still employed by the selling company to be de facto management agents of a buying company whose discriminatory motive in recommending employees for hire may be imputed to the buyer), *aff’d* in relevant part, 15 FMSHRC 606 (Apr. 1993).

The Secretary argues that Ambrose’s knowledge may be imputed to CalPortland because Lamb relied on Ambrose’s recommendations.<sup>35</sup> (Sec’y Br. at 40–42.) After Ambrose accepted

---

<sup>35</sup> The Secretary does not contend that Salzborn is an agent of CalPortland whose knowledge and animus may be imputed. Indeed, unlike Ambrose who accepted a job offer to work for CalPortland, Salzborn was never employed by CalPortland. (Tr. 616:9–618:15.) Although his role was to act as a liaison between Riverside and CalPortland during the mine’s transition, Salzborn remained an employee of Riverside (Martin Marietta) and retired from Riverside on September 30, 2015, before CalPortland took over the mine. (*Id.*)

CalPortland's job offer, Antonoff consulted Ambrose for her hiring recommendations and made notes on a spreadsheet, which he shared with Lamb, as noted above. (Tr. 685:19–686:5, 688:24–3, 819:18–821:20, 824:9–14, 843:3–18, 904:17–905:2; Ex. CPC–27.) Lamb incorporated Ambrose's recommendations in her own spreadsheet list. (Tr. 915:3–13, 916:4–13; Ex. CPC–29.) On the spreadsheet list, Lamb circled in blue ink the names of employees who she would not hire based on her independent review of the application and interview materials. (*Id.*) She also circled in blue ink the names of employees Ambrose did not recommend. (*Id.*) Lamb relied on her spreadsheet list to make the final hiring decisions for CalPortland. (Tr. 904:3–11, 915:3–13, 916:4–13; Ex. CPC–29.) Because Ambrose already accepted CalPortland's job offer before she met with Antonoff, I determine that Ambrose was a de facto agent of CalPortland at the time she gave her hiring recommendations. Given that Ambrose's recommendations were indistinguishable from Lamb's own recommendations on the spreadsheet list Lamb relied on to make the hiring decisions, I also determine that Ambrose had influence over Lamb's hiring decisions. Accordingly, I conclude that Ambrose's knowledge of Pappas's protected activity may be imputed to Lamb.

Based on the reasons above, I determine that CalPortland had knowledge of Pappas's protected activity.

b. Hostility or Animus toward Protected Activity

The Secretary argues that Ambrose displayed animus that may be imputed to CalPortland when she failed to address Pappas's harassment, which led to Pappas's outburst and subsequent discipline. (Sec'y Br. at 40–42, 33–36.) Like knowledge, a supervisor's animus may be imputed to an employer if the supervisor influenced the adverse employment decision. *See Turner*, 33 FMSHRC at 1067–68; *Garcia*, 24 FMSRHC at 358 (Comm'r Jordan, concurring). As determined above, Ambrose acted as a de facto agent of CalPortland at the time she gave her recommendations, which influenced CalPortland's hiring decisions. *See discussion supra* Part V.B.1.a. Any discriminatory animus that motivated her recommendations could therefore be imputed to CalPortland. *See Turner*, 33 FMSHRC at 1067–68; *Meek*, 13 FMSHRC at 1978, *aff'd* in relevant part, 15 FMSHRC 606 (Apr. 1993).

However, as previously discussed, the evidence does not establish that Ambrose exhibited animus toward Pappas's protected activity. *See discussion supra* Part V.A.2.b.i. Pappas himself testified that Ambrose had always been nice and polite to him. (Tr. 170:14–17.) Ambrose addressed Pappas's harassment concerns by speaking with Pappas's supervisors, who never reported any further issues to her. (Tr. 660:22–661:5, 662:15–22, 170:24–173:12.) Ambrose's subsequent maternity leave also offers a non-discriminatory reason for why she could not fully remedy Pappas's issues with co-workers and also limited her role in Riverside's investigation into the hostile work environment claim against Pappas. (Tr. 662:11–14.) Further, I have already determined that Ambrose's recommendation was not in any part motivated by Pappas's protected activity. *See discussion supra* Part V.A.2.e. Thus, consistent with my prior determinations, I cannot conclude that Ambrose displayed discriminatory animus that may be imputed to CalPortland.

The Secretary has failed to put forward any additional evidence showing that other agents of CalPortland with knowledge of Pappas's protected activity exhibited animus or hostility toward the protected activity. Notably, the Secretary has claimed that CalPortland's liability for Pappas's discrimination could stem from Walters's alleged knowledge of Pappas's protected activity, which Salzborn communicated to him. Yet, the Secretary inexplicably did not develop this theory and neglected to present evidence through Walters's deposition or Walters's testimony at hearing that Walters displayed animus or hostility toward the protected activity. Walters's comments to Inspector Jackson referring to Pappas as a "poor performer" and "not a good employee," and indicating Pappas was a "no" for hire appear unrelated to Pappas's protected activity, given that Walters denied knowledge of Pappas's 2014 discrimination complaint. (Ex. S-22.) Moreover, although Salzborn exhibited animus toward Pappas's protected activity, he was not an agent of CalPortland whose knowledge and animus may be imputed. *See* discussion *supra* Part V.B.1.a, note 35.

Based on the reasons above, I therefore conclude that the Secretary has failed to establish that Ambrose or any other agent of CalPortland exhibited animus or hostility towards Pappas's protected activity.

c. Coincidence in Time

The eight-month gap between Pappas's reinstatement at Oro Grande in January 2015 and CalPortland's failure to hire on September 28, 2015, does not support a coincidence in time finding. However, I have determined that a coincidence in time existed between Pappas's complaints about harassment to Ambrose, whose knowledge may be imputed to CalPortland. *See* discussion *supra* Part V.A.2.c. Because Ambrose knew about Pappas's harassment complaints, the last of which occurred in July 2015, and declined to recommend Pappas two-months later, which influenced CalPortland's adverse hiring decision, I determine that the two-month window establishes a coincidence in time between Pappas's protected activity and CalPortland's adverse action.

d. Disparate Treatment

The Commission has determined that "[t]ypical 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." *Chacon*, 3 FMSHRC at 2512. "Precise equivalence in culpability between employees" is not required, rather employees must have engaged in conduct of "comparable seriousness." *Pero*, 22 FMSHRC at 1368.

Although the Secretary has not made a specific claim for disparate treatment against CalPortland, the Secretary suggests that Lamb did not give the same time and attention to Pappas's job application as the other applications, but rather relied solely on Ambrose's recommendation to not hire Pappas. (Sec'y Br. at 43-44.) The Secretary claims that had Lamb evaluated the applications according to her description of her review process, she would have uncovered other applications with the same problems she identified in Pappas's application. (*Id.*) Yet, the Secretary argues, Lamb did not make similar negative remarks about these applicants on the spreadsheet she created to make the final hiring decisions. (*Id.*)

During CalPortland's interview process, Inspector Jackson found that 48 out of 99 applicants answered similarly to Pappas in response to the question about conflicts with co-workers. (Tr. 574:12–23; Ex. S–29.) Jackson also found that 56 applicants answered similarly to Pappas in response to the question about disagreements with a boss and that 29 applicants answered similarly to Pappas in response to the question about reporting safety violations. (Tr. 574:24–575:7; Ex. S–29.) Jackson additionally noted that several applicants' working history demonstrated "job hopping" or a history of three or more job positions at Oro Grande. (Tr. 570:12–19; Ex. S–29.) Based on these numbers, the Secretary suggests that these other miner applicants should have also not been recommended for hire by Lamb.

But, of these applicants that Jackson identified, only three miners' applications and interview questions reflected both job hopping and answers similar to Pappas's for the questions about reporting safety violations and workplace conflicts which Lamb identified factored in her decision not to hire Pappas.<sup>36</sup> (Exs. S–29, S–30.) Although these three applicants were extended job offers by CalPortland, their application materials also reveal significant differences from Pappas's application. (Exs. S–30, CPC–30 at 2–4.) For example, all three applicants were being considered for positions other than laborer – one an electrician, one a shift utility worker, and one a mill lubeman. (Exs. S–30, CPC–30 at 2–4.) Pappas's application does not indicate he would be qualified to be hired as an electrician, which was considered a coveted position. (Ex. S–13; Tr. 932:23–25.) Moreover, although Pappas noted he would be open to any position at the mine and had previously held utility and lubeman positions, Pappas's application showed that he had been demoted back to a laborer twice since 2010. (Ex. S–13; Tr. 274:3–276:5.) The other two miners, on the other hand, either held more specialized jobs consistently throughout their job history or showed a progression in job title. (Ex. S–30.)

At first blush, the sheer number of employees who were hired by CalPortland seems to suggest disparate treatment inasmuch as Pappas was one of only 15 miners who were not extended job offers. (Tr. 142:18–144:6; Ex. CPC–30.) However, further analysis shows that Pappas was not hired over other miners because of his application and job history. (Ex. S–13.)

Based on the evidence before me, I therefore determine that the record as a whole does not weigh in favor of finding disparate treatment.

e. Conclusion

The Secretary has met his burden of production by presenting evidence for each element required to establish a prima facie case of discrimination. However, weighing the record in its entirety, I determine that the Secretary has not met his burden of persuasion to establish that any

---

<sup>36</sup> These applicants were Lawrence Herrera, Timothy Turnage, and David Wray. (Ex. S–30.) The Secretary also identified the applicant Tommy Ontiveros as having provided similar interview answers as Pappas and a job hopping history. (Ex. S–29.) However, in reviewing his application, Tommy Ontiveros listed only one position and demonstrated a progression in salary. (Ex. S–30.) Another applicant, Danny Ontiveros, had listed a number of jobs at Oro Grande, but did not provide the same answers during his interview as Pappas did. (*Id.*)

adverse action taken by CalPortland against Pappas was motivated in any part by Pappas's protected activity.

Specifically, although the Secretary presented two theories by which CalPortland could be held liable for discrimination, he failed to develop and put forward enough evidence to support a discrimination claim for either one. First, the Secretary presented evidence that CalPortland may have had knowledge of Pappas's protected activity through Salzborn and Walters. However, the record not only fails to establish Walters's actual knowledge of the protected activity, but also does not contain any reliable evidence to indicate whether such knowledge would have motivated him to discriminate against Pappas. Second, the Secretary relies heavily on Ambrose's link to CalPortland, asserting that her knowledge and animus motivated her negative recommendation of Pappas and may be imputed to CalPortland. However, although her knowledge and animus may be imputed to CalPortland as CalPortland's agent, there is insufficient evidence proving she was hostile towards Pappas's protected activity. The Secretary's failure to depose Ambrose, or even Walters, prior to the hearing was an odd omission, given the emphasis placed on these witnesses in the Secretary's theory of the case.

Furthermore, the record does not support a finding that Lamb treated Pappas disparately during her job application review and hiring process. Even if the Secretary's allegations regarding Lamb's hiring process were true and Lamb did rely solely on Ambrose's recommendation, the Secretary's theory still falls short of establishing that such reliance would have been improper given that Ambrose had non-discriminatory reasons for not recommending Pappas.

Therefore, I conclude that the Secretary has not established by a preponderance of evidence a case of discrimination against CalPortland. Nevertheless, had the Secretary met his burden of persuasion, I examine in the alternative whether CalPortland has established an affirmative defense below.

## **2. Affirmative Defense**

CalPortland asserts as an affirmative defense that it would have not hired Pappas based on unprotected activity alone. (CPC Br. at 44–47.) According to CalPortland, Pappas did not perform as well as other applicants during CalPortland's hiring process. (*Id.*) In contrast, the Secretary asserts CalPortland provided inconsistent and shifting reasons for not hiring Pappas. (Sec'y Br. at 44–45; Sec'y Reply Br. to CPC at 7–11.) The Secretary claims that Pappas's application was indistinguishable from the applications of the over 100 other miners and that CalPortland's proffered reasons are pretextual. (*Id.*)

When an operator asserts its affirmative defense, a judge must examine “whether the reasons are plausible, whether they actually motivated the operator's actions, and whether they would have led the operator to act even if the miner had not engaged in protected activity.” *Pendley*, 601 F.3d at 425. The Commission may not impose its own business judgment as to an operator's actions. *Id.* If the operator's affirmative defense is “weak, implausible, or out of line with the operator's normal business practices,” then the justification may be found to be pretextual. *Price*, 12 FMSHRC at 1534. The complainant “may establish that an employer's

explanation is not credible by demonstrating ‘either (1) that the proffered reasons had no basis *in fact*, (2) that the proffered reasons did not *actually* motivate [the adverse action], or (3) that they were *insufficient* to motivate [the adverse action].’” *Turner*, 33 FMSHRC at 1073.

When CalPortland and Martin Marietta announced the asset purchase, their message indicated that a number of Riverside employees would lose their jobs. (Tr. 361:14–362:25.) Arps testified that many miners were genuinely afraid and uncertain about their future employment. (Tr. 361:14–362:25, 363:3–23, 369:2–370:1.) Pappas missed that meeting, yet was told by his supervisor, Joe Padilla that the application to CalPortland would just be a “formality” and was under the impression that because Oro Grande had just enough people to run the plant as it is, the Oro Grande miners’ jobs were safe. (Tr. 138:13–21, 272:24–273:4, 278:7–12.) Padilla had already been hired by CalPortland as a supervisor, perhaps explaining why he viewed the application process as a formality. (Tr. 138:6–11.)

However, because of the asset purchase, Riverside’s Crestmore facility would be shut down and its miners would have to find jobs elsewhere.<sup>37</sup> (Tr. 918:5–8; Ex. S–37 [83:24–84:6, 86:3–6].) Many of these Crestmore employees, approximately 21 of them, applied to be reemployed at Oro Grande under CalPortland’s ownership. (Tr. 896:10–24, Ex. CPC–28 at 2.) As Padilla noted to Pappas, Oro Grande was already fully staffed under Riverside with 110 hourly miners. (See Tr. 808:14–809:14, 810:1–13, 844:8–12; Ex. CPC–27.) Given the widened applicant pool that included miner applicants from both Crestmore and Oro Grande, a number of Riverside miners would have still lost their jobs even if CalPortland maintained the same staffing levels at Oro Grande as Riverside did. CalPortland ultimately only hired approximately 99 hourly miners to start working at Oro Grande on October 1, 2015. (Tr. 716:17–720:20; Exs. CPC–32, CPC–33.)

Prior to receiving CalPortland’s application, Pappas testified he did nothing to prepare to apply for a job at CalPortland. (Tr. 139:15–18.) Pappas testified that he received the application late and filled it out just ten minutes prior to his interview. (Tr. 272:19–273:11.) Pappas sought his supervisor Padilla’s help because he did not know how to fill out the application; Padilla told Pappas to not “even worry about it.” (Tr. 272:19–273:11.) Other miners, as Arps testified, were more nervous and tried to put their best foot forward by creating résumés beforehand that listed all their former job duties and titles to attach to the application. (Tr. 363:3–23.) Pappas did not attach a résumé to his application, but instead included job bid announcements that included general job descriptions of the positions Pappas’s held, which Padilla printed out on his computer right before Pappas’s interview. (Tr. 139:19–140:9, 272:19–273:11; Ex. S–13.) Based on Padilla’s representations, Pappas may have not considered the application process to be as important as other miners did.

In response to Inspector Jackson’s investigation, CalPortland stated that Pappas was not hired because they received more applications than available positions and those hired were

---

<sup>37</sup> After the sale’s close, a few employees were retained by Riverside at the Crestmore facility under a service agreement to finish packaging and moving inventory out of Crestmore to CalPortland. (Ex. S–37 [87:8–14].) Riverside now only employs one worker at Crestmore to act as a caretaker. (Ex. S–37 [83:24–84:6].)

better applicants than Pappas. (Exs. S-26, S-27, S-28 at 1.) Lamb explained that the answers Pappas gave during his interview did not reflect the type of answers CalPortland sought. (Tr. 906:23-907:4, 913:3-914:9.) Pappas's interviewer wrote that Pappas would correct a miner he saw committing a safety violation and that he never had conflict with a co-worker or boss. (*Id.*; Ex. S-14.) Lamb testified she looked for applicants who would report safety violations to supervisors, and she had trouble believing that a miner with a long work-history would have never had such workplace conflicts. (Tr. 906:23-907:4, 913:3-914:9.) Lamb also noted that Pappas's application demonstrated "job hopping" and his salary history at the mine did not show a progression. (Tr. 911:19-912:4; Ex. S-13.) Lamb concluded that Pappas's work history and interview answers raised "red flags" demonstrating that Pappas likely had performance issues which he did not identify and that Pappas was not someone CalPortland should hire. (Tr. 912:1-913:2, 913:15-20, 914:5-9.)

The Secretary asserts that given the time constraints of CalPortland's hiring, it is implausible that Lamb gave such detailed consideration of Pappas's application and that Pappas's application was actually "indistinguishable" from all the other miners' application. (Sec'y Br. at 44-45; Sec'y Reply Br. to CPC at 7-11.) However, Lamb is an experienced human resources professional,<sup>38</sup> and her testimony is supported by the hiring documents, including Pappas's application and notes from Pappas's interview. (Tr. 879:8-17, 876:21-877:1; Exs. S-13, S-14.) Although Pappas has suggested that he was not thoroughly given consideration because he was only asked three of the six interview questions listed on the interviewer's questionnaire, he also testified that the answers the interviewer wrote down for the other questions reflect answers he would have given had he been asked those questions. (Tr. 144:20-146:15, 229:8-230:17, 231:14-233:24, 236:21-237:10, 240:3-7, 242:15-23; Ex. S-14.) Furthermore, as discussed above, the record does not support a finding that Pappas was treated any differently from the other miners who applied to CalPortland nor does it support the Secretary's assertion that Pappas's application was comparable to other miners who were hired by CalPortland. *See* discussion *supra* Part V.B.1.d.

Indeed, CalPortland presented evidence that the applicants for laborer positions who were extended offers were better candidates than Pappas in Lamb's estimation. (CPC Br. at 30-31, 46.) CalPortland hired six laborers to begin employment at Oro Grande under CalPortland on October 1, 2015. (Tr. 729:17-731:17; Ex. CPC-32.) This group of laborers included Arps, who personally introduced himself to Lamb as President of the Union and whose salary history reflected increases. (Tr. 923:6-925:18; Exs. S-30, S-32.) Lamb testified she was impressed with Arps's interview responses. (Tr. 925:4-18.) Indeed, at hearing Arps was an articulate and well-spoken witness. The hired laborers also included three Crestmore employees. Lamb testified that CalPortland wanted to offer some positions at Oro Grande to the Crestmore group, whose jobs were being eliminated at the Crestmore facility. (Tr. 918:2-18.) Lamb stated that the Crestmore miners had many crossover skills and that the company wanted to introduce new people into the Oro Grande culture. (Tr. 918:2-18.) The other two hired laborers included one miner who had

---

<sup>38</sup> Lamb has 30 years of experience working in human resources and has held positions in every functional area, including recruiting, compensation, benefits, employee development, and employee relations. (Tr. 879:8-14.) She served as CalPortland's vice president of organizational planning and development from February 2013 to December 2015. (Tr. 876:21-877:1.)

been with the company since 1979 and had received increases in pay as well as another miner who had formerly been involved in an apprenticeship program to become an electrician. (Tr. 929:11–23, 932:9–934:16; Exs. S–30, S–32.) Lamb stated CalPortland could not hire the latter miner as an electrician, but she was impressed with the miner who showed potential and was willing to learn new skills, so she considered him for a laborer position. (Tr. 932:9–934:16.)

Lamb provided reasonable justifications for not hiring Pappas, and I find her testimony to be credible in light of the competition for jobs at the Oro Grande facility, her experience, and the documents that support her testimony. Lamb had sufficient reason not to hire Pappas, which not only include the “red flags” she considered to be present on Pappas’s application, but also the number of other qualified miners from both the Crestmore and Oro Grande mines competing for a limited number of positions. I do not find Lamb’s proffered reasons to be weak or implausible. Her business judgment and CalPortland’s decisions to hire less hourly staff and introduce new employees from Crestmore to the Oro Grande facility must therefore be accorded deference. *Pendley*, 601 F.3d at 425.

I therefore determine that even if the Secretary had met his burden of persuasion in establishing a case of discrimination, CalPortland has established its affirmative defense proving it would have not hired Pappas for unprotected activity alone.

### **3. Conclusion**

Based on foregoing reasons, I therefore conclude that the Secretary failed to prove Pappas’s claim of discrimination under section 105(c) of the Mine Act against CalPortland for

the company's failure to hire Pappas. In the alternative, I find that CalPortland would have not hired Pappas for Pappas's unprotected activity alone.<sup>39</sup>

## VI. ORDER

In light of the foregoing, it is hereby **ORDERED** that the Secretary's complaint of discrimination on behalf of Jeffrey Pappas under section 105(c) of the Mine Act be **DISMISSED**.

/s/ Alan G. Paez

Alan G. Paez

Administrative Law Judge

---

<sup>39</sup> Because I have determined that the Secretary failed to establish that Riverside unlawfully discriminated against Pappas under section 105(c), I need not determine whether CalPortland may be liable as a successor-in-interest for Riverside's discrimination.

In the alternative, I briefly consider the Commission's nine-factor test and note that the record weighs in favor of finding a substantial continuity of business operations from Riverside to CalPortland. *Keene*, 10 FMSHRC at 1153 (citing *Munsey*, 2 FMSHRC 3463); *see* discussion *supra* Part III.C. If the remedy for Riverside's discrimination in this present case was reinstatement, then it could perhaps be seen as a continuation of Riverside's obligations set forth by the Decision Approving Settlement issued on December 3, 2014, in Pappas's prior discrimination case. (*See* Ex. S-1.) In such case, CalPortland may have had notice of the charge and liability, and Riverside could not provide relief to Pappas because it no longer owns Oro Grande. *See Munsey*, 2 FMSHRC at 3466 (noting that an ALJ decision finding liability for reinstatement may give notice to a successor operator and that a miner will not be made whole unless he is offered reinstatement).

However, I have determined that CalPortland would not have hired Pappas regardless of Riverside's negative references. Therefore, reinstatement would not be the proper remedy for Riverside's negative job reference, which would create a new liability separate from Pappas's 2014 discrimination complaint. CalPortland would not have had notice of this new liability, given that CalPortland's asset purchase closed on October 1, 2015, and Pappas did not file this instant discrimination complaint until October 12, 2015. (Tr. 680:4-5, 680:9, 691:1-2, 731:6-9; Joint Ex. 1.) Further, any remedies other than reinstatement, such as civil penalties or economic relief, could be provided by Riverside who still owns the Crestmore facility and exists as a direct subsidiary of Martin Marietta, which owns over 400 other facilities. (Ex. S-37 [82:14-17, 83:2-84:84, 83:24-84:1.]) Therefore, despite a substantial continuity of business, the other factors would not weigh in favor of finding CalPortland a successor-in-interest to Riverside's liability for discriminatorily giving Pappas a negative job reference.

Distribution: (Via Electronic Mail & U.S. Mail)

Abigail Daquiz, Esq., U.S. Department of Labor, Office of the Solicitor, 300 Fifth Avenue,  
Suite 1120, Seattle, WA 98104-2397  
(daquiz.abigail@dol.gov)

Sonya P. Shao, Esq., U.S. Department of Labor, Office of the Solicitor, 350 South Figueroa  
Street, Suite 370, Los Angeles, CA 90071-1202  
(shao.sonya.p@dol.gov)

Brian P. Lundgren, Esq., and Erik M. Laiho, Esq., Davis Grimm Payne & Marra, 701 Fifth  
Avenue, Suite 4040, Seattle, WA 98104  
(blundgren@davisgrimmpayne.com)  
(elaiho@davisgrimmpayne.com)

Karen L. Johnston, Esq., Jackson Kelly PLLC, 1099 18th Street, Suite 2150, Denver, CO 80202  
(kjohnston@jacksonkelly.com)

Jeffrey Pappas, 12279 Merrod Way, Victorville, CA 92395-9774  
(U.S. Mail Only)

/ivn & rd



# **ADMINISTRATIVE LAW JUDGE ORDERS**



**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

OFFICE OF ADMINISTRATIVE LAW JUDGES  
1331 PENNSYLVANIA AVE., N.W., SUITE 520N  
WASHINGTON, DC 20004-1710  
TELEPHONE: 202-434-9956 / FAX: 202-434-9949

February 3, 2017

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

v.

INTREPID POTASH – NEW MEXICO,  
LLC,  
Respondent.

CIVIL PENALTY PROCEEDINGS

Docket No. CENT 2016-219-M  
A.C. No. 29-00170-402396

Mine: Intrepid Potash East

Docket No. CENT 2016-220-M  
A.C. No. 29-02028-402395

Mine: Intrepid Potash North

**ORDER DENYING RESPONDENT’S MOTION FOR SUMMARY DECISION AND GRANTING IN PART THE SECRETARY’S MOTION FOR SUMMARY DECISION**

The above-captioned proceedings arise from the Secretary’s petitions for assessment of civil penalties filed under section 105(d) of the Federal Mine Safety and Health Act of 1977, as amended, 30 U.S.C. § 815(d). At issue are two citations issued by the Secretary of Labor (“the Secretary”) to mine operator Intrepid Potash–New Mexico, LLC (“Intrepid”) under section 104(a) of the Mine Act: Citation No. 8863931 in Docket No. CENT 2016-219-M and Citation No. 8863929 in Docket No. CENT 2016-220-M. A hearing is scheduled for February 16, 2017. The matter is currently before me upon the parties’ cross motions for summary judgment.<sup>1</sup>

Legal Framework for Summary Decision

Commission Procedural Rule 67, which is analogous to Rule 56 of the Federal Rules of Civil Procedure, permits an administrative law judge to grant summary decision when the entire record shows that “there is no genuine issue as to any material fact” and that “the moving party is entitled to summary decision as a matter of law.” 29 C.F.R. § 2700.67(b); see *Missouri Gravel Co.*, 3 FMSHRC 2470, 2471 (Nov. 1981). The record must be viewed in the light most

---

<sup>1</sup> Intrepid filed its summary decision motion on January 10, 2017, and the Secretary filed his response and cross-motion on February 1, 2017. Today, Intrepid filed a Motion to Strike the Secretary’s response and cross motion. Intrepid argues that the Secretary “wholly failed to respond to Respondent’s motion” and failed to provide a separate statement of material facts in issue, and should have submitted his cross motion no later than 25 days before the hearing pursuant to 29 C.F.R. § 2700.67. However, as Intrepid acknowledges, the Secretary requested and was granted permission to file his response and cross motion on February 1. The cross motion serves as his response to Intrepid’s Motion for Summary Decision. It contains a statement that the Secretary agrees with Intrepid that the facts are not in dispute, and also states in detail why as a matter of law Intrepid is not entitled to prevail on its motion. Accordingly, I overrule Intrepid’s Motion to Strike.

favorable to the nonmoving party and the judge may not weigh the factual evidence or engage in fact-finding beyond those facts that are established in the record. *W. Alabama Sand & Gravel, Inc.*, 37 FMSHRC 1884, 1887 (Sept. 2015); *Hanson Aggregates NY, Inc.*, 29 FMSHRC 4 (Jan. 2007). Summary judgment should not be granted “unless the entire record shows a right to judgment with such clarity as to leave no room for controversy and establishes affirmatively that the adverse party cannot prevail under any circumstances.” *KenAmerican Res., Inc.*, 38 FMSHRC 1943, 1947 (Aug. 2016) (quoting *Campbell v. Hewitt, Coleman & Assocs., Inc.*, 21 F.3d 52, 55 (4th Cir. 1994)).

### Factual Background

The following facts are not in dispute.

Intrepid operates the Intrepid Potash East and Intrepid Potash North mines in New Mexico. (Resp. Mot. 3; Sec’y Mot. 2.) In September and December 2014, Intrepid purchased two transloaders for use at these mines, primarily to load granulated material from railcars to dump trucks. (Resp. Mot. 3; Sec’y Mot. 2.) Each transloader was equipped with an emergency stop device referred to as an “e-stop” that was located on the front or throat of the conveyor belt above the wheel. (Resp. Mot. 3; Sec’y Mot. 5) The transloaders were not equipped with railings or any other type of guarding along the sides of the belt. (Sec’y Mot. 6, 8.)

On July 21, 2015, an accident occurred involving the transloader at the North mine. Employees Tylan Tovar and Trusten Weyerman were using the transloader to transfer material from a railcar into a truck when chunks of material began clogging the opening in the railcar, so the two workers began banging on the railcar with hammers to disrupt the blockage. (Resp. Mot. 5; Sec’y Mot. 3.) While they were engaged in this task, Tovar stepped onto the moving conveyor belt. (Resp. Mot. 5; Sec’y Mot. 3.) His foot caught on the belt and one of his legs was dragged into the chute. (Resp. Mot. 5; Sec’y Mot. 3-5.) As he was being dragged, the miners were able to deactivate the conveyor drive motor by hitting the e-stop. (Resp. Mot. 5; Sec’y Mot. 3.) Other employees brought a large portable torch to the scene of the accident and used it to remove Tovar from the transloader by cutting off the top brace of the belt structure. (Sec’y Mot. 4.) Afterward, Tovar was taken to the hospital and was found to have sustained only bruising injuries. (Resp. Mot. 5-6.)

MSHA Inspector Darwin L. Bratcher subsequently investigated the accident. (Resp. Mot. 6; Sec’y Mot. 6.) On August 5, 2015, Bratcher issued Citation No. 8863929 alleging that the e-stop on the transloader at the North mine “was not located so that a person falling on or against the conveyor could readily deactivate the conveyor drive motor,” in violation of 30 C.F.R. § 56.14109. (Ex. S-1; Ex. R-12.) The citation was terminated about a month later with notation that guarding and e-stops had been installed on the transloader. (Ex. S-1; Ex. R-12.)

Inspector Bratcher also inspected the East mine on August 5, 2015. After the accident but before Bratcher arrived, Intrepid had tagged out, removed from service, and barricaded the transloader at the East mine. (Resp. Mot. 8; Sec’y Mot. 6-7.) Nonetheless, Bratcher cited the East mine transloader for a violation of 30 C.F.R. § 57.14109 under Citation No. 8863931, which alleges, “Railings are not provided to prevent persons from falling on or against this conveyor.

The emergency stop device was not located so that a person falling on or against the conveyor could readily deactivate the conveyor drive motor.” (Ex. S-2; Ex. R-12.) The citation was terminated in February 2016 with notation that “railings/guards” had been installed. (Ex. S-2; Ex. R-12.)

### Discussion and Conclusions of Law

The parties agree that there no genuine issues of material fact, but dispute whether the facts establish that the cited mandatory safety standards were violated. These standards, 30 C.F.R. §§ 56.14109 and 57.14109, contain identical language. Each states:

- Unguarded conveyors next to the travelways shall be equipped with –
- (a) Emergency stop devices which are located so that a person falling on or against the conveyor can readily deactivate the conveyor drive motor;
  - or
  - (b) Railings which –
    - (1) Are positioned to prevent persons from falling on or against the conveyor;
    - (2) Will be able to withstand the vibration, shock, and wear to which they will be subjected during normal operation; and
    - (3) Are constructed and maintained so that they will not create a hazard.

30 C.F.R. § 56/57.14109.

Intrepid does not argue that the cited regulations are inapplicable to the transloaders or that either of the transloaders was equipped with railings. Rather, Intrepid contends that the e-stops on the transloaders were properly located such that they could readily deactivate the conveyor drive motors, satisfying § 56/57.14109(a). Citing *Asarco, Inc.*, 14 FMSHRC 829 (May 1992) (ALJ), Intrepid argues that the phrase “readily deactivate” in § 56/57.14109(a) does not require an emergency stop device on a conveyor belt to automatically deactivate the motor as soon as a person falls onto the belt, but requires only that the stop device be readily accessible to the falling person. (Resp. Mot. 9-11.)

The Secretary asserts that *Asarco* is no longer good law, as it has been superseded by the Commission’s decision in *Buffalo Crushed Stone, Inc.*, 19 FMSHRC 231 (Feb. 1997). The Secretary contends that the e-stops on Intrepid’s transloaders did not satisfy the language or intent of § 56/57.14109(a) under *Buffalo* because they could not be readily activated by a falling miner. Each e-stop was located at the throat of the conveyor rather than along the sides, meaning it would not be automatically triggered by a falling miner and the miner would not be able to consciously activate it until after he had already fallen onto the moving belt, which thwarts the protective purpose of the standard as set forth in the *Buffalo* decision, according to the Secretary. (Sec’y Mot. 9-17.)

I agree with the Secretary. In *Buffalo*, the Commission addressed the meaning of “readily deactivate” in the context of § 56/57.14109(a) and held that this regulatory language reasonably

requires a falling miner to be able to access an emergency stop cord, button, bar, or lever on a conveyor belt in order to stop the motor *before* landing on the moving belt. 19 FMSHRC at 234-36. The Commission reasoned that § 56/57.14109(a) is directed toward preventing miners from coming into contact with a moving belt, as shown by the fact that its language is directed at “falling” miners and that railings “positioned to prevent persons from falling” are listed as one means of providing the necessary protection. *Buffalo*, 19 FMSHRC at 235. This interpretation makes sense. A miner should not have to consciously think about finding and activating a conveyor belt’s emergency stop device after he has already lost his balance and is in the stressful situation of falling onto the moving belt or has already fallen onto it and is being dragged. The e-stops on Intrepid’s transloaders were not positioned to effectively prevent miners from coming into contact with a moving belt in such situations because they were located only at the end of each conveyor. Indeed, when Tovar fell onto the belt at the North mine transloader in July 2015, the e-stop did not deactivate the belt readily enough to prevent him from being pulled into the conveyor belt machinery, and he had to be cut out. He was fortunate not to incur more serious injuries. I find that Intrepid violated § 57.14109 and § 56.14109 as alleged in Citation Nos. 8863929 and 8863931 because the e-stops were not positioned so that a falling person could readily deactivate the conveyor drive motor.

Intrepid argues that Citation No. 8863931, which pertains to the transloader at the East mine, should be vacated because the cited transloader was not available for use at the time the citation was written. (Resp. Mot. 14-15.) However, the transloader had previously been used at the mine without an appropriate emergency stop device or railing in violation of § 56.14109 and was tagged out only after Tovar’s accident. The fact that it was taken out of service and barricaded after the accident may mitigate Intrepid’s negligence somewhat, but does not cancel out the violation that had already occurred.

Intrepid further argues that both citations should be vacated because it did not have fair notice that the Secretary would interpret § 56/57.14109 to require the emergency stop devices on the transloaders to be positioned differently, as the Secretary had never previously cited the transloaders or warned the company about the potentially violative condition. (Resp. Mot. 12-13.) This argument is unavailing. The interpretation of § 56/57.14109 advanced by the Secretary in this case is not new. The *Buffalo* decision is twenty years old and has been followed by several ALJs. See *Concrete Materials*, 35 FMSHRC 690 (Mar. 2013) (ALJ); *CEMEX Constr. Materials of Fla., LLC*, 34 FMSHRC 2519 (Sept. 2012) (ALJ). The Secretary has also published guidance on § 56/57.14109 stating that an unguarded conveyor should be equipped with emergency stop devices or railings on both sides and that MSHA expects the stop devices to be “located along the portion of the unguarded conveyor that is adjacent to a travelway.” MSHA, *Program Policy Manual*, Vol. IV, Parts 56/57, at 51-52 (2009). A reasonably prudent mine operator familiar with the protective purposes of § 56/57.14109 would have recognized that the e-stops on the transloaders were not properly positioned along the unguarded portions of the conveyor belts to protect falling miners and that this condition presented a hazard warranting corrective action within the purview of the cited regulations, especially in light of the past litigation and the guidance the Secretary has provided the mining industry on this issue. Accordingly, it was appropriate for the Secretary to charge Intrepid with these two violations. See *LaFarge North America*, 35 FMSHRC 3497, 3500-01 (Dec. 2013); *Ideal Cement Co.*, 12 FMSHRC 2409, 2415-16 (Nov. 1990).

Turning to the issues of gravity and negligence, the Secretary asks me to accept the MSHA inspector's assessment of these issues as set forth in the citations. (Sec'y Mot. 17-18.) Intrepid counters that its negligence was low and that it is entitled to summary judgment on this point. (Resp. Mot. 15-16.) I find summary judgment on the issues of gravity and negligence to be inappropriate at this time. Intrepid has not made any arguments respecting gravity. Further, material facts appear to remain in dispute or have not been fully developed, such as how quickly the miners were able to stop the conveyor drive motor at the North mine after Tovar fell, how recently the transloader at the East mine had been used before the inspection, and whether the positioning of the e-stops was "not typical," as the Secretary alleges. The Commission has emphasized that summary decision should not be granted "unless the entire record shows a right to judgment with such clarity as to leave no room for controversy." *KenAmerican Res., Inc.*, 38 FMSHRC 1943, 1947 (Aug. 2016). Here, I find it appropriate to give the parties an opportunity to further develop the record on the issues of gravity, negligence, and any other factors bearing on the penalties in light of my finding that the violations occurred.

For the foregoing reasons, Intrepid's motion for summary decision is **DENIED** and the Secretary's cross motion for summary decision is **GRANTED IN PART** on the issue of whether the e-stops on Intrepid's transloaders violated § 57.14109 and § 56.14109.

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

Distribution:

Emily L.B. Hays, Esq., U.S. Department of Labor, Office of the Solicitor, 1244 Speer Boulevard, Suite 216, Denver, CO 80204

Dana M. Svendsen, Esq., Jackson Kelly PLLC, 1099 18th Street, Suite 2150, Denver, CO 80202

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

OFFICE OF ADMINISTRATIVE LAW JUDGES  
1331 PENNSYLVANIA AVE., N.W., SUITE 520N  
WASHINGTON, DC 20004-1710  
TELEPHONE: 202-434-9956 / FAX: 202-434-9949

March 15, 2017

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

v.

CYPRESS POINTE INCORPORATED,  
Respondent.

CIVIL PENALTY PROCEEDINGS

Docket No. CENT 2015-480-M  
A.C. No. 41-04793-379976

Mine: Milam Rock Pit

**ORDER GRANTING RESPONDENT’S MOTION FOR SUMMARY DECISION AND DENYING SECRETARY’S CROSS-MOTION FOR SUMMARY DECISION**

Before: Judge Rae

The above-captioned proceeding is before me upon the Secretary of Labor’s petition for assessment of civil penalties under section 105(d) of the Federal Mine Safety and Health Act of 1977, as amended, 30 U.S.C. § 815(d). At issue is one citation issued by the Secretary to mine operator Cypress Pointe Incorporated (“CPI”) under section 104(d)<sup>1</sup> of the Mine Act: Citation Number 8858079. The parties have filed cross motions for summary judgment.

**Factual and Procedural Background**

The disputed citation was issued by MSHA Inspector Ray G. Hurtado on March 23, 2015 for an alleged berming violation at the Milam Rock Pit, an aboveground mine near Milam, Texas that was operated by CPI at that time and has since shut down permanently. (Resp. Mot. 2; Sec’y Cross Mot. 5.) By CPI’s account, there were approximately 1500 feet of berms at the mine at the time the citation was issued. (Resp. Mot. 2.) On the entrance road to the pit, there was a berm along one side of an earthen bridge crossing a wet weather stream that filled with runoff during rainy periods. (*Id.*) In addition, berms surrounded a number of settling ponds at the site that had been installed by CPI to capture rock pit runoff in order to comply with EPA regulations. (*Id.*)

The Milam area received heavy rain in March 2015 and the mine was shut down for several weeks due to flooding. (Resp. Mot. 2; Sec’y Cross Mot. 12.) When Inspector Hurtado visited the mine on March 23, the only person present was mine superintendent Dale Warr, Jr., who was operating a front-end loader in the pit area. (Resp. Mot. 3; Sec’y Cross Mot. 3.) Hurtado observed that approximately 100 feet of roadway did not have a berm in place. (Resp.

---

<sup>1</sup> The issuance of a citation under section 104(d)(1) denotes that the alleged violation was significant and substantial (S&S) and was caused by the mine operator’s “unwarrantable failure” to comply with a mandatory health or safety standard. 30 U.S.C. § 814(d)(1).

Mot. 1; Sec’y Cross Mot. 3.) According to CPI, the berm along the entrance road had washed away in the flooding and the mine was closed to all customers and employees except Warr, who was using the loader to drain trapped water from the pit, fill washed out areas, and rebuild the berm. (Resp. Mot. 1-3.) According to the Secretary, Warr was using the loader to travel near the edge of a 5-foot drop-off as he removed the berm. (Sec’y Cross Mot. 3-4.)

Because 100 feet of berm were not in place, Inspector Hurtado issued Citation Number 8858079 alleging that CPI was in violation of 30 C.F.R. § 56.9300, which requires berms along roadways wherever a drop-off exists that could cause a vehicle to overturn. He marked the violation as significant and substantial (S&S), reasonably likely to cause a lost workdays or restricted duty type injury to one person, and involving high negligence. He terminated the citation less than an hour after issuing it, noting that a berm had been installed. (Sec’y Pet.)

The Secretary proposed a penalty of \$2,000.00 for the citation, which CPI paid. (Resp. Mot. 3; Sec’y Cross Mot. 2.) However, CPI subsequently sent a letter to MSHA contesting the citation and filed a motion to reopen the penalty assessment. The Commission reopened the penalty case in October 2016. The Secretary filed a penalty petition in November 2016 and the case was assigned to me. CPI has now filed a motion for summary judgment asking me to vacate the citation and order the Secretary to repay the penalty. The Secretary has filed a cross motion agreeing that summary judgment is appropriate but asking me to uphold the citation as written and approve the penalty.

### Legal Framework for Summary Decision

Commission Procedural Rule 67, which is analogous to Rule 56 of the Federal Rules of Civil Procedure, permits an administrative law judge to grant summary decision when the entire record shows that “there is no genuine issue as to any material fact” and that “the moving party is entitled to summary decision as a matter of law.” 29 C.F.R. § 2700.67(b); *see Missouri Gravel Co.*, 3 FMSHRC 2470, 2471 (Nov. 1981). The record must be viewed in the light most favorable to the nonmoving party and the judge may not weigh the factual evidence or engage in fact-finding beyond those facts that are established in the record. *W. Alabama Sand & Gravel, Inc.*, 37 FMSHRC 1884, 1887 (Sept. 2015); *Hanson Aggregates NY, Inc.*, 29 FMSHRC 4 (Jan. 2007). Summary judgment should not be granted “unless the entire record shows a right to judgment with such clarity as to leave no room for controversy and establishes affirmatively that the adverse party cannot prevail under any circumstances.” *KenAmerican Res., Inc.*, 38 FMSHRC 1943, 1947 (Aug. 2016) (quoting *Campbell v. Hewitt, Coleman & Assocs., Inc.*, 21 F.3d 52, 55 (4th Cir. 1994)).

### Discussion and Conclusions of Law

The parties agree that there no genuine issues of material fact, but dispute whether the facts establish that the cited mandatory safety standard, 30 C.F.R. § 56.9300, was violated. The standard states in pertinent part: “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.” 30 C.F.R. § 56.9300(a).

The citation states:

Approximately 100 feet of roadway near the portable screen did not have a berm where a drop-off existed of sufficient grade to cause a vehicle to overturn. A drop-off of about 5 feet to the bottom existed. The berm was removed with a front-end loader, operated by the superintendent, for water drainage. The superintendent exposed himself to overturn injuries by traveling along the drop-off. The superintendent engaged in aggravated conduct constituting more than ordinary negligence in that he was aware of the berm requirements. This violation is an unwarrantable failure to comply with a mandatory standard.

The Secretary argues that a violation is established because a 100-foot section of berm was missing, superintendent Warr was using the loader close to the edge, and the 5-foot drop-off was sufficient to result in the loader overturning. (Sec’y Cross Mot. 7.) The Secretary has submitted an affidavit from Inspector Hurtado attesting to these facts, along with three photographs Inspector Hurtado took confirming there was an unbermed roadway in the pit area. (*Id.*, Attachments.)

CPI admits that the 100-foot section of berm was missing but argues that the berm had sustained flood damage necessitating repairs and that Warr was in the process of draining standing water and rebuilding the eroded earthen berm to return it to compliance with § 56.9300. (Resp. Mot. 3.) CPI points out that § 56.9300(a) requires berms to be “maintained” and a separate regulation, § 56.20003, requires the workplace to be kept in dry condition so far as possible. (*Id.* at 4.) CPI argues that if Warr’s actions in trying to achieve compliance with these regulations constituted a violation, operators would be placed in an untenable “Catch 22” situation, because whenever a berm washes away during flooding the operator would be out of compliance and unable to get back into compliance by rebuilding the berm. (*Id.* at 3-4.)

CPI’s argument is, in essence, that it was impossible to comply with § 56.9300 under the circumstances. CPI has raised this argument at every level of this proceeding, including in its initial letter to MSHA contesting the citation in June 2015, which stated “Surely [the regulation] wasn’t mean[t] to apply literally as berms are being built or maintained,” and in its answer to the penalty petition, in which CPI pointed out that the action prescribed by the inspector to abate the violation was for superintendent Warr to continue rebuilding the berm – the very activity for which CPI was cited. (*See* Resp. Mot. to Reopen; Resp. Answer.) Yet the Secretary wholly ignores this argument, instead asserting that a violation is established simply by the fact that the berm was missing and Warr was working near the edge of the 5-foot drop-off.

The Secretary cites three ALJ decisions in support of his position. (Sec’y Cross Mot. 6.) But even if these decisions held binding precedential value, which they do not, two of them are irrelevant because they deal with issues that are not disputed in this case, such as whether the cited area was a roadway and whether the drop-off was of sufficient grade or depth to create a vehicle overturn hazard. *Stone Plus, Inc.*, 38 FMSHRC 661 (Apr. 2016) (ALJ); *Pappy’s Sand & Gravel*, 20 FMSHRC 647 (June 1998) (ALJ). The remaining decision, *Andersen Sand & Gravel Co.*, concerns a situation where an operator received a citation after intentionally removing a

berm. 13 FMSHRC 1269 (Aug. 1991). This is factually similar to the instant case, as Warr intentionally removed part of CPI's berm for drainage purposes. However, in this case, CPI's berm was already unavoidably damaged by flooding.<sup>2</sup> Also, unlike in the instant case, the operator in *Andersen* was found to have resumed normal mining operations for several months without rebuilding its berm. By contrast, this mine site was closed to all customers and employees except Warr after the flooding occurred. As acknowledged by the Secretary, Warr was the only person at the worksite, and there is no allegation he was doing anything other than trying to drain residual floodwater and repair the damaged berm in order to satisfy the operator's obligation to provide and maintain berms under § 56.9300.

The Secretary never addresses the troublesome fact that CPI was cited for not having a berm while Warr was in the process of rebuilding the berm. The Secretary asserts that Warr "should have recognized the violative condition instead of risking injury or, worse, his life." (Sec'y Cross Mot. 6.) But the Secretary does not say what he believes Warr should have done instead to bring the berm back into compliance with the regulations. The Secretary fails to explain how this berm, or any other berm damaged by forces of nature, could ever be rebuilt if its damaged state prohibited the operator from getting close enough to make the necessary repairs. For that matter, if § 56.9300 flatly prohibits anyone from approaching a drop-off where a berm is needed but has yet to be constructed, it is unclear how berms could ever be built in the first place without running afoul of the regulation. This would be absurd, and I decline to interpret § 56.9300 in this manner. The regulation must give operators leeway to perform berm construction and maintenance work when a berm is not yet in place. Otherwise, compliance would be impossible.

---

<sup>2</sup> If the Secretary contended that the entire 100-foot section of berm had been removed intentionally, this might raise a material factual dispute. The impossible situation described by CPI would be avoidable if the missing berms resulted entirely from a decision of its own making. But the Secretary does not dispute that flooding washed out some portion of the missing berm. In fact, he agrees that berms often washed away at this mine during severe rain and also argues that the berms must have been missing throughout March 2015 because the mine had been closed for several weeks due to flooding, which means he is assuming that the floods caused the damage. (Sec'y Cross Mot. 5-6, 12.) The long and short of it is, this proceeding was a waste of time and resources and should never have proceeded to this point in litigation.

I find that CPI did not violate § 56.9300(a) by working near a drop-off without a berm when the only work taking place was necessary construction work on said berm.

Accordingly, CPI's motion for summary judgment is **GRANTED** and the Secretary's cross motion for summary judgment is **DENIED**. Citation Number 8858079 is hereby **VACATED** and this proceeding is **DISMISSED**.

/s/ Priscilla M. Rae

Priscilla M. Rae

Administrative Law Judge

Distribution:

Felix Marquez, Esq., U.S. Department of Labor, Office of the Solicitor, 525 South Griffin Street, Suite 501, Dallas, TX 75202

James S. Carter, President, Cypress Pointe Inc., 1490 Burl Ivy Way, Hemphill, TX 75948

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

OFFICE OF ADMINISTRATIVE LAW JUDGES  
721 19<sup>TH</sup> ST. SUITE 443  
DENVER, CO 80202-2500  
TELEPHONE: 303-844-5266 / FAX: 303-844-5268

March 20, 2017

DANIEL B. LOWE,  
Complainant,

v.

VERIS GOLD USA, INC., and JERRITT  
CANYON GOLD, LLC,  
Respondents.

MATTHEW A. VARADY,  
Complainant,

v.

VERIS GOLD USA, INC., and JERRITT  
CANYON GOLD, LLC,  
Respondents.

DISCRIMINATION PROCEEDINGS

Docket No. WEST 2014-614-DM  
WE-MD 14-04

Docket No. WEST 2014-307-DM  
WE-MD 14-03

Mine: Jerritt Canyon Mill  
Mine ID: 26-01621

**ORDER**

Before: Judge Simonton

These cases are before me upon complaints of discrimination under section 105(c) of the Federal Mine Safety and Health Act of 1977. Daniel Lowe and Matthew Varady (“Complainants”) each filed discrimination complaints with the Secretary against Veris Gold (“Veris”) in November 2013. The Secretary declined to pursue their cases, and Lowe and Varady appealed pursuant to § 105(c)(3). Veris Gold filed a petition for bankruptcy in June 2014, and one year later the United States Bankruptcy Court of the District of Nevada approved the sale of certain assets, including the Jerritt Canyon Mill, to Jerritt Canyon Gold LLC (“JCG”) “free and clear” of “claims based on any successor or transferee liability and any enforcement action or enforcement history,” including “all...employment and pension claims...” Doc. No. 318 in Dkt. No. 14-51015 (Bankr. D. Nev.) (“Sale Order”). Shortly after the Bankruptcy Court approved the Sale Order, the presiding Commission Administrative Law Judge found that the Complainants established their discrimination claims against Veris and granted their motion to amend their complaints to include JCG as a successor in interest. At issue in these consolidated cases is whether the express terms of the bankruptcy court’s Sale and Enforcement Orders can extinguish the Complainants’ successorship claims against JCG and other affiliated entities under the Mine Act.

JCG moves to dismiss the cases because the Sale Order permitted it to purchase the Jerritt Canyon Mill free and clear of liens, claims, and interests, specifically including employment law claims, and stated that JCG would not be liable as a successor to Veris. The Complainants argue that the Mine Act authorizes them to pursue their discrimination claims against JCG as a successor in interest to Veris and to add various other parties as successors as well.<sup>1</sup> At the request of the Court, the Complainants, JCG, alleged affiliate WBox 2014-1Ltd. (“WBox”), and the Solicitor filed briefs addressing the court’s jurisdiction and authority to enforce the Complainants’ established discrimination claims against JCG in contravention of the Bankruptcy Court’s Sale and Enforcement order.<sup>2</sup> On the basis of the briefs and the prior submissions of the parties,<sup>3</sup> I make the following findings and order.

## I. BACKGROUND

Lowe and Varady first filed their discrimination complaints against Veris Gold (“Veris”) in November of 2013, shortly after they were discharged. The Secretary declined to pursue the claims, and the Complainants timely appealed the decisions to the Commission in April and May of 2014.

On June 9, 2014, Veris filed a petition for bankruptcy in the Supreme Court of British Columbia, Canada, Vancouver Registry, and filed a petition for recognition of the filing with the Bankruptcy Court for the District of Nevada. Veris listed the Complainants as creditors and sent notices of the bankruptcy to their personal addresses.

On June 4, 2015, the Bankruptcy Court issued an order approving a previously proposed sale of certain Veris assets to Jerritt Canyon Gold (“JCG”), pursuant to § 363 of the Bankruptcy

---

<sup>1</sup> The Complainants allege that the following entities were “established or cited inside and outside of the actual bankruptcy sale of Veris Gold USA, Inc.: Jerritt Canyon Gold LLC; Whitebox Asset Management; Whitebox Advisors LLC; WBVG; WBVG LLC; WBVG 2014 Ltd.; Eric Sprott; Sprott Mining Inc.; Jerritt Canyon Gold LLC *dba* a subsidiary of Sprott Mining Inc.” *See* Complainants’ Brief, at 6-7.

<sup>2</sup> At this time, the Solicitor, WBox, and the other entities mentioned above are not parties to this case. The court ordered the Solicitor and WBox to submit briefs in a limited appearance to present their legal positions and aid the Court in rendering a decision.

<sup>3</sup> Since the submission of the parties’ briefs, the Complainants have emailed the Court alleging that (1) the Solicitor’s office and its representatives have not read or responded to their emails, and (2) that Counsel for JCG has sent a letter informing the Complainants that it will pursue sanctions in accordance with the Bankruptcy Court’s enforcement order if Complainants continue to pursue their claims before the Commission. Regarding the first email, the Solicitor is not a party to this case and has no role or responsibility in the proceedings beyond the limited appearance to file the briefs requested by the Court. As for the email from Counsel for JCG, the Complainants have since filed a second complaint with the Commission alleging interference based on the contents of the letter. The letter is not pertinent to the instant cases, and will be sufficiently addressed in that interference proceeding.

Code. Sale Order at 6. The Order expressly approved the sale “free and clear” of all liens, claims or interests related to “any act or omission of the Debtors” prior to the sale closing, including any claims “based on any successor or transferee liability,” and including any “labor, employment, and pension claims.” Sale Order at 6. The Sale Order also stated that JCG “is not a ‘successor’ to the Debtors or their estates by reason of any theory of law or equity, and the Purchaser shall not assume, nor be deemed to assume...any liability” of the Debtors. *Id.* at 21. Finally, the order expressly barred all individuals, including “former employees” and “governmental...and regulatory authorities” from pursuing any claims against JCG or its affiliates, successors, or assignees. *Id.* at 22.

The Complainants filed a motion in the Bankruptcy Court to stay the Sale Order two weeks after its approval. The Bankruptcy Court denied the motion because the Complainants did not follow proper procedure and did not establish a legal or factual basis for a hearing on the Stay. Doc. No. 325 in Dkt. No. 14-51015 (Bankr. D. Nev.). The asset sale closed on June 24, 2015, and the Complainants did not appeal the Sale Order. The sale generated minimal proceeds; administrative expenses were paid but none of the secured or general unsecured creditors received compensation. *See* Doc. No. 394 at 24 in Dkt. No. 14-51015 (Bankr. D. Nev.). The Bankruptcy Court entered an order granting a motion to close the Bankruptcy case on September 2, 2015. *See* Doc. No. 356 in Dkt. No. 14-51015 (Bankr. D. Nev.). The Order reiterated that all previous orders entered by the Court remained in full force and binding, and preserved the jurisdiction of the United States Bankruptcy Court for the District of Nevada in conflicts stemming from this matter. *Id.* at 2-3.

Meanwhile, the Complainants’ discrimination complaints against Veris continued to proceed before the Commission. The presiding Administrative Law Judge held Complainant Varady’s hearing on June 8-10, 2015, and issued a decision affirming his discrimination complaint on September 2, 2015. *See Matthew Varady v. Veris Gold USA, Inc.*, 37 FMSHRC 2037 (Sept. 2015) (ALJ). While acknowledging the ongoing bankruptcy sale, the ALJ nonetheless ordered the Secretary of Labor to file a petition for penalty assessment against Veris. *Id.* at 2061. The ALJ did the same after finding in favor of Complainant Lowe. *Daniel B. Lowe v. Veris Gold USA, Inc.*, 37 FMSHRC 2337, 2347-49 (Oct. 2015) (ALJ). The Secretary moved to dismiss the docket, arguing that the ALJ lacked jurisdiction under the Bankruptcy Code because the Complainants brought their suits as private individuals under § 105(c)(3), and thus neither suit was subject to the automatic stay exception under § 362(b)(4). The ALJ did not rule on this motion. At this time, neither party disputes that the Complainants have established a claim against Veris. *See* Respondent’s Brief at 19.

In January of 2016, both Complainants filed motions to amend their complaints before the Commission to add JCG as a successor to Veris, despite the explicit terms of the Sale Order. JCG entered a limited appearance to protest the Complainant’s motions, arguing that the ALJ did not have jurisdiction to contravene or modify the Bankruptcy Court’s Sale Order, which allowed a “free and clear” purchase and barred all successorship and employment law claims. In March of 2016 the ALJ granted the Complainants’ motions and denied JCG’s subsequent motion for certification of interlocutory review. The Commission denied JCG’s direct petition for interlocutory review in the following months. *See Daniel B. Lowe v. Veris Gold USA, Inc. and*

*Jerritt Canyon Gold, LLC*, 38 FMSHRC 565 (Mar. 2016) (ALJ); *Matthew A. Varady v. Veris Gold USA, Inc., and Jerritt Canyon Gold, LLC*, 38 FMSHRC 513 (Mar. 2016) (ALJ).

On August 4, 2016, JCG filed a Motion to Reopen the Bankruptcy case before the U.S. Bankruptcy Court to enforce the Sale Order and related injunction. On August 11, 2016, the Court held a hearing on the motion. Both Complainants attended and participated in the proceedings. On September 2, 2016, the Court granted JCG's motion. The Bankruptcy Judge specifically advised the Complainants of their right to appeal his decision and outlined the proper procedure.<sup>4</sup> While the Judge did not grant JCG's motion for sanctions at this time, he expressed his concern that the Complainants were pursuing a remedy in another administrative forum in violation of § 362(a) of the Bankruptcy Code. He ordered the Complainants to stop pursuing their cases before the Commission or face sanctions because the Bankruptcy Court was the proper venue to contest the terms of the Order and injunction. Though it was their right to do so, the Complainants did not appeal the Bankruptcy Court's decision.

Following the Order of the Bankruptcy Court, the Commission ALJ dismissed the Complainants' cases *sua sponte* for fear of putting them at risk of sanctions. The Complainants nonetheless filed for discretionary review before the Commission on November 23, 2016. The Commission granted the petition and vacated the ALJ's dismissal as premature. *Daniel B. Lowe v. Veris Gold USA, Inc. and Jerritt Canyon Gold, LLC, Matthew Varady v. Veris Gold USA, Inc. and Jerritt Canyon Gold, LLC*, 38 FMSHRC 2899, 2900 (Dec. 2016). The Commission held that the Complainants should freely determine their response to the Bankruptcy Court's Order, vacated the dismissal, and remanded the consolidated cases to the Chief Administrative Law Judge who then assigned the cases to this court. *Id.* While the Commission declined to make factual findings, it suggested that additional briefing was likely necessary on remand to discuss the impact of the Sale Order and the Complainants' successorship claims. *Id.*

## II. DISCUSSION

The Complainants contend that the Mine Act grants the Commission exclusive authority to adjudicate cases brought before it, and thus the Bankruptcy Court lacks authority to extinguish their claims. They argue that miners who have established a 105(c) discrimination complaint under the Mine Act have a Congressionally-recognized status and thus have the right to pursue their successorship claims against JCG and other entities associated with the Veris Gold Sale. *See Munsey v. Smitty Baker Coal Co.*, 2 FMSHRC 3463 (Dec. 1980).

The Commission has held that a corporate successor may be held liable for its predecessor's violation of the Mine Act. *Sec'y of Labor o/b/o Corbin v. Sugartree Corp.*, 9 FMSHRC 394, 397 (Mar. 1987), *aff'd sub nom. Terco, Inc. v. Fed. Coal Mine Safety & Health Review Comm'n*, 839 F.2d 236 (6<sup>th</sup> Cir. 1987); *see also Munsey v. Smitty Baker Coal Co.*, 2

---

<sup>4</sup> Specifically, the Bankruptcy Court Judge said "If you think the orders that are entered as a result of today's hearing are incorrect, you have a remedy. You can ask a court to review them. I am not the final word...you need to exercise the remedies that are provided by the Bankruptcy Code and the appellate rules and statutes." Doc. No. 383 in Dkt. No. 14-51015 (Bankr. D. Nev.).

FMSHRC 3463, 3465 (Dec. 1980) (applying successorship doctrine in a Coal Act Case). However, JCG argues that successor liability is not available in this case because it acquired Veris' assets "free and clear" as part of a bankruptcy proceeding, and because the Sale and Enforcement Orders bar any successorship claims from government entities or employment disputes.

JCG purchased the Jerritt Canyon Mill mine in a sale authorized by the bankruptcy court on June 4, 2015. Section 363(f) of the Bankruptcy Code permits a trustee in bankruptcy to "sell property under subsection (b) or (c) free and clear of any interest in such property of an entity other than the estate." 11 U.S.C. § 363(f). Courts have generally held that this language empowers the trustee to sell assets free and clear of successor liability claims. *See, e.g., In re Motors Liquidation Co.*, 829 F.3d 135 (2d Cir. 2016), *petition for cert. filed sub nom. General Motors, LLC, v. Celestine Elliott, et. al.*, No 16-764 (Dec. 15, 2016); *In re Chrysler LLC*, 576 F.3d 108, 126 (2d Cir. 2009), *vacated as moot sub nom.; Ind. State Police Pension Tr. v. Chrysler LLC*, 558 U.S. 1087 (2009); *In re Trans World Airlines*, 322 F.3d 283, 288-90 (3d Cir. 2003) ("TWA"); *In re Leckie Smokeless Coal Co.*, 99 F.3d 573, 582 (4th Cir. 1996); *but see Zerand-Bernal Grp., Inc. v. Cox*, 23 F.3d 159, 163 (7th Cir. 1994). These courts have interpreted the "interests in property" language to refer to not only in rem interests, but also to interests that "arise from the property being sold." *Chrysler*, 576 F.3d at 126; *TWA*, 322 F.3d at 290; *see also Motors Liquidation Co.*, 829 F.3d at 154-56. In *Leckie*, the 4th Circuit held that a pension fund's right to collect premium payments from a successor under the Coal Act is an interest in property that may be extinguished in a § 363 sale because:

[t]hose rights are grounded, at least in part, in the fact that those very assets have been employed for coal-mining purposes: if [the debtors] had never elected to put their assets to use in the coal-mining industries, and had taken up business in an altogether different area, the Plan and Fund would have no right to seek payments from them.

*Leckie*, 99 F.3d at 582.

These courts have also observed that allowing a claimant to assert a successor claim against a § 363 asset purchaser would "subvert the Bankruptcy Code's priority scheme, by allowing a low-priority, unsecured claim to leapfrog over other creditors in the bankruptcy." *In re Grumman Olson Indus., Inc.*, 467 B.R. 694, 703 (S.D.N.Y. 2012); *see also Chrysler*, 576 F.3d at 126; *TWA*, 322 F.3d at 292; *New Eng. Fish Co.*, 19 B.R. 323, 329 (Bankr. W.D. Wash. 1982) (Holding that purchasers would not take businesses burdened with civil rights litigation, thus chilling or rendering impossible any other sale). Moreover, courts have noted that allowing the bankruptcy trustee to sell assets free and clear of successor liability claims enables the trustee to maximize the sale price of the assets. *See Douglas v. Stamco*, 363 F. App'x 100, 103 (2d Cir. 2010); *TWA*, 322 F.3d at 292-93; *Leckie*, 99 F.3d at 586-87. While this may be at the expense of successor liability claimants, it is consistent with the Bankruptcy Code's goal of preserving jobs. *See TWA*, 322 F.3d at 293.

The Complainants argue that the Mine Act's purpose and authority grant miners a Congressionally-recognized status beyond that of ordinary creditors. Complainants Brief at 8. The Complainants believe that this status elevates Mine Act claims above the bankruptcy court's

authority to extinguish claims for successor liability. See *International Technical Products Corp.*, 249 N.L.R.B. 1301 (1980) (“*ITP*”). In *ITP*, the NLRB held that a bankruptcy court’s free and clear sale did not extinguish a successor’s liability for back pay under an NLRB order against the debtor. *Id.* at 1303. The Board stated that:

“[W]hile a bankruptcy court may have the authority to assign priority to the Board’s claim for back pay, the authority to modify or set aside the order upon which the claim is based rests exclusively with the Board and the appropriate reviewing Federal courts, and not the bankruptcy courts.

*ITP*, 249 N.L.R.B. at 1303.

I decline to apply the *ITP* decision to the facts at hand. First, *ITP* was decided under the previous Bankruptcy Act, and it is unclear whether it is applicable under the current code. The decision was not appealed, and other Board decisions have challenged the validity of its holding. See *Kanowski Furniture, Inc.*, 314 NLRB 107, 112 (1994) (“Whatever the final balance between the [NLRA and Bankruptcy Code] may be, totally ignoring regular bankruptcy proceedings is not it.”); *In the Matter of Ecusta Development Center*, 32 NLRB AMR 71, 2005 WL 6715471 (2005) (Judge/Administrative Officer) (“*ITP*... fails to take into account and reconcile the important competing objectives underlying [the Bankruptcy Code’s] different Federal statutory scheme.”). This court has also expressed doubt about the viability of *ITP*’s holding in the context of §105(c)(3) complaints. See *Justice v. Gateway Eagle Coal Co., LLC*, 38 FMSHRC 2341, 2344 (Aug. 2016) (ALJ).

Second, the *ITP* holding has been criticized by various Courts of Appeals, including the Ninth circuit, for conflicting with the Supreme Court’s decision, *Nathanson v. National Labor Relations Board*, 344 U.S. 25 (1952). The Court in *Nathanson* held that the NLRB may enforce a back pay award against a bankrupt entity, but that the claim is not entitled to priority or special status.<sup>5</sup> Most Courts of Appeals have found that the Bankruptcy Court has the authority to approve an assets sale free and clear of successor liability. *Id.* at 27-29; see *TWA*, 322 F.3d at 291-92 (barring successorship for EEOC discrimination claims); *In re Leckie Smokeless Coal Co.*, 99 F.3d at 582 (barring successorship claims of pension funds stemming from the Coal Act); *NLRB v. Walsh (In re Palau Corp.)*, 18 F.3d 746, 750 (9th Cir. 1993) (Holding that the Bankruptcy Code determines whether NLRB back pay claims receive priority); *In re New Eng.*

---

<sup>5</sup> The Complainants rely on *Nathanson* to argue that Mine Act discrimination claims are similar to NLRB unfair labor practice claims, and thus cannot be extinguished. Their reliance is misplaced, however, since the Court in *Nathanson* held that “the policy of the NLRA is fully served by recognizing the claim for back pay as one to be paid from the estate. The question whether it should be paid in preference to other creditors is a question to be answered from the Bankruptcy Act.” *Id.* at 28-29. Assuming that the Mine Act and NLRA are sufficiently similar to warrant comparison, the holding in *Nathanson* would support the argument that discrimination claims under the Mine Act should not be prioritized over Veris’ secured creditors, who did not receive payment from the sale to JCG. Thus, the holding in *Nathanson* supports the Bankruptcy Court’s Sale Order in this case because Mine Act discrimination claims are not given special status or preference to other creditors under the terms of the Bankruptcy Code.

*Fish Co.*, 19 B.R. at 327 (finding that the *ITP* majority's attempt to distinguish *Nathanson* is based on "specious reasoning").

The Ninth Circuit, where the Jerritt Canyon Mill is located, has declined to accept the Board's ruling in *ITP* regarding statutory claims analogous to the Mine Act, and has clarified the interplay between federal employment statutes and the Bankruptcy Code. *See In re Palau Corp.*, 18 F.3d at 750; *New Eng. Fish Co.*, 19 B.R. at 327. In *New England Fish Co.*, the Bankruptcy Court found that Title VII civil rights claimants were unsecured creditors and therefore could not pursue successorship liability claims in a free and clear sale. *New Eng. Fish Co.*, 19 B.R. at 328. The Court found that adhering to *ITP* and allowing pursuit of successorship would create a "value judgment...that it was the intention of Congress for certain creditor or claimant constituencies to be accorded a higher priority than any set forth in the Code," contrary to the Supreme Court's holding in *Nathanson*. *Id.* In *Palau*, the Court found that while NLRB laws prohibiting unfair labor practices govern the question of whether or not a claim for compensation exists and what the value of that claim is, it is the Bankruptcy Code which determines the priority and the allowability of any and all claims filed in a bankruptcy proceeding. *In re Palau Corp.*, 18 F.3d at 750 (citations omitted).

Here, allowing the Complainants to pursue successorship liability against JCG in violation of a free and clear sale would subvert the policies outlined in the Bankruptcy Code and affirmed in *Nathanson*. Like the Title VII claimants in *New England Fish Co.*, the Complainants in these cases are unsecured creditors. They pursued their claims and received a decision and monetary judgment well after Veris initially petitioned for bankruptcy and the Judge finalized the Sale Order. *New Eng. Fish Co.*, 19 B.R. at 328. The Complainants' motions to amend their complaints and include JCG as a successor were filed even later. It is undisputed that the asset sale only covered administrative costs, and did not satisfy the claims of Veris' secured creditors, let alone its unsecured creditors. *See* Doc. No. 394 at 24 in Dkt. No. 14-51015 (Bankr. D. Nev.). Therefore, to allow the Complainants to pursue successorship claims in violation of a free and clear Sale Order would prioritize an unsecured creditor over the unpaid secured and unsecured claims expressly protected within the Bankruptcy Code.

Furthermore, I find no support for the claim that the Commission can override or ignore the Bankruptcy Court's interpretation and enforcement of the Sale Order to allow successorship liability. The Mine Act's discrimination provisions are similar to the NLRA's unfair labor practices in *Palau*, in that the statutes govern the existence and value of employment claims, but do not authorize the agency to determine priority and allowability of those claims in a bankruptcy proceeding. *See Palau*, 18 F.3d at 750. In this case, the issue is not whether discrimination occurred but whether the Complainants can pursue their successorship claims beyond the terms of the Sale Order before the Commission. The interpretation and efficacy of the Sale Order is governed by the Bankruptcy Code and not the Mine Act. *Id.*

The bankruptcy court determined the priority and allowability of the Complainants' claims when it ordered the sale "free and clear of all Liens, Claims, and Interests," and stated that JCG would not be liable as a successor to Veris. The Bankruptcy Court also expressly retained jurisdiction over disputes regarding the terms of the Sale Order. This was clearly within the

bankruptcy court's power under § 363. Thus, to deny the Respondent's Motion to Dismiss and adjudicate the issue of successor liability would be futile.

### **ORDER**

Upon review of the complaint and the entire record in these cases, the Respondent's Motion to Dismiss is **GRANTED**. Complainants' motion to add additional parties as successors in interest to Veris Gold is **DENIED**.

Should the Complainants wish to obtain an order of payment against Veris Gold, they are directed to resubmit claims for personal relief no later than April 3, 2017. The Complainants should state with particularity whether they are seeking reinstatement, back pay, or both, and should provide calculations of back pay and evidence of mitigation of circumstances. *See Metric Constructors*, 6 FMSHRC 226, 232 (Feb. 1984) (Employee must reasonably search for a suitable alternative job.), *aff'd*, 766 F.2d 469 (11th Cir. 1985); *Sec'y o/b/o Michael J. Dunmire v. Northern Coal Co.*, 4 FMSHRC 126, 144 (Feb. 1982) (back pay may be reduced where a miner fails to mitigate damages by failing to remain in the labor market or to search diligently for alternative work) (citations omitted). Upon receipt of Complainant's petitions for relief against Veris Gold, I will review them and issue a subsequent order for relief against Veris Gold and consistent with my above order dismiss any and all claims against JCG. .

If the Complainants elect not to submit claims for personal relief against Veris Gold they may immediately notify the court and a dismissal order will be issued. The parties will then have 30 days after the dismissal order is issued within which to appeal to the Commission for discretionary review.

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

Distribution: (U.S. First Class Mail)

Cathy L. Reece, Fennemore Craig, P.C., 239 East Camelback Rd., Suite 600, Phoenix, AZ 85016

Mark Kaster, Dorsey & Whitney, 1500 South 6<sup>th</sup> Street, Minneapolis, MN 55402

Annette Jarvis, Dorsey & Whitney, 136 South Main Street, Suite 1000, Salt Lake City, UT 54101

Eric Sprott, 200 Bay Street, Suite 2700, P.O. Box 27, Toronto, Ontario, Canada M5J 2J1

Matthew A. Varady, 701 South 5<sup>th</sup> Street, #6, Elko, NV 89801

Daniel Lowe, P.O. Box 2608, Elko, NV 89803

Shaun Heinrichs, Veris Gold, 688 West Hastings Street, Suite 900, Vancouver, BC, V6B 1P1, Canada

Tevia Jeffries, Dentons Canada LLP, 250 Howe Street, 20<sup>th</sup> Fl., Vancouver, BC V6C 3R8, Canada

Brad J. Mantel, Office of the Solicitor, U.S. Department of Labor, 201 12<sup>th</sup> Street South, Suite 401, Arlington, VA 22202

Benjamin R. Botts, Office of the Solicitor, U.S. Department of Labor, 90 7<sup>th</sup> Street, Suite 3-700, San Francisco, CA 94103

W. Christian Schumann, Office of the Solicitor, U.S. Department of Labor, 201 12<sup>th</sup> Street South, Suite 401, Arlington, VA 22202

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

OFFICE OF ADMINISTRATIVE LAW JUDGES  
1331 PENNSYLVANIA AVENUE, NW, SUITE 520N  
WASHINGTON, DC 20004-1710  
PHONE: (202) 434-9933 | FAX: (202) 434-9949

March 21, 2017

SECRETARY OF LABOR,  
U.S. DEPARTMENT OF LABOR,  
on behalf of DAVID FRANKLIN  
WINSLOW, JR.  
  
Complainant,

TEMPORARY REINSTATEMENT

Docket No. LAKE 2017-0190  
MSHA Case No. NC-MD-17-02

v.

WALBRIDGE COMPANY and  
IMPERIAL CRANE SERVICES, INC.,  
Respondents.

Mine: St. Mary’s Cement  
Mine ID: 20-00038

**ORDER DISMISSING APPLICATION FOR TEMPORARY REINSTATEMENT**

Before: Judge Moran

This case is before the Court upon an application for temporary reinstatement under section 105(c) of the Federal Mine Safety and Health Act of 1977, filed by the Secretary on March 8, 2017. On Wednesday, March 15, the Court held an initial conference call with the parties and discussed potential dates for a hearing, should the Respondents request a hearing. During this conversation, counsel for the Secretary stated that it would check with Mr. Winslow to see if he was “available” for a hearing within the coming week, because he is now working at a new job in the Detroit area. The Court then reminded the Secretary that it would not delay a hearing absent a compelling reason, and that the Complainant would need to be conscious of this if requesting an extension of time. 29 C.F.R. § 2700.45(c) (A hearing shall be held within 10 calendar days of a request, “unless compelling reasons are shown in an accompanying request for an extension of time.”).

On Friday, March 17, both Respondents timely notified the Court and the Secretary via e-mail of their request for a hearing. On Monday, March 20, the Court issued a Notice of Hearing, with the hearing to be held on Thursday, March 23, 2017.

That same day, Attorney Jing Zhang e-mailed the Court on behalf of the Secretary, stating,

Mr. Winslow has informed me that he is no longer seeking temporary reinstatement at this time. His job circumstances have changed, and at this time he

does not want to be temporarily reinstated. The Secretary requests that this week's hearing on temporary reinstatement be canceled.

E-mail from Attorney Zhang to the Court and all parties, March 20, 2017.

The Court responded,

I am in receipt of your message, Attorney Zhang. I will cancel the Temporary Reinstatement hearing scheduled for this Thursday, March 23, 2017, but before I formally announce that the hearing is cancelled, I want it to be understood that, by foregoing this, Mr. Winslow, is unalterably ceding his right to being temporarily reinstated in this matter.

I express this point because of the language you employed in stating that Mr. Winslow is "no longer seeking temporary reinstatement *at this time*." (emphasis added) You mention the "at this time" qualifier twice in your email, below. The Respondents have businesses to run and they cannot be left in a state of uncertainty as to whether the Complainant might, at some indefinite future time within the ensuing 90 days following the filing of his complaint, want to be temporarily reinstated. Therefore, cancellation of the temporary reinstatement hearing, coming about solely from the Complainant's initiation, will have the effect of permanently barring such temporary reemployment with the Respondents in connection with this complaint.

E-mail from Judge Moran to Attorney Zhang and all parties, March 20, 2017.

In short, the Court has been informed through the Secretary's e-mail that Mr. Winslow has found new employment that he wishes to continue. Because the Complainant no longer wishes to seek temporary reinstatement with the Respondents, the scheduled hearing is canceled and the application for temporary reinstatement is denied.

Congress created the temporary reinstatement process as "an essential protection for complaining miners who may not be in the financial position to suffer even a short period of unemployment or reduced income pending the resolution of the discrimination complaint." S. Rep. No. 181, 95th Cong., 1st Sess. 36-37 (1977), reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong. 2nd Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, at 624-25 (1978). In protecting miners with non-frivolous complaints, the temporary reinstatement process forces mine operators to "bear a proportionately greater burden of the risk of an erroneous decision in a temporary reinstatement proceeding" *Jim Walter Resources, Corp.*, 920 F.2d 738, 748 n. 11 (11th Cir. 1990).<sup>1</sup>

---

<sup>1</sup> Should an operator economically reinstate a miner, by paying them without the benefit of their labor, the operator has no right "to seek reimbursement from the miner should the miner not eventually prevail on his or her discrimination claim." *North Fork Coal Corp.*, 33 FMRHSC 589, 592 (Mar. 2011).

Accordingly, Mr. Winslow, through the Secretary of Labor, had two options at the outset of his case: (a) seek temporary reinstatement pending the Secretary's determination whether to proceed with a discrimination complaint or (b) continue his complaint without seeking reinstatement. Having chosen the former option, a hearing was duly requested by the Respondents and notice served upon all parties. Now, with the Secretary having informed the Court that Mr. Winslow does not want to be temporarily reinstated, his Application for Temporary Reinstatement has been withdrawn. The Secretary vaguely alludes that Mr. Winslow's "job circumstances have changed." This may be accurately translated: the Complainant has found another job. Accordingly, Complainant has waived his right to seek temporary reinstatement.

The position adopted by the Secretary, which is effectively, "the complainant no longer seeks temporary reinstatement, but perhaps at some future time may wish to re-invoke that right," is inconsistent with the fundamental purposes behind temporary reinstatements. Under the Secretary's view, the temporary reinstatement process would provide wide latitude for complainants who wish to vacillate between their employment options. In other words, if the Complainant were to decide next week that he *no longer enjoys his current job*, then the Respondents and the Court may once again be in the position of expending resources to prepare for an expedited hearing. This is not a tenable outcome.

Given the facts above, it would be manifestly unfair to leave the Respondents waiting for weeks on end to see if the Complainant will change his mind once more. As mentioned above, litigants may obtain leave of the Court to delay the temporary reinstatement process for legitimate, compelling reasons. However, abandoning that process, while still leaving the door open to possibly reviving it later on, is antithetical to the provision's purpose and as such is not a legitimate use of that relief.

Accordingly, the application for temporary reinstatement is **DENIED**, and these temporary reinstatement proceedings are **DISMISSED with prejudice**.

So **ORDERED**.

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

Distribution:

Jing Zhang, Esq., Office of the Solicitor, U.S. Department of Labor, 230 S. Dearborn St., Rm. 844, Chicago, IL 60604

Suzanne Dunne, Esq., Office of the Solicitor, U.S. Department of Labor, 230 S. Dearborn St., Rm. 844, Chicago, IL 60604

Connie Cessante, Esq., Clark Hill PLC, 500 Woodward Ave., Suite 3500, Detroit, MI 48226

Kurt A. Miller, Esq., One Oxford Centre, 301 Grant St., 14th Floor, Pittsburgh, PA 15219

Ryan Hiss, Esq., Laurie & Brennan, LLP, Two North Riverside Plaza, Ste. 1750, Chicago, IL 60606

David Franklin Winslow, Jr., 1479 Blue Heron Drive, Highland, MI 48357

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

OFFICE OF ADMINISTRATIVE LAW JUDGES  
1331 PENNSYLVANIA AVENUE, NW, SUITE 520N  
WASHINGTON, DC 20004-1710  
PHONE: (202) 434-9933 | FAX: (202) 434-9949

March 23, 2017

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

v.

PEABODY MIDWEST MINING LLC,  
Respondent.

CIVIL PENALTY PROCEEDING

Docket No. LAKE 2016-0305  
A.C. No. 12-02295-409606

Mine: Francisco Underground Pit

**ORDER OF STAY**

Before: Judge Moran

This case is before the Court upon a petition for assessment of a civil penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977. The Respondent, Peabody Midwest Mining LLC (“Respondent” or “Peabody”), has filed a motion in limine (“Motion”) to preclude the Secretary’s use of several non-final orders in support of the flagrant designation for Order No. 9036925. The Secretary opposed the Motion, requesting instead that this matter be consolidated in order to promote judicial efficiency. For the reasons that follow, the Court **GRANTS** Peabody’s alternative request that the Court stay this matter until Order Nos. 9036623, 9036625 and 9036922 are adjudicated.<sup>1</sup>

The Respondent’s Motion is captioned, “Motion in Limine to Preclude Use of Order Nos. 9036623, 9036625 AND 9036922 as Non-Final Orders in Support of the Secretary’s Flagrant Designation for Order No. 9036925.” Understanding the basis for the Motion must begin with the single matter involved in Docket No. LAKE 2016-0305, a section 104(d)(2) Order alleging a violation of 30 C.F.R. § 75.202(a). That section, titled, “Protection from falls of roof, face and ribs,” provides in subsection (a) “The roof, face and ribs of areas where persons work or travel shall be supported or otherwise controlled to protect persons from hazards related to falls of the roof, face or ribs and coal or rock bursts.” 30 C.F.R. § 75.202(a).

The Secretary, having “specially assessed” the alleged violation, is seeking a civil penalty of \$60,613.00. It is true, per the Secretary’s “Narrative Findings for a Special Assessment” that

---

<sup>1</sup> The Respondent’s alternative request seeks a stay until those Orders “are adjudicated and may become final.” Motion at 6. The Court is uncertain about the duration sought in the Respondent’s Motion with its use of the phrase “may become final.” The Court’s intention is to continue the stay until it has issued a final decision in LAKE 2016-140 and LAKE 2016-269.

the Secretary contends that the alleged violation was “flagrant.”<sup>2</sup> Narrative. The same document elaborates that by “flagrant,” the Secretary means,

a reckless failure to make reasonable efforts to eliminate a known violation of a mandatory health or safety standard that reasonably could have been expected to cause death or serious bodily injury. The operator failed to correct the cited hazardous conditions over an extended period of time, displaying a complete disregard for the safety of the miners required to work or travel in the area. In addition, management permitted production to resume with knowledge that exposure to the hazardous ribs would increase.

Narrative at 2.

The Narrative essentially echoes the Mine Act’s statutory provision regarding flagrant violations. 30 U.S.C. 820(b)(2). While reckless and repeated violations are within the ambit of that section, in this instance the Secretary is asserting that the alleged violation is of the “repeated” variety, and for that proposition the Secretary intends to draw upon Order Numbers 9036623, 9036625 and 9036922. Each of these Orders is in contest, contained within other dockets, and none are final orders. Order Nos. 9036623 and 9036625 are at issue in Docket LAKE 2016-140.<sup>3</sup> Order No. 9036922 is at issue in Docket LAKE 2016-269. That latter docket is set for a hearing commencing on May 31, 2017.<sup>4</sup>

Given the foregoing, Peabody requested that the Court preclude the Secretary from relying on Order Nos. 9036623, 9036625, and 9036922 to support the flagrant designation of the Order at issue here, as those Orders are not final. Motion at 6. However, in the alternative, Peabody requested that the Court stay these proceedings “until Order Nos. 9036623, 9036625 and 9036922 are adjudicated and may become final.” *Id.*

In its Response in Opposition, the Secretary admits that he “intends to introduce evidence of Respondent’s *past violation history* to support the flagrant and unwarrantable failure designations, as well as the ‘high’ negligence determination, for this Order, [Order No. 9036925.]” and toward that end looks to Order Nos. 9036922, 9036623 and 9036625 as support for its claims. Response at 2 (emphasis added).

---

<sup>2</sup> The Special Assessment also asserts that the violation “resulted from the operator’s unwarrantable failure to comply with mandatory standards and resulted from the operator’s high negligence and [ ] [that] the cited standard is a ‘Rules to Live by’ standard.” Narrative Findings at 1.

<sup>3</sup> Docket LAKE 2016-140 has been stayed at the Secretary’s request, pending a Section 110(c) investigation related to Order No. 9036623.

<sup>4</sup> Both Dockets LAKE 2016-140 and LAKE 2016-269 are assigned to this Court.

The Secretary contends that Respondent's "repeated" failure to eliminate the known "rib hazard" meets the statutory criteria under both the "narrow" and "broad" applications for claims of flagrant violations. *Id.* at 3. The "narrow," application is a stand-alone approach under which a flagrant violation can be established within the four corners of the cited violation itself, whereas the latter approach looks to "the operator's violation history to be taken into account in determining whether its failure was 'repeated' in nature." *Id.* Although the Secretary asserts that it can establish the alleged violation in Order No. 9036925 under both applications, it contends that it may prove a flagrant violation under the broad approach by "introduc[ing] evidence of the conditions alleged in non-final Order Nos. 9036623, 9036625, and 9036922." *Id.* (emphasis added). The Secretary asserts it is "entitled" to offer evidence "using the operator's violation history" to prove a repeated flagrant violation. *Id.* at 5. And, while the Secretary admits that Part 100's history of previous violations "stands for the proposition that only final orders will be included in determining an operator's history," he then discordantly asserts it is "merely and appropriately [ ] recognizing a history of repeated failures to make reasonable efforts to eliminate a known violation to support a 'repeated' flagrant violation determination." *Id.*

In the Court's view, this line of thinking from the Secretary follows the "conviction and sentencing, followed by a trial," school of thought. In advocating such an approach, the Secretary conflates the *issuance* of citation or order, with the establishment of the underlying violation. The judicial process doesn't work in that manner. A flagrant violation claim is among the more serious allegations for a mine operator to face, and this observation guides the Court in evaluating the present motion. Peabody contends, and the Court agrees, that "[i]t is inappropriate and contrary to principles of due process to predicate a flagrant violation upon alleged violations that are not final," as they are presently only unproven assertions.<sup>5</sup> Motion at 3. Further, while the Secretary complains that "the Respondent should not be given a *windfall* ([as] the Secretary's ability to prove his allegation [would] be hampered significantly) because the cases are pending," it is the Secretary who acted to forestall the resolution of the Order Nos. 9036623, 9036625 from Docket No. LAKE 2016-140, until it completes the Section 110(c) investigation related to those matters.<sup>6</sup> Response at 6 (emphasis added). Those Orders, it should be noted, were issued nearly 17 months ago, in October 2015.

---

<sup>5</sup> Respondent also points out that the Part 100 Criteria and Procedures for Proposed Assessment of Civil Penalties "provides that when considering history of previous violations for a penalty determination, '[o]nly assessed violations that have been paid or finally adjudicated or have become final Orders of the Commission will be included in determining an operator's history.'" Motion at 4, citing 30 C.F.R. §100.3(c). Therefore, considering these non-final orders also runs afoul of the penalty computation.

<sup>6</sup> The last of the three orders the Secretary would like to employ, Order No. 9036922, which is within Docket No. LAKE 2016-0269, is also non-final and is among dockets scheduled for hearing before this Court commencing in late May 2017.

**Accordingly, for the foregoing reasons, the Court GRANTS Peabody's alternative request, that this matter be stayed until Order Nos. 9036623, 9036625 and 9036922 are adjudicated.** While stayed, there is no reason that discovery should be held up for Order Nos. 9036623, 9036625 and 9036922. In that way, once the Section 110(c) investigation is concluded, the hearing for those Orders may proceed expeditiously.

**SO ORDERED.**

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

Distribution:

Rachel L. Graeber, Office of the Solicitor, U.S. Department of Labor, 230 S. Dearborn St., Room 844, Chicago, IL 60604 [graeber.rachel@dol.gov](mailto:graeber.rachel@dol.gov)

Arthur M. Wolfson, Esq., Jackson Kelly, PLLC, Three Gateway Center, Suite 1500, 401 Liberty Avenue, Pittsburgh, PA 15222 [awolfson@jacksonkelly.com](mailto:awolfson@jacksonkelly.com)

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

OFFICE OF ADMINISTRATIVE LAW JUDGES  
721 19<sup>TH</sup> ST. SUITE 443  
DENVER, CO 80202-2500  
TELEPHONE: 303-844-5266 / FAX: 303-844-5268

March 27, 2017

DANIEL B. LOWE,  
Complainant,

v.

VERIS GOLD USA, INC., and JERRITT  
CANYON GOLD, LLC,  
Respondents.

MATTHEW A. VARADY,  
Complainant,

v.

VERIS GOLD USA, INC., and JERRITT  
CANYON GOLD, LLC,  
Respondents.

DISCRIMINATION PROCEEDINGS

Docket No. WEST 2014-614-DM  
WE-MD 14-04

Docket No. WEST 2014-307-DM  
WE-MD 14-03

Mine: Jerritt Canyon Mill  
Mine ID: 26-01621

**ORDER OF DISMISSAL**

These cases are before me upon complaints of discrimination under section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c) by Daniel Lowe and Matthew Varady (“Complainants”) against Veris Gold USA, Inc. (“Veris”) and Jerritt Canyon Gold LLC (“JCG”).

On March 20, 2017, this court issued an Order granting JCG’s Motion to Dismiss and Denying the Complainants’ motion to add additional parties as successors in interest to Veris Gold. The court found that while the Complainants established their discrimination claims against Veris Gold, the Bankruptcy Court’s Sale Order and Enforcement Order barred their claims against JCG and other entities as successors in interest to the sale of Veris’s assets. The Order instructed the Complainants that should they choose to do so, they may obtain an order of payment against Veris Gold by resubmitting claims for personal relief. If the Complainants elected not to do so, they were to inform the court, and the Court would immediately issue an Order of Dismissal.

On March 21, 2017, the Complainants notified the Court via email that they “d[id] not seek to make claims against Veris Gold USA, Inc., at this time because to do so would be futile as there are no assets left to make claims against due to the sale of Veris Gold USA, Inc. in accordance with the Bankruptcy Order.”

Accordingly, **IT IS ORDERED** that these cases be **DISMISSED**. The Complainants have 30 days from the date of this Order to appeal the March 20, 2017 decision to the Commission for discretionary review.

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

Distribution: (U.S. First Class Mail)

Cathy L. Reece, Fennemore Craig, P.C., 239 East Camelback Rd., Suite 600, Phoenix, AZ 85016

Mark Kaster, Dorsey & Whitney, 1500 South 6<sup>th</sup> Street, Minneapolis, MN 55402

Annette Jarvis, Dorsey & Whitney, 136 South Main Street, Suite 1000, Salt Lake City, UT 54101

Eric Sprott, 200 Bay Street Suite 2700, P.O. Box 27, Toronto, Ontario, Canada M5J 2J1

Matthew A. Varady, 701 South 5<sup>th</sup> Street, #6, Elko, NV 89801

Daniel Lowe, P.O. Box 2608, Elko, NV 89803

Shaun Heinrichs, Veris Gold, 688 West Hastings Street, Suite 900, Vancouver, BC V6B 1P1, Canada

Tevia Jeffries, Dentons Canada LLP, 250 Howe Street, 20<sup>th</sup> Fl., Vancouver, BC V6C 3R8, Canada

Brad J. Mantel, Office of the Solicitor, U.S. Department of Labor, 201 12<sup>th</sup> Street South, Suite 401, Arlington, VA 22202

Benjamin R. Botts, Office of the Solicitor, U.S. Department of Labor, 90 7<sup>th</sup> Street, Suite 3-700, San Francisco, CA 94103

W. Christian Schumann, Office of the Solicitor, U.S. Department of Labor, 201 12<sup>th</sup> Street South, Suite 401, Arlington, VA 22202

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES  
721 19<sup>TH</sup> ST. SUITE 443  
DENVER, CO 80202-2500  
TELEPHONE: 303-844-5266 / FAX: 303-844-5268

March 27, 2017

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

v.

VERIS GOLD USA, INC., and its  
Successors,  
Respondent.

CIVIL PENALTY PROCEEDING

Docket No. WEST 2015-909-M

Mine: Jerritt Canyon Mill  
Mine ID: 26-01621

## ORDER OF DISMISSAL

This case is before me upon a petition for assessment of Civil Penalty pursuant to the Federal Mine Safety and Health Act, 30 U.S.C. §§ 801 *et seq.* and 29 C.F.R. § 2700.28. Daniel Lowe and Matthew Varady (“Complainants”) filed discrimination complaints against Veris Gold (“Veris”) pursuant to section 105(c) (3). In an order dated September 2, 2015, the presiding ALJ found Veris Gold liable for discrimination against Varady. The ALJ noted that Veris had previously filed a petition for Bankruptcy, but nonetheless instructed the Secretary to assess a civil penalty against Veris. The Secretary filed its position on September 11, 2015. The presiding ALJ then issued a decision on October 15, 2015, finding Veris Gold liable for discrimination against Lowe and instructed the Secretary to assess a civil penalty in that docket as well. On December 23, 2015, however, the Secretary withdrew the petition for civil penalty in Varady’s case and filed a Motion to Dismiss the Dockets.<sup>1</sup>

On March 20, 2017, this court entered an Order granting JCG’s motion to dismiss the Complainants’ successorship claims and denied the Complainants’ motion to add other affiliates of Veris as successors. The court explained that although the Complainants established their claims against Veris Gold, the Sale and Enforcement Orders issued by the Bankruptcy Court foreclosed their pursuit of successorship liability against Jerritt Canyon Gold, LLC, (“JCG”) the purchaser of certain Veris Gold assets, and its other affiliates. The Order also instructed the Complainants that, should they wish to enter a claim against Veris Gold, they were to resubmit their claims for personal relief. On March 21, 2017, the Complainants informed the court via email that they did not wish to obtain orders against Veris because the company had been

---

<sup>1</sup> Both Varady and Lowe are in the same position regarding the bankruptcy issue in that findings of discrimination were made after the bankruptcy sale order had been issued. Therefore, my order dismissing any penalty docket or a potential for one shall apply to Lowe’s case. Specifically, I find the Secretary’s motion to dismiss the Varady case applicable to the Lowe docket as well.

liquidated and no longer had assets to pay their claims. Pursuant to the terms of that Order, this court dismissed the cases in a separate order dated today.

In light of the March 20, 2017 Order, the Secretary's pursuit of a civil penalty against Veris is also futile. Veris Gold has been liquidated and no longer possesses assets to pay off its creditors, and the Bankruptcy Court's Sale Order expressly prohibits pursuit of successorship liability claims.

Accordingly, the Secretary's Motion for dismissal in the Varady case is hereby **GRANTED** and applied to the Lowe case as well. **IT IS ORDERED** that this penalty docket be **DISMISSED**.

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

Distribution: (U.S. First Class Mail)

Cathy L. Reece, Fennemore Craig, P.C., 239 East Camelback Rd., Suite 600, Phoenix, AZ 85016

Mark Kaster, Dorsey & Whitney, 1500 South 6<sup>th</sup> Street, Minneapolis, MN 55402

Annette Jarvis, Dorsey & Whitney, 136 South Main Street, Suite 1000, Salt Lake City, UT 54101

Eric Sprott, 200 Bay Street Suite 2700, P.O. Box 27, Toronto, Ontario, Canada M5J 2J1

Matthew A. Varady, 701 South 5<sup>th</sup> Street, #6, Elko, NV 89801

Daniel Lowe, P.O. Box 2608, Elko, NV 89803

Shaun Heinrichs, Veris Gold, 688 West Hastings Street, Suite 900, Vancouver, BC V6B 1P1, Canada

Tevia Jeffries, Dentons Canada LLP, 250 Howe Street, 20<sup>th</sup> Fl., Vancouver, BC V6C 3R8, Canada

Brad J. Mantel, Office of the Solicitor, U.S. Department of Labor, 201 12<sup>th</sup> Street South, Suite 401, Arlington, VA 22202

Benjamin R. Botts, Office of the Solicitor, U.S. Department of Labor, 90 7<sup>th</sup> Street, Suite 3-700, San Francisco, CA 94103

W. Christian Schumann, Office of the Solicitor, U.S. Department of Labor, 201 12<sup>th</sup> Street South, Suite 401, Arlington, VA 22202

Bruce L. Brown, Office of the Solicitor, U.S. Department of Labor, MSHA, 300 Fifth Ave, Suite 1120, Seattle, WA 98104

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

March 28, 2017

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

v.

M-CLASS MINING, INC.,  
Respondent

M-CLASS MINING, INC.,  
Contestant

v.

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

CIVIL PENALTY PROCEEDINGS

Docket No. LAKE 2015-686  
A.C. No. 11-03189-390047

Docket No. LAKE 2016-55  
A.C. No. 11-03189-394304

Mine: MC #1

CONTEST PROCEEDINGS

Docket No. LAKE 2015-186-R  
Order No. 9033167; 12/05/2014

Docket No. LAKE 2015-185-R  
Order No. 9033166; 12/05/2014

Mine: MC #1

**ORDER**

Before: Judge Feldman

The captioned consolidated civil penalty and contest proceedings are before me upon petitions for assessment of civil penalty filed pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977 (“Mine Act”), 30 U.S.C. § 815(d). The Secretary of Labor seeks to impose a total civil penalty of \$133,000.00 for 104(d)(2) Order Nos. 9033166 and 9033167, which allege M-Class Mining, Inc.’s (“M-Class”) failure to timely withdraw miners from a working section after the malfunction of a ventilation fan, in violation of 30 C.F.R. § 75.313(a)(3) and 30 C.F.R. § 75.313(c)(1), respectively. These orders were issued by the Mine Safety and Health Administration (“MSHA”) on December 5, 2014.

On April 27, 2016, Docket Nos. LAKE 2015-686 and LAKE 2015-185-R were stayed based on the parties’ representation that the Secretary had initiated an investigation to determine whether to initiate a personal liability case pursuant to the provisions of section 110(c) of the Mine Act. The stay was to be lifted upon completion of the Secretary’s investigation.

Given the Secretary's failure to complete his section 110(c) investigation during the six months following the issuance of the stay, on September 14, 2016, an order was issued requiring the Secretary to advise, on or before November 10, 2016, whether he had initiated a 110(c) proceeding for consolidation, or alternatively, whether he had declined to bring any relevant 110(c) actions. Thereafter, the Secretary moved to consolidate the captioned civil penalty matters in Docket Nos. LAKE 2015-686 and LAKE 2016-55 with the relevant contest matters in Docket Nos. LAKE 2015-185-R and LAKE 2015-186-R. The captioned matters were consolidated pursuant to the Secretary's request on December 12, 2016, at which time the Secretary was granted an extension, until January 25, 2017, to comply with the September 14 order.

As the Secretary failed to comply with the January 25, 2017, deadline, on February 8, 2017, the Secretary was Ordered to Show Cause why the captioned matters should not be dismissed for a failure to prosecute. On February 9, 2017, the Secretary responded, asserting that he had failed to comply with the January 25 deadline "because the Secretary had neither 'initiated a relevant 110(c) proceeding' nor had the Secretary 'declined to bring any relevant 110(c) actions.'" The Secretary further requested that the stay remain in effect pending the ongoing 110(c) investigations.

The reasonable time period for filing a section 110(c) action has been previously addressed in a Commission proceeding:

Section 105(a) of the Act provides that "[i]f, after an inspection or investigation, the Secretary issues a citation or order under section 104, he shall, within a reasonable time after the termination of such inspection or investigation, notify the operator ... of the civil penalty proposed to be assessed ... for the violation cited ...." Section 110(c) is silent regarding when an individual respondent must be notified of a proposed penalty assessment. However, since penalty assessments against individuals brought under § 110(c) arise from the same inspections as penalty assessments against operators, it would logically follow that the reasonable time requirement [referred to in] § 105(a) should apply to penalty assessments brought under § 110(c).

*Brinson, et al., employed by Kentucky-Tennessee Clay Co.*, 35 FMSHRC 1463, 1465 (May 2013) (ALJ Tureck) (citations omitted). Thus, it has been held that the provisions of section 105(a), and its apparent applicability to section 110(c) cases, require the Secretary to file a petition for assessment of civil penalty within a "reasonable time" *after termination of an investigation*. However, the Secretary has identified 18 months as the operative reasonable time period for filing civil penalty petitions in 110(c) cases, computed from the date of the subject citation or order, which in this case is December 5, 2014, rather than the date of the completion of the 110(c) investigation. *See* I MSHA, U.S. Dep't of Labor, *Program Policy Manual*, § 110(c) (2012).

Specifically, MSHA's Program Policy Manual provides:

Investigative timeframes have been established to help ensure the timely assessment of civil penalties against corporate directors, officers, and agents. Normally, such assessments will be issued *within 18 months from the date of issuance of the subject citation or order*. However, if the 18 month timeframe is exceeded, [the Compliance and Investigation office ("TCIO")] will review the case and decide whether to refer it to the Office of Special Assessments for penalty proposal. In such cases, the referral memorandum to the Office of Special Assessments will be signed by the Administrator.

*Id.* (emphasis added).

I recognize that the Secretary's obligation to initiate a 110(c) proceeding within a reasonable period of time is not jurisdictional. *Sec'y of Labor v. Twentymile Coal Co.*, 411 F.3d 256, 261 (D.C. Cir. 2005) (holding that the "reasonable time" provision for filing petitions for civil penalty in the Mine Act is intended to "spur the Secretary to action," rather than to confer rights on litigants that will limit the scope of the Secretary's authority). However, the Secretary's discretion to initiate 110(c) proceedings in a timely manner is not unfettered. Here, approximately 27 months have passed since the issuance of the subject violations during which time witnesses may have become unavailable and memories may have faded. However, I will reluctantly provide the Secretary with an additional reasonable period of time to complete his investigation.

### **ORDER**

In view of the above, **IT IS ORDERED** that the Secretary must *initiate, on or before August 31, 2017* (32 months after the issuance of the underlying citation), a relevant 110(c) proceeding, or advise the undersigned that he has declined to do so. In furtherance of the efficient utilization of the Commission's resources,<sup>1</sup> should the Secretary fail to meet this deadline, I will entertain a motion to dismiss the *captioned proceedings* against M-Class Mining, Inc., for failure to prosecute.

/s/ Jerold Feldman

Jerold Feldman

Administrative Law Judge

---

<sup>1</sup> The consolidation of any relevant 110(c) proceeding with the captioned civil penalty proceedings is an essential means of avoiding wasteful and duplicative adjudication. For the principle of collateral estoppel would not preclude a 110(c) litigant's right to a *de novo* 110(c) hearing despite a prior adjudication of the civil penalty proceeding brought against the mine operator.

Distribution: (Regular and Certified Mail)

Rachel L. Graeber, Esq., U.S. Department of Labor, Office of the Solicitor, 230 S. Dearborn Street, Room 844, Chicago, IL 60604

Eric Silkwood, Esq., Hardy Pence PLLC, 500 Lee Street East, Suite 701, Charleston, WV 25301

/acp

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

OFFICE OF ADMINISTRATIVE LAW JUDGES  
1331 PENNSYLVANIA AVENUE, N.W., SUITE 520N  
WASHINGTON, D.C. 20004

March 30, 2017

SECRETARY OF LABOR,  
MINE SAFETY AND HEALTH  
ADMINISTRATION (MSHA),  
on behalf of JEFFREY PAPPAS,  
Complainant,

DISCRIMINATION PROCEEDING

Docket No. WEST 2016-264-DM  
WE MD 16-02

v.

CALPORTLAND COMPANY, and  
RIVERSIDE CEMENT COMPANY,  
Respondents.

Mine ID 04-00011  
Mine: Oro Grande Quarry

**ORDER DENYING MOTION TO EXCLUDE WITNESSES**  
**AND**  
**ORDER DENYING MOTION FOR SANCTIONS**

This case is before me upon a complaint of discrimination filed by the Secretary of Labor (“Secretary”), on behalf of Jeffrey Pappas against CalPortland Company (“CalPortland”) and Riverside Cement Company (“Riverside” or “RCC”), pursuant to section 105(c)(2) of the Federal Mine Safety and Health Review Act of 1977 (“Mine Act”), 30 U.S.C. § 815(c)(2). Chief Administrative Law Judge Robert J. Lesnick assigned the matter to me on March 11, 2016. On April 14, 2016, I issued a Notice of Hearing, which set this matter for hearing and provided guidelines for discovery. I held a hearing on December 6–9, 2016, in San Bernardino, CA.

Four days before the hearing on December 2, 2016, the Secretary filed a Motion in Limine to Exclude Riverside Cement Company Witnesses. Riverside filed a timely response on December 16, 2016, after I extended the filing deadline at the hearing. Additionally, the Secretary filed a Motion for Sanctions for Spoliation of Evidence against CalPortland on December 2, 2016. CalPortland timely filed a response on December 5, 2016. At the beginning of the hearing, the parties presented brief arguments on the two motions. (Tr. 12:4–16:24, 19:8–21:2.) I informed the parties that I would issue my rulings on the two motions with the decision. (Tr. 16:25–17:2, 21:17–21.) Given the number of issues and volume of the record present in this matter, I now issue this separate order.

For the reasons stated below, the Secretary’s Motion in Limine to Exclude Riverside Cement Company Witnesses is hereby **DENIED**, and the Secretary’s Motion for Sanctions for Spoliation of Evidence against CalPortland is hereby **DENIED**.

**I. ORDER DENYING MOTION TO EXCLUDE WITNESSES**

The Secretary’s motion in limine seeks to exclude testimony by Jamie Ambrose and David Salzborn because the Secretary was not made aware that Riverside intended to present

their testimony until they were listed in Riverside's prehearing statement on November 22, 2016. (Mot. to Exclude at 1–2; Tr. 12:4–13:2.) The Secretary asserts that during discovery Riverside represented it did not have access to Ambrose and Salzborn when answering interrogatories and then designated a company representative who was unable to answer questions regarding Pappas's work history during a Fed. R. Civ. P. 30(b)(6) deposition. (Mot. to Exclude at 2–7; Tr. 12:4–13:2.) The Secretary states that had he known Riverside intended to present the testimony of Ambrose and Salzborn, the Secretary could have moved to compel answers regarding their testimony during discovery, but did not have the opportunity to do so. (Mot. to Exclude at 5.) The Secretary asserts that the testimony should be excluded because of Riverside's late disclosure. (*Id.* at 5–6.)

In response, Riverside explains that Ambrose and Salzborn are necessary rebuttal witnesses. (RCC Resp. at 1, 8.) Riverside argues that it never claimed it did not have access to these individuals, but merely answered that they were beyond Riverside's control because Ambrose and Salzborn are no longer Riverside employees. (RCC Resp. at 2; Tr. 13:17–2.) Riverside notes that the Secretary was well-aware of the two witnesses' identities, but never requested to depose either witness. (RCC Resp. at 2–3.) Furthermore, Riverside argues that the Secretary failed to timely express his dissatisfaction regarding Riverside's discovery answers. (*Id.* at 3–6; Tr. 13:12–16.)

Commission Judges have broad authority to regulate the conduct of parties in proceedings before them. 29 C.F.R. § 2700.55; *Mark Gray v. North Fork Coal Corp.*, 35 FMSHRC 2349, 2359 (Aug. 2013). Excluding evidence is an extreme sanction not to be imposed absent a showing of willful deception or flagrant disregard. 35 FMSHRC at 2360 (citations omitted). Here, neither witness had been employed by Riverside since September 30, 2016, so Riverside's representations were accurate. Further, the Secretary had ample opportunity spanning over a year to depose Ambrose and Salzborn if he so chose. Indeed, the Secretary has long known about Ambrose and Salzborn's identities, which came up in MSHA Special Investigator Kyle Jackson's interviews in November 2015. (Tr. 514:9–23, 530:3–19; Exs. S–17, S–18, S–22.) Indeed, counsel for the Secretary clearly knew of these witnesses and their potential importance to this case from the testimony given at the Temporary Reinstatement hearing I held in January 2016; and, I set the December 2016 merits hearing in April 2016 providing ample time for discovery. Moreover, Ambrose is in fact employed by CalPortland, another party to this case from which the Secretary could have requested the sought-after information. Because the Secretary's motion fails to show he made any attempt to depose or obtain contact information for either witness, I cannot conclude that Riverside demonstrated willful deception or flagrant disregard to the Secretary's discovery requests.

Accordingly, the Secretary's motion to exclude these witnesses is **DENIED**.

## **II. ORDER DENYING MOTION FOR SANCTIONS**

The Secretary's motion for sanctions seeks an adverse inference against CalPortland as a remedy for CalPortland's alleged spoliation. (Mot. for Sanctions at 1–6.) On October 31, 2016, just five weeks before hearing, the Secretary requested from CalPortland all the application materials for miners it did not hire on October 1, 2015, which CalPortland could not provide. (*Id.*

at 4; Daquiz Decl. at 2.) The Secretary now asks me to draw an adverse inference that the missing applications demonstrate that CalPortland selectively denied employment to miners who had engaged in protected activity under the Mine Act, rebutting CalPortland's assertion that the unhired miners performed worse during the application process. (*Id.* at 3.)

In response, CalPortland argues that (1) the applications are not relevant, (2) the Secretary received information regarding applicants CalPortland did not hire in its initial 2015 investigation, and (3) CalPortland diligently searched for the materials in November 2016 when the Secretary requested additional information regarding the applicants not hired, but the applications could not be found. (CalPortland Mem. in Resp. at 1–22.) CalPortland admits that the applications were destroyed, though inadvertently and unintentionally. (*Id.* at 13–14.)

A party is under a duty to preserve evidence in its possession when the party knows that the evidence is potentially relevant to litigation before the evidence was destroyed. *Leon v. IDX Systems Corp.*, 464 F.3d 951, 959 (9th Cir. 2006). If a duty exists, the prejudice suffered by the party seeking sanctions must be considered before determining the appropriate sanction. *See id.* at 958–960 (noting the risk of prejudice must be considered before determining whether dismissal is an available sanction). When a party does not preserve evidence in its control, a judge can draw an adverse inference that the evidence destroyed would have been unfavorable to the destroying party. *See IO Coal Co.*, 31 FMSHRC 1346, 1359 & n.11 (Dec. 2009).

Here, CalPortland provided the Secretary a sample of applications of miner applicants who were not hired during MSHA's initial November 2015 investigation. (Mot. for Sanctions at 4.) Thereafter, in July 2016, the Secretary requested "all documents related to the hiring of all personnel and employees at the Mine" during discovery; but due to the poor drafting of the Secretary's request (which referred to "all personnel and employees"), CalPortland believed it only needed to produce the applications of hired miners, not unhired miner applicants. (*Id.*; Daquiz Decl. at Ex. A, B; Lundgren Decl. at Ex. 1–4.) Not until October 31, 2016, did the Secretary clarify that the request was to include the applications of unhired miner applicants. (Daquiz Decl. at 2; Lundgren Decl. at Ex. 1–2.) In November, CalPortland attempted to locate those applications but discovered the materials must have been destroyed. (CalPortland Mem. in Resp. at 13–14.)

Because the applications of miners who were not hired by CalPortland were subject to MSHA's initial investigation in November 2015, I find that CalPortland knew it had a duty to preserve those applications in anticipation of litigation. However, I do not find that CalPortland intentionally destroyed those applications in light of CalPortland's cooperation in producing the applications during MSHA's initial request and its effort to locate the documents after the Secretary's later request. Moreover, because the Secretary had already received a sample of those applications, I determine that the prejudice suffered by the Secretary does not warrant the severe sanctions requested.

Accordingly, the Secretary's motion for sanctions against CalPortland is **DENIED**.

### **III. ORDER**

Based on the reasons above, the Secretary's Motion to Exclude Witnesses and the Secretary's Motion for Sanctions are hereby **DENIED**.

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

Distribution: (Via Electronic Mail & U.S. Mail)

Abigail Daquiz, Esq., U.S. Department of Labor, Office of the Solicitor, 300 Fifth Avenue,  
Suite 1120, Seattle, WA 98104-2397  
(daquiz.abigail@dol.gov)

Sonya P. Shao, Esq., U.S. Department of Labor, Office of the Solicitor, 350 South Figueroa  
Street, Suite 370, Los Angeles, CA 90071-1202  
(shao.sonya.p@dol.gov)

Brian P. Lundgren, Esq., and Erik M. Laiho, Esq., Davis Grimm Payne & Marra, 701 Fifth  
Avenue, Suite 4040, Seattle, WA 98104  
(blundgren@davisgrimmpayne.com)  
(elaiho@davisgrimmpayne.com)

Karen L. Johnston, Esq., Jackson Kelly PLLC, 1099 18th Street, Suite 2150, Denver, CO 80202  
(kjohnston@jacksonkelly.com)

Jeffrey Pappas, 12279 Merrod Way, Victorville, CA 92395-9774  
(U.S. Mail Only)

/ivn